APPEAL NO. 94114

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). At a contested case hearing held in (city), Texas, on January 4, 1994, the hearing officer, (hearing officer), took evidence on the sole disputed issue, namely, whether the appellant (claimant) timely reported an injury to the respondent (employer/carrier), and, if not, whether he had good cause for late reporting. The hearing officer concluded that claimant neither timely reported his back injury to employer/carrier nor showed good cause for his untimely reporting. Claimant timely filed two requests for review, both of which, in essence, challenge the factual sufficiency of the evidence to support the pertinent factual findings and legal conclusions. Claimant also asserts certain evidentiary failures. The employer/carrier's response urges affirmance.

DECISION

Finding no reversible error and the evidence sufficient to support the challenged findings and conclusions, we affirm.

Claimant testified that he was employed by employer/carrier's animal control division; that while previously working in employer/carrier's sanitation department, he suffered pulled back muscles in (year); that on (date of injury), his back was injured in a job-related automobile accident; that he underwent back surgery in April 1992; and that following the surgery he returned to light duty work in March 1993 and was given duties as a dispatcher. Claimant stated that on (date), he accompanied, (Ms. F), a trainee, to the field to instruct and assist her in baiting an animal trap. This was the first field work he had done since returning to work. Claimant said that while traveling to the location of the trap, he noticed a large dog chained to a tree without water, felt he was observing an animal cruelty case, and decided to take the dog to the shelter. He said he put the restraining loop over the dog's neck, the dog struggled, and he felt his back "wrench." It took three efforts to restrain and control the dog. When they got back into the truck, claimant said he mentioned to Ms. F that he thought he had hurt his back "back there." When they returned to the shelter, claimant said he mentioned to his supervisor, (Ms. C) and to (Mr. JR), another supervisor, that his "back was hurting me." He acknowledged, however, that he did not mention his back hurting in the context of the incident with the dog. In his testimony, claimant did not appear to be contending that his mention of his back pain to Ms. C and Mr. JR on (date) was in the context of a work-related injury.

Claimant took the position that he did not become aware that he had sustained a new injury on (date) until (date). He testified that after (date) he did not "understand" his back pain and at first thought it was pain from his prior surgery. By September 21st, however, he "suspected that this was different" and wanted to discuss it with a health care professional. He obtained an appointment for the next day with his doctor, (Dr. S). He said that they discussed his back pain, that claimant then reconstructed his activities, and that they deduced that he had re-injured his back on (date) while struggling to control the dog. Claimant also testified that he did not thereafter report his (date) injury to any supervisor "because to be honest, I don't trust them." He said that after talking to Dr. S on

(date) he became aware he had injured his back on (date). Claimant also testified that on or about October 7th, the animal control division supervisor, (Mr. SR), approached him at work and angrily demanded he complete a "fact sheet" concerning the (date) incident. Mr. SR had become aware of claimant's assertion of an (date) work-related injury by October 7th though claimant said he did not report the injury to employer/carrier on that day either. On cross-examination, claimant conceded that he had signed under oath his answers to the carrier's interrogatories, that his answer to one of them stated that he was aware of having injured his back on (date), that he reported it to Ms. C and to Mr. JR, and that the pain was of a different type than that from his surgery. However, claimant said he had not read that interrogatory answer. Claimant also denied having reported his injury to Ms. C and to Mr. JR on (date). Claimant complained in his appeal about the demeanor of the cross-examiner. While the tape-recorded hearing record reveals that claimant was subjected to a vigorous and searching cross-examination, we do not find that the conduct of employer/carrier's counsel departed from the acceptable role of an advocate. There was no objection made by claimant to carrier's counsel's conduct of the cross-examination.

Ms. C testified that she was claimant's supervisor on (date). When he returned to the shelter that day with Ms. F, Ms. C said she asked him "if he was okay" because it had been his first field activity since returning to work. She said claimant never mentioned having hurt his back and that she was unaware of it until sometime in October when she learned of it from Mr. SR. She said she knew of it by October 19th because claimant had filed a claim. Mr. JR, who had from time to time supervised claimant, testified that on (date) claimant never mentioned to him that he was injured or in pain, and that he, too, first heard of the matter from Mr. SR on or about October 7th. Mr. SR testified that it was on October 7th that he talked to claimant for the first time about his claimed injury and that claimant had not previously mentioned having been injured.

Dr. S's report of (date) stated that when claimant saw Dr. S on August 12th he did not mention his back injury of (date) because he thought it would resolve with hot tub baths and medication, but that on (date) claimant "for the first time tells me that he reinjured his back on (date)." After recounting claimant's history of lumbar disc syndrome following his auto accident of (date of injury), and his lumbar spine surgery of April 14, 1992, Dr. S stated the impression that "[o]n (date) he was sent out in the field to impound a dog and aggravated his back with increasing lumbar pain with radiation to the lower extremities, ..." In a November 22nd letter to employer/carrier's adjusting firm, Dr. S stated that "[h]e told me on 9-22-93 that he had reinjured his back on (date)."

The hearing officer found that on or before September 2, 1993, claimant did not notify any person holding a management or supervisory position with employer/carrier that he claimed a work-related injury to his back, that employer/carrier did not have actual knowledge of the injury on or before September 2nd, and that in delaying the reporting of his injury in excess of thirty days from (date), claimant did not exercise the degree of diligence which an ordinary prudent person would have exercised under the same or similar circumstances. Based on these findings, the hearing officer concluded that claimant did

not timely report an injury to employer/carrier and that good cause did not exist for his failure to timely notify employer/carrier of his injury.

Sections 409.001(a) and (b) provide that an employee shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs and that the notice may be given to an employee of the employer who holds a supervisory or management position. Section 409.002 provides in part that the failure to notify an employer as required by Section 409.001(a) relieves the employer and the employer's insurance carrier of liability unless the employer or the carrier have actual knowledge of the injury or the Texas Workers' Compensation Commission (Commission) determines that good cause exists for failure to provide notice in a timely manner. The burden is on the claimant to establish the existence of notice of injury. Miller v. Travelers Insurance Company, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). To satisfy the purpose of the notice of injury requirement, the employer need know only the general nature of the injury and the fact that it is job related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). An employee who fails to give the employer notice of the injury within the 30-day period has the burden to show good cause for such failure. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). In Texas Workers' Compensation Commission Appeal No. 94050, decided February 25, 1994, we observed the following: "Our review of the Texas case law reveals that the reasons or excuses commonly recognized as `good cause' include the claimant's belief that the injury is trivial, mistake as to the cause of the injury, reliance on the representations of employers or carriers, minority, and physical or mental incapacity, while the advice of third persons and ignorance of the law are frequently held not to constitute good cause." Whether an employee has exercised that degree of diligence required under the ordinarily prudent person test is usually a question of fact for the fact finder. A claimant's conduct must be examined "in its totality" to determine whether the ordinary prudence test was met, and the reason for delay will generally be found in the claimant's own testimony. *See* Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi (year), no writ).

The hearing officer is the trier of fact in a contested case hearing and is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). As an interested witness, the claimant's testimony did no more than raise a fact issue for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 91070, decided (date of injury). The hearing officer, as the trier of fact, is privileged to believe all, part, or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

We are satisfied the evidence is sufficient to support the hearing officer's findings and conclusions. Claimant's theory seemed to be that after (date) he both trivialized his injury and did not realize he had re-injured himself until (date) when he discussed his back condition with Dr. S, reconstructed recent past events, and connected his condition to the dog handling incident of (date). However, an employee must show that good cause, once

established, continued up to the date the injury was reported to the employer. Texas Workers' Compensation Commission Appeal No. 91066, decided December 4, 1991. Claimant testifed that after his (date) visit with Dr. S, when he became aware he had re-injured himself on (date), he not only did not notify any of his supervisors, because he did not trust them, but that it was Mr. SR who brought the matter up when he asked claimant to complete a "fact sheet" on October 7th. We do not find the hearing officer's determinations to be so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

We view claimant's complaints concerning the absence of witnesses to be without merit. Claimant, who was represented by an attorney at the hearing, asserts in his appeal that two witnesses who could have testified to supervisory abuse of claimant while on light duty did not appear at the hearing, and that another witness, Ms. F, was excused from the hearing before testifying. There was no assertion that the two witnesses claimant had in mind were subpoenaed pursuant to the Commission's Rules nor was any request for their presence made at the hearing. The hearing officer gave both parties an opportunity to object to the release of Ms. F, and claimant did not indicate any desire to call her as a witness. We also find no merit to claimant's assertion that the hearing officer seemed "irritated" at having to be in the hearing and thus may have been biased. As with the assertion of improper demeanor on the part of the carrier's counsel when cross-examining claimant, the tape-recorded record revealed no conduct on the part of the hearing officer which could be characterized as other than fair and impartial. Consequently, there is no sound basis on which to disturb the hearing officer's decision.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge