APPEAL NO. 950115
FILED MARCH 3, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On October 18, 1994, a contested case hearing was held. With respect to the issues before him, the hearing officer determined that respondent (claimant) had good cause for his failure to timely notify his employer of his injury and that claimant sustained a compensable right shoulder injury on _____. Appellant (employer/carrier), appeals challenging the sufficiency of the evidence to support the hearing officer's determinations. Claimant's response urges affirmance, arguing that the hearing officer's decision and order are supported by sufficient evidence.

DECISION

We affirm.

Claimant testified that he had been employed as a maintenance worker with employer/carrier for approximately 12 years. Claimant testified that on _____, he attempted to open a valve on an asphalt tank. He stated that he could not open the valve with his hands, so he put the lever on his right shoulder to get better leverage. As he was pushing up on the lever with his shoulder, claimant felt a "pop", but he stated that the pain was not severe and he did not think he had injured himself. He testified that he gradually developed pain of increasing severity and on November 11, 1993, he sought medical care from (Dr. B), who attributed the pain to either arthritis or tendinitis. In a follow-up visit with Dr. B on December 16, 1993, Dr. B repeated the diagnosis of arthritis or tendinitis. Claimant stated that he told his employer about his shoulder pain and that his doctor had determined that it was related to arthritis or tendinitis. Thereafter, claimant was referred to (Dr. M). In progress notes from claimant's initial appointment, Dr. M concurred in the diagnosis of arthritis, specifically noting that claimant's shoulder problem "doesn't look like the result of an injury." After a period of conservative treatment with Dr. M, which did not alleviate claimant's pain, Dr. M ordered an MRI. On March 29, 1994, Dr. M reviewed the MRI results with claimant, recommended surgery, and noted that claimant's shoulder condition was likely the result of an injury. On March 29th, after that visit, claimant called his supervisor, (Mr. W), and reported the work-related injury of _____. Claimant testified that although he had increasing pain he continued to work up to the date of his shoulder surgery, April 15, 1994, and was able to perform his usual job duties. Claimant returned to work after his shoulder surgery on May 26, 1994.

Mr. W testified on behalf of employer/carrier. He stated that claimant first reported the _____, work-related injury to his shoulder on March 29, 1994. He noted that claimant had complained of shoulder pain prior to that but had attributed it to arthritis. In addition, (Mr. T), Mr. W's assistant and another of claimant's supervisors, stated that claimant first reported his _____, on-the-job injury on March 30, 1994. However, he also noted that claimant had previously complained of shoulder pain but had related it to arthritis.

Employer/carrier argues that the hearing officer's determination that claimant had good cause for his failure to timely notify his employer of the injury was against the great weight of the evidence. As we have stated on many occasions, the test for the existence of good cause is that of ordinary prudence, that is, whether the claimant prosecuted his claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 931012, decided December 20, 1993; Texas Workers' Compensation Commission Appeal No. 93677, decided September 21, 1993 (citing Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948)). The existence of good cause is a question of fact and the test for reversal is one of abuse of discretion. Appeal No. 931012, *supra*. In Appeal No. 93677, *supra,* the abuse of discretion standard in the context of a good cause determination was described as a finding that the hearing officer's decision was "arbitrary or without any basis in the record." "It is well settled that an injured employee's `trivialization' of an injury or reasonable belief that the injury is not serious may amount to good cause for not reporting the injury within the statutory time constraints." Appeal No. 93677, *supra*. In addition, we have previously noted that the existence of good cause may be premised upon reliance on the advice of a doctor. Texas Workers' Compensation Commission Appeal No. 931135, decided January 27, 1994, and the cases cited therein.

Claimant testified that initially he did not believe that his _____, injury was serious. In addition, he testified that as the pain became more severe his doctors related it to arthritis or tendinitis, as opposed to an injury. In fact, Dr. M specifically opined that claimant's shoulder problem "doesn't look like the result of an accident." Claimant also stated that it was only after Dr. M advised him of the results of the MRI on March 29, 1994, suggesting surgery and attributing the problem to an injury that he realized he had sustained an on-the-job injury on _____. It is undisputed that he called his supervisor later that day to report his injury. Our review indicates that the hearing officer's determination that claimant had good cause for his failure to notify his employer within 30 days of his injury is supported by sufficient evidence. Therefore, we find no basis for disturbing that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Under the 1989 Act, the claimant has the burden of proving that he sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. Whether claimant suffered a compensable injury is a fact question to be resolved by the hearing officer. The hearing officer is the sole judge of the weight, credibility, relevance and materiality of the evidence. Section 410.165(a). As the fact finder, the hearing officer is charged with the responsibility for resolving the conflicts in that evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer could believe all, part, or none of the testimony of any witness and could properly decide what weight she would assign to the other evidence before her. Campos, *supra*. We will not substitute our judgment for that of the hearing officer where his

determinations are supported by sufficient evidence. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In this case, the hearing officer determined that claimant sustained a compensable right shoulder injury on _____. In so doing, the hearing officer accepted the claimant's testimony, relating his injury to his employment. In Texas Workers' Compensation Commission Appeal No. 931002, decided December 13, 1993, we noted that expert medical evidence of causation is not generally required to prove injury and disability. Rather we stated that in most instances "issues of injury and disability may be established by testimony of the claimant alone and the trier of fact may accept or reject such testimony in whole or in part, and may accept lay testimony over that of medical experts." (citing Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 494 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.)). It was within the hearing officer's province as the fact finder to accept claimant's testimony to establish a causal connection between his work and the injury. Campos, *supra*. Nothing in our review of the record indicates that the hearing officer's determination that claimant sustained a compensable injury is clearly wrong or manifestly unjust; therefore, it is affirmed. Cain, *supra.*

Finding that the hearing officer's decision and order are supported by sufficient evidence, they are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge