APPEAL NO. 980267
FILED MARCH 26, 1998

Following a contested case hearing held in (City), Texas, on December 16, 1997, with the record closing on January 8, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant (claimant) did not sustain a compensable back injury on _____; that the respondent (carrier) is relieved from liability because of claimant's failure to timely notify his employer of the injury; that claimant did not have good cause for his untimely notification; and that claimant did not have disability resulting from an injury of _____. Claimant has appealed contending that the employer had actual knowledge of the injury and that the medical evidence established that he sustained a new back injury on _____.

DECISION

Affirmed.

Claimant testified that on _____, while employed as an institutional investor, he injured his low back pushing one of his two-drawer file cabinets to another location in the work area on the trading floor. Claimant acknowledged having had a previous back problem treated by his orthopedic surgeon, Dr. C, but indicated he had not had recent back pain before the incident on _____ when the pain was "immediate" and "very noticeable." Claimant said he thought he had a "pulled back" or muscle spasm which would resolve and that he continued to work. He said he called Dr. C's office that day but Dr. C was out of town; that he called Dr. C on or about September 3, 1996, and was prescribed a Medrol dosepak for pain; that Dr. C had twice previously prescribed such dosepaks, once in December 1994 when he hurt his back carrying a large Christmas tree, and again in December 1995; that in September 1996 he thought his back was improving until he experienced back pain at a wedding in late October 1996 after a lot of standing and activities; and that shortly after the wedding he called Dr. C who prescribed a different pain medication and referred him to Dr. B whom he saw on October 30, 1996, and who gave him a series of epidural steroid injections (ESIs). Claimant further testified that he called Ms. M, the employer's human resources manager, on November 14, 1996, and told her what had happened and that he followed up with a memo on November 21, 1996. In her recorded statement in evidence, Ms. M stated that claimant called approximately two weeks before his November 21, 1996, note explaining what had happened. In his answers to the carrier's deposition questions, claimant stated that he notified Ms. M of his accident on November 14, 1996. His note of November 21, 1996, related the incurring of the back injury while changing his work location. Claimant also said that for the most part, his back does not presently bother him, that no doctor has given him work restrictions, that

his disability periods are for days off for doctors visits and physical therapy, and that he had recently quit his job.

Mr. R, a coworker, testified that on _____, he was moving one of his file cabinets while claimant was moving one of his and he saw claimant "wince," stand up, put his hand to his lower back, and say, "I think I've hurt my back." Mr. R said he then helped claimant move the file cabinet and that later on that day, he joked with two supervisors, Mr. G and Mr. M, who were in close proximity at the time of the incident, that he had to help claimant move his file cabinet. He said he did not think claimant was seriously injured but that within a week or two following the incident claimant told him he thought he had more than a pulled muscle. He further stated that in September 1996, he attended a baseball game with claimant and had to let claimant out of the car near the stadium because claimant said his back pain would make it difficult for him to walk from the parking lot. The recorded statement of Mr. T stated that he accompanied claimant to that game, around Labor Day, and that claimant was in great pain from his back.

Dr. C wrote on October 9, 1997, that he has been asked to comment on claimant's 1996 on-the-job injury, that he did not see and examine claimant for it but did prescribe a Medrol dosepak and, later, Darvocet, and that he referred claimant to Dr. B, a pain anesthesiologist, for consideration of pain relieving techniques which had not previously been necessary. In answers to deposition questions, Dr. C stated that after _____, he next saw claimant on May 28, 1997, and diagnosed exacerbation of claimant's old congenital stenosis with aggravation of his lumbar 3-4 root pattern as well as his larger herniated nucleus at L4-5, and that the second diagnosis was partial rupture of the biceps tendon; that he treated claimant in December 1994 for acute lumbar nerve root radiculitis; that he saw claimant again in November 1995 for another episode of anterior thigh and back pain; that an MRI (above described) was obtained on December 8, 1995; that he was not involved in claimant's acute treatment for the _____, episode but "would assume" claimant was having an aggravation of his pre-existing problems " which he [claimant] related to his incident on 8-26-96." Dr. C also stated that throughout the course of his treatment claimant took very little pain medication.

Dr. B reported on October 30, 1996, that claimant, then 52 years of age, had a three to four year history of back and right lower extremity pain, that he has intermittent exacerbations which in the past have been relieved with Medrol dosepaks, that the pain over the past few months has not resolved and has been more persistent, and that a December 1996 MRI showed spinal stenosis at L3-4 and L4-5, a large disc herniation at L4-5 and a herniation at L3-4, as well as marked degenerative changes at L3-4, L4-5, and L5-S1. Dr. B's treatment plan was for a course of ESIs which her records reflect concluded on December 11, 1996.

Claimant contended, and thus had the burden of proving by a preponderance of the evidence, that on _____, while moving a file cabinet at work, he sustained

a back injury by having aggravated his preexisting lumbar spine condition or otherwise; that the employer had actual knowledge of the injury on _____ when Mr. R joked with two supervisors about having had to help claimant move a file cabinet; that, in the alternative, claimant had good cause for not reporting the injury to the employer within 30 days of _____, due to his trivializing the seriousness of the injury until seeing Dr. B on October 30, 1996; and that he had disability, as that term is defined in Section 401.011(16).

The hearing officer found that claimant first reported his alleged injury of _____, to his employer on November 7, 1996; that claimant did not act as a reasonably prudent person would have in waiting until November 7, 1996, to report his injury to his employer; that claimant did not injure his back, and did not aggravate his preexisting back condition, when he was moving a file cabinet on _____; and that any inability to obtain and retain employment at wages equivalent to his preinjury wages is due to something other than an injury he sustained on _____.

The disputed issues presented questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, is to resolve the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing body, we will not disturb the factual determinations of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case.

The hearing officer could infer from the evidence including the medical evidence that on _____, claimant experienced another episode of pain or a flare-up of his preexisting lumbar spine condition which included stenosis, two herniated discs, and degenerative disc disease. The Appeals Panel has recognized that the aggravation of a preexisting condition may constitute an injury in its own right. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992. However, to prove an aggravation injury, what must be shown is some enhancement, acceleration, or worsening of the underlying condition as distinguished from the mere recurrence of symptoms. Texas Workers' Compensation Commission Appeal No. 960304, decided March 21, 1996. The hearing officer could consider the medical evidence, particularly the report of Dr. B, of claimant's having had several episodes of low-back pain prior to _____, and the later episode at the wedding in late October 1996, and could also consider the absence of medical evidence showing some enhancement, acceleration, or worsening of the underlying lumbar spine condition on _____.

As for the timely notice issue, claimant testified that he notified the employer of his injury on November 14, 1996, when he called Ms. M and his answers to the carrier's interrogatories also stated that date. However, the hearing officer found the date of the notice to be November 7, 1996, apparently relying on Ms. M's testimony that claimant called her about two weeks before submitting his written memo of November 21st. The hearing officer could infer that Mr. R's joking with Mr. S and Mr. W about having to help claimant move the file cabinet that day did not provide the employer with actual knowledge that claimant had earlier that day sustained a back injury. As for good cause for not reporting the injury until November 7, 1996, a good faith belief that the injury is not serious can constitute good cause for failure to give timely notice providing the belief meets the test of ordinary prudence. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). The Appeals Panel has not required that a claimant "immediately" report the injury upon the termination of good cause. Texas Workers' Compensation Commission Appeal No. 93544, decided August 17, 1993. It has been held that while a reasonable time should be allowed for filing a claim after the seriousness of the injury is suspected or determined, no set rule has been established for measuring diligence in that respect, and each case must rest upon its own facts. Hawkins v. Safety Casualty Company, 207 S.W.2d 370 (Tex. 1948). The hearing officer's discussion indicates that he did not regard the evidence as establishing that claimant "trivialized" the injury until he reported it. The hearing officer noted that two other witnesses knew claimant had pain prior to November 7, 1996, and that claimant knew the pain was from moving the file cabinet. The hearing officer is apparently referring to the statements of Mr. R and Mr. T concerning the severity of claimant's pain when they attended a ball game in September 1996. The hearing officer could also consider that claimant's back pain was severe enough to result in his receiving an ESI from Dr. B on October 30, 1996, and the absence of any explanation for his delaying giving notice until November 7th.

As for disability, the finding of a compensable issue is a threshold requirement to establish disability. Section 401.011(16).

Claimant complains in his appeal that the carrier failed to obtain relevant evidence from Dr. C and from Mr. G, and that Dr. B had no first-hand knowledge of any preexisting history of back pain. We are aware of no obligation on the part of the carrier to obtain evidence for the claimant and to the extent claimant's assertions constitute the assignment of error, we find no error let alone reversible error.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Elaine M. Chaney
Appeals Judge