APPEAL NO. 94344

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 4, 1994, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues presented for resolution were:

1.Did the CLAIMANT sustain a compensable injury on (date of injury)?

2.Did CLAIMANT report an injury to the employer on or before the thirtieth day after the injury, and if not, does good cause exist for failing to report the injury timely?

3.Does CLAIMANT have disability resulting from any injury sustained on (date of injury), entitling him to temporary income benefits, and if so, for what periods?

The hearing officer determined that the claimant sustained an injury in the course and scope of his employment on (date of injury), that claimant did not report his injury within 30 days, but had good cause for not doing so because claimant thought his injury was trivial and that claimant had disability beginning August 20, 1993, and continuing to the date of the CCH.

Appellant, (employer or carrier herein, as appropriate) contests the hearing officer's determination on the second issue (the notice issue) on the ground that the hearing officer's determinations on this issue "were beyond the scope of the issues delineated by the benefit review officer's report and by claimant's answers to carrier's interrogatories." Carrier does not appeal the hearing officer's determinations that claimant sustained a compensable injury on (date of injury) (all dates will be 1993 unless otherwise noted) and that claimant had disability beginning August 20th. Carrier requests that we reverse the hearing officer's decision on the notice issue and render a decision in its favor. Respondent, claimant herein, did not file a response.

DECISION

The decision of the hearing officer is affirmed.

The facts are largely undisputed. Claimant had worked for employer as a custodian for approximately nine years. On (date of injury), while claimant was using a "wet/dry vacuum" he slipped and fell, injuring his right knee and left hip. (CL), who was a recently hired part-time employee, was working with claimant and saw him slip and fall. The head custodian at the particular school involved was (JC) who at the time and date of injury was away from the campus. CL went to claimant and asked if claimant was "[o]kay" and both claimant and CL testified that claimant said "he was okay." CL told a crew supervisor of claimant's fall and subsequently told JC when JC returned to campus. JC testified that he had been told about claimant's fall by CL "and one or two other employees." JC

emphasized he was aware of claimant's fall, but not his injury. CL testified he was not claimant's supervisor and in fact was a part-time employee at the time of the incident.

Claimant testified that he thought his injury would get better with rest. The day after the fall, (date), claimant said he called in sick and that this was just before the July 4th weekend, and that he was going on a scheduled vacation for the next two weeks. Claimant testified that although he was sore, he did not think the injury was anything major and would get better with rest. After claimant's two week vacation, claimant returned to work. Claimant testified that his hip and knee continued to bother him, but he continued to work until August 19th, when he went to see an orthopedic specialist. Claimant stated the doctor told him he may need surgery to his knee, and took him off work. Claimant called the employer, apparently on August 19th, to find out why they were refusing to pay the doctor's bill. Employer's liaison testified that claimant told her he had not reported the injury to his supervisor. Claimant testified that he thought CL was a supervisor because JC, upon leaving the campus, the day of the accident, had told CL to make sure to send the rest of the custodians to the main building at 3:00 p.m.

Carrier contended, both at the CCH and on appeal, that the only ground for claimant disputing the 30-day notice issue was that claimant reported the injury to CL, whom claimant believed to be his supervisor at the time. Carrier argued that the claimant should be limited, in his effort to show good cause for failing to give timely notice, to claimant's position as stated at the BRC and in claimant's response to carrier's interrogatories. Claimant's position at the BRC was that he believed CL was his supervisor. The hearing officer overruled carrier's objections and allowed claimant to testify on other good cause issues, namely trivialization.

The hearing officer determined in pertinent part, appealed by carrier that:

CONCLUSIONS OF LAW

3.CLAIMANT did not report his injury to a supervisor within thirty days but had good cause for the failure to report since the injury appeared to be trivial in nature.

4.[Employer] had actual knowledge of CLAIMANT's accident so it is not relieved of liability for compensation by CLAIMANT's failure to report his injury within thirty days.

Carrier contends that the hearing officer erred in receiving evidence on issues of timely notice which supported contentions not raised by claimant at the BRC or in answers to carrier's interrogatories. Carrier cites claimant's position as stated in the BRC report and attempted to limit claimant's testimony only to the fact he considered CL as his supervisor. Carrier cites as authority for its position, Section 410.031(b)(3) (which provides that the BRO will report a statement of the position of the parties regarding each unresolved issue) and

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) (dealing with the statement of disputes). Carrier emphasizes "[a]n issue that was not raised at a BRC may not be considered at a CCH unless . . . . (ii) the Commission determined that good cause existed for not raising the issue at the BRC. Tex. Labor Code Ann. § 410.151."

First of all, we would note that in regards to the second issue, the BRC report did state ". . . does good cause exist for failing to report the injury timely." We understand that it is carrier's position that claimant was required to precisely state his good cause grounds at the BRC and in answers to carrier's interrogatories. The Appeals Panel has earlier held that the lack of pleading specificity has not required a reversal. Texas Workers' Compensation Commission Appeal No. 91123, decided February 7, 1992; Texas Workers' Compensation Commission Appeal No. 92199, decided June 26, 1992. On a number of occasions, a claimant has pleaded that the date of an injury was on one date and the evidence at the CCH proved a different date of injury and the Appeals Panel has stated that this lack of specificity has not required a reversal. *See* Texas Workers' Compensation Commission Appeal No. 93183, decided April 22, 1993, and Appeal No. 92199, *supra*. The hearing officer in the instant case found, and is supported by the evidence, that although claimant did not report his injury to a supervisor within 30 days, he had good cause for not doing so because he trivialized his injury until he was told by a doctor of the serious nature of the injury. We note that in workers' compensation cases under the 1989 Act, conformity to legal rules of evidence is not required. Section 410.165(a). We are unwilling to hold, as a matter of law, that a claimant must state, with specificity, each and every good cause ground he may have, at the risk of not being allowed to prove any other ground, provided it does not rise to the level of being a separate or distinct issue.

We would further note that claimant's belief that CL was his supervisor on (date of injury), is not necessarily inconsistent with a belief that his injury was trivial. Carrier argues that claimant's good cause argument that he believed his injury to be trivial is "inconsistent with, his sole contention at the BRC and in his Interrogatory Answers that he did supply notice within thirty (30) days through (CL)." (Emphasis in the original.) We do not agree. Claimant could have reported the accident and maintained he was "Okay" (as he did to CL). Carrier maintains that claimant's contention he gave notice through CL within 30 days "constituted an 'election of remedies' precluding the inconsistent argument that [claimant] did not give notice because he believed his injuries to be trivial." (Emphasis in the original citing Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980).) We disagree with carrier's contention. At most, claimant was pursuing alternative theories, being that he had reported the accident and injury, but even if he had not, he had good cause for failing to do so because he believed his injury to be trivial. Bocanegra, cited by carrier on the election of remedies issue, states "[t]here is no election, that is, no inconsistency in choices, when one first unsuccessfully pursues a right or remedy which proves unfounded and then pursues the one that is allowed." *Id*. at 852 Bocanegra goes on in its discussion of election of remedies to state that there is no " . . . election which will bar further action unless the choice is made with a full and clear understanding of the

problems, facts, and remedies essential to the exercise of an intelligent choice." *Id*. Clearly that was not the case here, and we find no merit in carrier's contention on this point.

The Appeals Panel had held that good cause for failure to timely report an injury within 30 days can be based upon the injured worker's belief that the injury is not serious and his initial assessment of the injury as being trivial. Texas Workers' Compensation Commission Appeal No. 91030, decided October 30, 1991; Texas Workers' Compensation Commission Appeal No. 93649, decided September 8, 1993; Baker v. Weschester Fire Insurance Co. 385 S.W.2d 447, 449 (Tex. Civ. App.-Houston 1964, writ ref'd n.r.e.). The hearing officer, as the trier of fact and sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence (Section 410.165(a)) found that claimant had trivialized his injury and had good cause for not giving notice of the injury until the day he saw a doctor and the doctor told him he might need surgery. The standard of review of such "good cause" determinations is one of abuse of discretion. *See* Texas Workers' Compensation Commission Appeal No. 92409, decided September 25, 1992, and cases cited therein. We are satisfied here that the hearing officer did not abuse his discretion in finding good cause based on claimant's trivialization of his injury.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150

Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge