APPEAL NO. 990844

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 November 5, 1998. That case was remanded in Texas Workers' Compensation Commission Appeal No. 982903, decided January 21, 1999, on the sole issue of whether good cause was shown for the untimely notice of injury to the employer. A CCH on remand was held on March 26, 1999, and the hearing officer determined that the respondent (claimant) had good cause for his failure to timely notify the employer of his injury. Appellant (carrier) appeals, urging that the determination of the hearing officer is based on erroneous and inconsistent findings of fact and that the unappealed finding of fact that the claimant knew on or about _____, that he had injured his neck and that it was related to his employment effectively precluded a finding of good cause because of not knowing he had a new, as opposed to a continuing, injury from an earlier injury in 1988. The claimant responds that there is sufficient evidence to support the decision of the hearing officer and that good cause has been shown, thus the carrier is not relieved of liability for untimely notice.

DECISION

Affirmed.

The evidence in this case is well-covered in our previous decision, Appeal No. 982903, *supra*, and in the Decision and Order on Remand of the hearing officer. The evidence will only be touched upon here. The claimant sustained a cervical injury in 1988, did not have surgery, returned to work, and continued to experience some pain although it did not prevent him from working. He worked in a pit doing much overhead work and also performed as a truck driver. His pain got much worse and in July 1996 his neck started locking up and around _____, it got so bad that he was not able to use his arm at all. He was taken to the hospital emergency room by his wife on August 20, 1996, and ended up having emergency cervical surgery two days later. He was released from the hospital on August 26, 1996. The hearing officer found that by no later than July 31, 1996, the claimant knew or should have known that he sustained a work-related injury, that on _____, the claimant knew he had an injury to his neck that was work related, and that on September 18, 1996, the employer was notified of the injury. The claimant testified that he thought his neck injury was a continuation of the 1988 injury and that he did not know it was a new injury until his doctor told him during an office visit on either September 16 or 17, 1996, that it was definitely a new injury and not the 1988 injury, and that his son notified the employer on September 18, 1996. The hearing officer apparently found the claimant to be credible. He also discussed the evidence and found that claimant's actions were consistent with the claimant's assertions that he thought it was the old injury until September when his doctor stated it was definitely a new injury. The hearing officer determined that good cause was shown for the notification of injury filed more than 30 days after the date of injury, under the circumstances of this case. The carrier urges that good cause cannot be shown since the date of injury (not later than _____, but as early

as July 31st) is final and that the finding establishes a "new" injury, and thus the assertion of lack of knowing it was a new injury until told by the doctor on September 16th or 17th does not give rise to good cause.

We do not agree and have held that a determination of good cause should be evaluated within the context of the totality of the claimant's conduct. Texas Workers' Compensation Commission Appeal No. 962289, decided December 18, 1996. We have not read out the establishment of good cause for a late notice in occupational disease cases although a date of injury is based upon a knew or should have known basis. Texas Workers' Compensation Commission Appeal No. 981397, decided August 6, 1998; Texas Workers' Compensation Commission Appeal No. 981724, decided September 10, 1998 (Unpublished). Whether good cause exists is generally a factual issue for the hearing officer to determine. Only were we to conclude that his determination was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust would there be a sound basis to disturb his decision. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). We do not find that to be the case here and accordingly affirm the decision and order.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge