

APPEAL NO. 990062

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 2, 1998, a hearing was held. She then provided an opinion dated December 10, 1998, in which she found that the respondent (claimant) sustained a compensable back injury on _____, had good cause for her untimely notice, and had disability for periods of time in January, February, March, and April 1998. Appellant (carrier) asserts that there was no injury in _____, citing claimant's prior back problems and absence of medical attention; it also says that there was no good cause for late reporting because there was no diagnosis of a new injury in September 1997 and claimant did not trivialize the injury. Claimant replied that the decision of the hearing officer should be "preserved."

DECISION

We affirm.

Claimant began working for (employer) on June 6, 1997, but had been working for that employer, in a manner of speaking, through a temporary agency for several months prior to that time. On an induction physical exam on _____, claimant testified, she hurt her back when lifting a box said to weigh 50 pounds.

Claimant had previously injured her back in (State 1) in 1994 for which she then had surgery in 1995 to the L5-S1 area. Claimant testified that she did have some continuing problems with her back after the surgery; she added that her pain was predominantly on the left side and in the left leg, but she acknowledged that she did have some pain across the back, which included the right side and traveled a short distance into her right leg. When she picked up the box during the physical examination, she felt a pull in her back but did not tell the examiner, hoping that it was a "muscle problem" that she could "work out," and also not wanting to jeopardize her new job. She worked for employer and did not miss work for her back until calling in as "sick" for two days in August 1997. She said that she had some medications left over from her past back injury which she took until they ran out in July and borrowed other medication thereafter from friends. She continued working and first sought medical care on September 15, 1997, when she saw Dr. K.

Dr. K does not note a history of injury on _____, but he did note that in _____ she began to have "severe" right leg and back pain. He listed her injury date as that of her prior injury on January 28, 1994, but concluded by stating his concern because of "the onset of the right lower extremity pain." Claimant testified that when she saw Dr. K on September 15, 1997, she was concerned about weakness in her right foot which she had not previously had; Dr. K ordered another MRI at that time. Claimant testified that she then notified her supervisor, Mr. S, on September 16, 1997. She said that she told Mr. S of the lifting of the box and the new area of pain but said she also told him she would try to "reopen" her old (State 1) claim. Claimant also said that she told Dr. K of the lifting incident on _____, but he only referred to her pain in _____.

Mr. S's statement, provided in April 1998, corroborates claimant's account of when she notified employer of her injury. He said that claimant told him "in September" that while she was being examined, she hurt her back lifting something. Mr. S also said that he asked her why she waited to report it, and Mr. S then said that claimant replied that she thought it was from a previous injury and also thought it would "go away" because she was doing exercises for her back and taking medication. Mr. S agreed that claimant kept working.

There was frequent reference to claimant's attempts after September 1997, especially in December 1997, to have her old (State 1) claim reopened. She indicated that this failed and that (State 1) concluded that her condition did not result from the 1994 injury. In this context, claimant did not file a Notice of Claim until April 6, 1998, but that fact does not negate that claimant notified her supervisor in September 1997 of the lifting injury while being examined. A claimant has one year in which to file a claim; filing a claim is a different matter from giving notice to the employer of an injury. Whether or not a claimant chooses to ever file a claim does not negate notice to an employer when given.

After claimant saw Dr. K on September 15, 1997, she then had an MRI, which showed a bulging disc at L4-5 and gutter stenosis. Dr. K noted on October 10, 1997, that:

the source of the patient's pain is unclear. Options are post laminectomy instability L5-S1, mild bilateral lateral gutter stenosis at L4-5.

The above medical records of Dr. K clearly show that the latter part of Finding of Fact No. 4 is against the great weight and preponderance of the evidence. Finding of Fact No. 4 is sufficiently supported by the evidence insofar as it says that claimant received treatment from Dr. K on September 15, 1997, but the phrase, "who diagnosed Claimant as having post laminectomy instability at L5-S1 and mild lateral gutter stenosis at L4-5" is not supported by the evidence when tied to the treatment of September 15, 1997. Another record of Dr. K, dated April 20, 1998, states that claimant was "reinjured during a pre-employment physical on _____"; Dr. K said, also at that time, "it would appear that a new injury occurred in _____ or at least a severe aggravation"

The medical records of Dr. K sufficiently support the finding of fact that said Dr. K "opined that claimant's symptoms appear to be causally linked to the _____, lifting incident." While medical records of Dr. W from 1995 and 1996 indicate that he thought claimant could not return to her old job as a die press operator but had reached maximum medical improvement, those records do not negate the determination that claimant sustained a compensable injury in 1997, which is sufficiently supported by the medical records of Dr. K, the medical opinion of Medical Consultants Network in (State 1) that said claimant's condition is not the result of the 1994 injury, and the 1997 MRI.

Claimant's testimony that she hoped she may have a muscle pull, together with the fact that she could and did keep working, and did not seek medical care until September 15, 1997, is some evidence that she trivialized the injury. Opposed to that evidence is

claimant's acknowledgment that she had to take medications during this time and Dr. K's reference to her "severe pain" since _____. It should be noted though that claimant also added that she thought the medication and exercises she did for her back could enable her to work through the injury; this reference to the medication and exercise could support a belief that the injury was not serious. The question of trivialization is one for the hearing officer as fact finder to decide. That it may have been decided differently is not a basis for the Appeals Panel to reverse the determination.

In addition, the finding of fact that referred to claimant thinking the injury was not serious contained another basis for delay -- claimant also thought it may be related to another injury. See Texas Workers' Compensation Commission Appeal No. 941720, decided February 7, 1995, which cited Baca v Transport Insurance Company, 538 S.W.2d 814 (Tex. Civ. App.-El Paso 1976, writ ref'd n.r.e.) which found good cause for delay in notification based on a mistake as to causation. In this case, not only did Dr. K not indicate in his record of September 15, 1997, that claimant had a new injury, he indicated in his October 10, 1997, record that it was still not clear what the basis for her complaints was. These records could be considered to support a failure to notify an employer beyond September 15, 1997, based on a mistaken belief as to causation. Claimant's testimony and the statement of Mr. S indicate that when she gave him notice in September, she reported the _____ incident but indicated that she would see if it was a continuation of the old injury. Under these circumstances, the finding of fact that claimant believed her condition may be related to the prior injury is sufficiently supported by the evidence. This finding of fact and another finding of fact, mentioned immediately hereafter, are sufficiently supported by evidence that does not include the erroneous finding of fact that on September 15, 1997, Dr. K diagnosed gutter stenosis.

The evidence set forth in the preceding paragraph also sufficiently supports the finding of fact that claimant acted as a reasonably prudent person in giving notice on September 16, 1997. The evidence, the finding of fact describing claimant's belief as to the seriousness of the injury and the cause of the injury plus the finding of fact that claimant acted prudently in giving notice in September 1997, sufficiently support the conclusion of law that good cause existed for claimant's delay in providing notice of the lifting incident in June.

There was no assertion that the dates of disability set forth by the hearing officer were incorrect.

Finding that the decision and order are sufficiently supported by the evidence, we affirm, noting that part of Finding of Fact No. 4 is reversed, as described herein. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge