APPEAL NO. 990162

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 9, 1998. He determined that the appellant (claimant) sustained a right knee injury in the course and scope of his employment on _____; that the claimant, without good cause, failed to give his employer timely notice of the injury; that the claimant for various periods was unable to earn his preinjury wage, but did not have disability; and that the claimant did not elect to receive benefits under a health insurance policy in lieu of workers' compensation benefits. The claimant appeals the adverse notice and good cause determinations, contending they are contrary to the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The resolution of the other disputed issues have not been appealed and have become final. Section 410.169.

DECISION

Affirmed.

We will limit our discussion of the evidence to the appealed issue. The claimant worked as a hospital maintenance mechanic. On _____, a steal beam struck his right knee. He testified that he reported this incident and the resulting bruise the next morning to Mr. M, a supervisor, and was told by Mr. M that he, Mr. M, "would take care of it." After about a week, the claimant said, the bruise subsided and he only had knee pain from time to time. About a month later, he said, he described and reported the incident to Ms. R, the occupational health director, but said that by then he did not know if his knee pain was the result of old age or this incident. According to the claimant, Ms. R advised him to see a doctor and that the paperwork would be completed after the doctor's report. The claimant testified that the pain subsided and he thought it would clear up. By December 1997, however, the pain again increased and he decided to seek care in the emergency room (ER) on January 9, 1998, because he could no longer work from the pain. The claimant said he called either Ms. R or Mr. G, a foreman, from the ER, but at that time did not mention that his knee condition was work related. From the ER, the claimant eventually saw Dr. V, a specialist. The claimant admitted that at the time he had a "faint idea" but was not certain that his knee condition was related to the incident on _____. The first medical report of Dr. V refers to a February 18, 1998, visit. Although the claimant testified that he did not describe the accident at this first visit with Dr. V, the report of this visit contains a history of a metal piece falling on the right knee. At the second visit on March 2, 1998, after an MRI which showed a meniscal tear and cyst, the claimant said he told Dr. V that the only way his knee could be in this condition was from the metal beam striking it. The claimant said he reported the knee injury as work related the next day, March 3, 1998, to Ms. R. He also testified that he considered his knee injury "serious" on January 9, 1998, when he went to the ER and "suspected" it was work related or had an "inkling" prior to this, but "wasn't really sure." He pursued this as a workers' compensation claim after, he said, "I made sure" that it was work related by discussing it with Dr. V.

Mr. M testified that in July 1998 he was approached by the claimant, who told him he, the claimant, believed he reported his injury, but was not sure to whom, and asked Mr. M if he reported it to him. Mr. M said that the claimant never mentioned a knee injury to him "not even casually" until July 1998. He further testified that he saw the claimant on a daily basis, considered him an honest person "but as far as him approaching me about an injury, I can say beyond a shadow of a doubt that he did not come to me" and "I know that he did not."

Mr. R, the immediate supervisor, testified that he learned of the claimed injury in March 1998 when Ms. R "probably" talked to him. Mr. R said he was "sure" the claimant never reported it to him earlier. He said he saw the claimant limping in March 1998 and that caused him to ask the claimant about it. Mr. R said even then he was not sure if the claimant said he hurt himself at work or on the job. He testified that he then asked the claimant if he reported it and the claimant said no. Mr. R said he then told the claimant to report it. The claimant denied telling Mr. R that he had not yet reported the injury.

Ms. R testified that she is responsible for reports of on-the-job injuries. She said the claimant reported a right knee injury on March 3, 1998, and she then filled out an Employer's First Report of Injury or Illness (TWCC-1) and notified Mr. G. She said she would have done this earlier if he had reported the injury earlier and that, although she saw the claimant limping, he never mentioned a work connection or at least she did not recall him mentioning this.

In a sworn written statement, Mr. C wrote that he witnessed the accident and the claimant "reported it to his supervisor and the health nurse on [day after injury]."

Sections 409.001 and 409.002 provide that a carrier is relieved of liability for a work-related injury if the claimant fails to give the employer notice of the injury by the 30th day after it occurs unless the Texas Workers' Compensation Commission determines that good cause exists for the delay. Whether and, if so, when notice is given is a question of fact for the hearing officer to decide. The claimant in this case relies on timely notice and, failing that, good cause for lack of timely notice. It was the position of the claimant that he timely reported his injury when he told Mr. M about it on the morning of (day after injury), and offers the statement of Mr. C as corroboration. He also stated at the CCH that he told Ms. R "a month later," without more specificity as to when in terms of the statutory requirement to report by the 30th day after the injury. The hearing officer considered the conflicting evidence and concluded that the claimant did not give his employer timely notice of his injury. On appeal, the claimant argues that he established notice to Mr. M and that Ms. R's testimony does not prove that the claimant did not timely report the incident to her. The claimant characterizes Mr. M's testimony not as "adamantly" denying notice but as "not remembering" if notice was given. Our review of the record, as quoted above, discloses that Mr. M consistently and adamantly denied receiving notice of an injury the next day from the claimant. Arguably, Ms. R's testimony could be construed as nonprobative one way or the other since she asserted at one point that she simply did not recall if claimant reported the injury the next day. The hearing officer, as fact finder, was the sole judge of the weight and credibility to be given this evidence. He clearly could have considered Mr.

M's testimony to be a strong denial of receiving notice from the claimant the day after the injury, and not simply a lack of recollection. Similarly, he could have given little weight to Ms. R's testimony on the possibility of a timely notice or to Mr. C's limited statement, which does not describe how he came upon this knowledge of notice. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer, but conclude that the evidence, particularly the testimony of Mr. M, is sufficient to support the finding of no timely notice.

The hearing officer also determined that the claimant did not have continuing good cause for lack of timely notice until he reported the injury to Ms. R on March 3, 1998. We note in this regard that the claimant does not appeal this date as the date notice was given for purposes of determining good cause for the delay. 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." Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948). The existence of good cause is a question of fact, Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, 1992, and the "totality of a claimant's conduct must be primarily considered in determining ordinary prudence." Texas Workers' Compensation Commission Appeal No. 93544, decided August 17, 1993. We have also held that good cause must generally exist up to the time notice is given, although immediate notice upon the cessation of good cause is not required. *See* Texas Workers' Compensation Commission Appeal No. 950148, decided March 3, 1995.

In Texas Workers' Compensation Commission Appeal No. 91066, decided December 4, 1991, the Appeals Panel observed that trivialization of an injury, that is, "[a] bona fide belief of a claimant that injuries are not serious is sufficient to constitute good cause for delay in giving notice of injury. [Citation omitted]." In this case, the hearing officer found trivialization of the injury up to January 9, 1998, when the claimant went to the ER to have his knee examined. By the claimant's own admission, he considered his condition serious at this time, a conclusion consistent with seeking medical attention at an ER, and even "suspected" it was work related. He, nonetheless, did not report it because he wanted confirmation from Dr. V that his knee condition was work related. This confirmation did not occur, according to the claimant, until after the MRI and his visit with Dr. V on March 2, 1998. According to the appeal, the claimant sought this extra assurance "because there had been a significant passage of time, he was not sure whether the condition was work related until [Dr. V] gave his opinion that it is on March 2, 1998." The implication of this argument is that the longer one waits to report an injury the more tenuous the work-relatedness of the injury becomes, necessitating expert opinion on causation and thus creating good cause in the very act of delay. In any case, we have also noted that the existence of good cause may be premised on reliance on the advice or reassurance of a doctor. Thus, in Texas Workers' Compensation Commission Appeal No. 931135, decided January 27, 1994, relied on by the claimant, we affirmed a finding of good cause for lack of

timely notice where the injury occurred from running down stairs and the claimant testified that she did not associate this activity with the injury until asked by her doctor to "backtrack" her activities to the time her pain began and then she remembered the stairs incident. In Appeal No. 931135, the claimant "sought medical attention promptly but was only treated symptomatically. Upon more thorough examination, including testing and discussion with her doctor, she received a diagnosis and it was determined that the stair incident was the cause."

We believe the case we now consider is distinguishable from Appeal No. 931135 because, among other things, the claimant did not seek any medical attention until he went to the ER on January 9, 1998. He failed to act despite knowledge that he was struck on the knee on _____, and had recurring and subsiding bouts of pain ever since and despite the urging of Ms. R to see a doctor about a month after the accident. He still did not seek medical care until the ER visit and waited another month to see a specialist on whose advice he now relies for a finding of good cause in late reporting. Under these circumstances, one is hard-pressed to conclude that he was relying on a doctor's advice until, at the earliest, his first visit on February 18, 1998, with Dr. V, the report of which reflects that the claimant attributed his knee condition to an injury at work. As noted above, a determination of good cause must be based on the totality of the circumstances from the date of injury to the date notice is finally given. In this case, the hearing officer was not satisfied that the claimant established that he acted with reasonable prudence after January 9, 1998, in not obtaining further medical advice for over a month and then waiting until March 3, 1998, to report his knee injury. Under our standard of review, we believe the evidence is sufficient to support the determination of no good cause for the lack of timely notice.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge