APPEAL NO. 952130
FILED JANUARY 31, 1996

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 7, 1995, with the record kept open to receive medical records. The hearing officer determined that the respondent (claimant) suffered an injury in the course and scope of his employment on _____; that the claimant did not report his injury to his employer within 30 days of _____, but that the claimant had good cause for not notifying the employer until the employer received notice of the injury; and that the claimant has been unable to obtain and retain employment at wages equivalent to his preinjury wage from September 26, 1994, to the date of the hearing. The appellant (carrier) requested review urging that the determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust and requesting that the Appeals Panel reverse the decision of the hearing officer and render a decision in favor of the carrier, or in the alternative, that we reverse the decision of the hearing officer and remand for further development of the evidence. The claimant replied urging that the evidence is sufficient to support the determinations of the hearing officer and requesting that we affirm the decision of the hearing officer.

DECISION

We affirm in part and reverse and remand in part.

The claimant testified that in 1989 or 1990 he was injured and was diagnosed as having fibromyalgia or myositis. He said that he saw several doctors who prescribed various medicines for the myositis and that Dr. L told him that there was nothing he could do about it, that he probably would have it the remainder of his life, and that he would have to bear the pain. The claimant testified that he was hired in (city 2), Texas, in late August 1994; that he was not having any medical problems when he took the job; and that he and Mr. H, his supervisor and friend, went to (city 3), (state), to install insulation. He said that he had to carry boxes of insulation that were about five feet square and weighed from 25 to 45 pounds by placing them on his back and shoulders. The claimant stated that on _____, or about two weeks after he started working in city 3, he started having pain in his upper back and neck. He testified that he thought that the myositis was causing the pain, that he had flare-ups in the past that would go away, and that he thought that he could work through it. He said that the pain started on Monday or Tuesday, that he worked the remainder of the week, but that Sunday night the pain was so bad that he had to go to the doctor Monday morning. The claimant stated that he and Mr. H shared a motel room, that Monday morning he told Mr. H he hurt too bad to go to work and was going to see a doctor, that Mr. H told him to fill out workers' compensation forms, that he showed Mr. H the paperwork for his myositis and told him that he thought that it was from his previous injury and might go away in two or three days, and that Mr. H was upset because the claimant had not told him about the myositis. The claimant testified that he saw a doctor in a clinic, that he showed her the papers concerning myositis, that she prescribed pain

medication, that the pain was worse than it had ever been before, that he told Mr. H that he needed to go home to get in the hospital, and that Mr. H agreed. The claimant stated that he rode a bus to city 2 arriving there on October 1, 1994, that that he waited a few days to see if he would get better but did not, and that he then went to city 4, Texas, to the (hospital) where Dr. R became his doctor. The claimant said that a number of tests were conducted, that an MRI showed that he had a compressed nerve, that he was flown to a (hospital) in city 5, (state), on October 19, 1994, and that he had surgery on his cervical spine the next day. He testified that he was immobilized in bed for about ten days, that he was taking pain medication, that he returned to city 2, that he had the same symptoms he had before he had the surgery, that he went back to the hospital in city 4 two weeks after returning home, that he was admitted to the hospital, that he was returned to the hospital in city 5 on December 19, 1994, and that he had two cervical discs removed and a fusion performed. The claimant said that since the injury in September 1994, he drove cars to an auction about four or five times for a man who owns a car lot, that each time it took about two hours, and that he was paid $5.00 an hour, but that he has not done any other work. He stated that the doctor told him that he could try anything that he wants to but if his neck hurts to shut it down and that he has too much pain to have a permanent job.

The claimant testified that probably in November 1994 he called the Texas Workers' Compensation Commission (Commission) field office in city 1, that he asked what the proper procedure was to file a claim, that he was told that he would be sent the proper paperwork, and that after receiving the paperwork he sent it back the next day. He stated that he waited two weeks but did not hear anything, that he called the field office and was told that they had no record of his claim but that they would look for it and call him, that he called the field office again and was told that they found his paperwork but that they needed a statement from a doctor. The claimant stated that he did not call Mr. H in city 3, but about a week after he returned home after the first surgery he called Mr. H's mother in city 2 and asked her to tell Mr. H what had happened. He testified that he and a doctor never discussed whether his injury was work related, that he first believed his injury was work related after the first surgery which he had on October 20, 1994, and that he signed the Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on November 28, 1994. The claimant said that he did not know that he had thirty days to notify the employer of an injury and that as soon as he thought that his problem was from a work-related injury and his mind cleared up, he called the Commission field office.

Mr. H testified that the claimant has been a friend for a long time; that in 1994 he was a superintendent for the employer; that he hired the claimant as a helper for a job in (state); that the work in (state) started on September 6 or 7, 1994; that on a Monday morning the claimant was obviously in pain; that both of them thought that the pain was from a preexisting condition; that the claimant did not tell him that he was hurt on the job; that the claimant went to a doctor and received medication, and that he did not get better and returned to his home to get medical attention. He stated that in the winter and before Christmas his mother called him and told him that the claimant had had an operation in city 5. Mr. H said that on December 28 or 29, 1994, he first learned that the claimant was

claiming he was hurt on the job when he was told by the office manager.

Medical records from Dr. L and Dr. S indicate that the claimant was injured in 1989 and has myositis or fibromyalgia as a result of that injury. A report from Dr. G states that the claimant was seen on September 25, 1994, for neck pain; that he had with him medical notes stating that he had fibromyalgia, that there was no acute injury, and that medication was prescribed. A report from Dr. R dated October 18, 1994, states that the claimant reported working as a pipefitter in _____, developed excruciating neck pain, placed pipes above his neck, and had his neck in hyperextension for prolonged periods and denied recent trauma to his neck or head. Other records from (medical facilities) reflect that tests were conducted and that the claimant did have surgery on his cervical spine in October and December 1994. In a note dated June 12, 1995, Dr. M a neurosurgeon for the (hospital), wrote that the claimant was not able to work because of pain.

The carrier wrote that its appeal is based on the factual sufficiency of the evidence to support the determinations of the hearing officer. The carrier correctly states that the burden of proof is on the claimant and that the challenged factual determinations of the hearing officer will be overturned only if those determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. This is so even though another fact finder may have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). We find the evidence to be sufficient to support the determinations of the hearing officer on injury in the course and scope of employment and ability to obtain and retain employment at wages equivalent to the preinjury wage, and we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We now turn to the question of good cause for not timely notifying the employer of the injury. We have written numerous decisions stating that good cause for delay must continue up until the time notice is given and that the issue of good cause is a question of fact with the test for reversal being an abuse of discretion. *See* Texas Workers' Compensation Commission Appeal No. 950148, decided March 3, 1995, and Texas Workers' Compensation Commission Appeal No. 950115, decided March 3, 1995, and cases cited in those decisions. In Texas Workers' Compensation Commission Appeal No. 951301, decided September 18, 1995, we stated that under certain circumstances the mental condition of a claimant may be considered when deciding whether good cause for delay in notifying the employer of an injury continued until the time notice was given. *See also* Texas Workers' Compensation Commission Appeal No. 94200, decided April 4, 1994, for a decision concerning belief that an employer could not be contacted.

The hearing officer made the following findings of fact:

FINDINGS OF FACT

8. Claimant was not aware his pain was due to an on the job injury until

he recovered from the surgery of October 20, 1994.

9. Claimant went through a detoxification program during the period prior to his surgery on October 20, 1994.

10. Claimant was on pain medication following the surgery of October 20, 1994.

11. Claimant contacted the Commission about filing a claim prior to November 28, 1994, but refiled his claim when he contacted the Commission and discovered the claim was not on file.

12. Claimant's supervisor was in (state) during all time periods prior to Claimant notifying Employer of the claim.

Findings of Fact Nos. 8, 9, 10, and 12 are supported by sufficient evidence. Finding of Fact No. 10 merely states that the claimant was on pain medication following the surgery of October 20, 1994, without a finding concerning any effect it may have had on the claimant. The evidence indicates that the claimant filed only one TWCC-41, on November 28, 1994. The part of Finding of Fact No. 11 that infers that the claimant filed a claim prior to November 28, 1994, the date he signed the TWCC-41, is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust and is reversed. A review of the discussion, findings of fact, and conclusions of law does not provide a sufficient basis to allow us to determine whether the hearing officer abused his discretion in determining that the claimant had good cause for his failure to report the injury until December 1994 when the employer was notified through the claimant's filing a TWCC-41 with the Commission. The hearing officer's determination on good cause is therefore reversed and remanded for the hearing officer to make additional findings of fact and conclusions of law.

The carrier also argued on appeal that the claimant could not argue that he timely reported his injury and alternatively that he had good cause for not timely reporting his injury. Our review of the record reveals that the claimant did not contend that he timely reported the injury, but rather that he had good cause for not timely reporting his injury. Even if the record is construed to reflect that the claimant pursued alternative theories, in Texas Workers' Compensation Commission Appeal No. 94344, decided May 5, 1994, we held that a claimant could pursue a claim on the theory that an injury was timely reported or in the alternative that good cause existed for not timely reporting the claim.

We affirm the determinations of the hearing officer that the claimant sustained an injury in the course and scope of his employment on _____, and that the claimant has been unable to obtain and retain employment at wages equivalent to his preinjury wage since September 26, 1994, to the date of the hearing. We reverse the determination that the claimant had good cause for his failure to report his injury to his employer not later than the 30th day after _____, and remand for the hearing officer to make

appropriate findings of fact and conclusions of law. Failure of a claimant to timely notify the employer of an injury, without good cause for the failure to timely notify the employer of the injury, relieves the employer and the employer's insurance carrier of liability for an injury even if the injury was incurred in the course and scope of employment. Section 409.002. If compensation for an injury is not payable, the injury is not compensable and the claimant cannot have disability even though he is not able to obtain and retain employment at wages equivalent to the preinjury wage because of an injury sustained in the course and scope of employment, Texas Workers' Compensation Commission Appeal No. 94388, decided May 12, 1994.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge