APPEAL NO. 991256

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 13, 1999, a contested case hearing was held. With regard to the four issues before her, the hearing officer determined (1) that respondent (claimant) sustained a compensable (repetitive trauma right shoulder) injury on _____, (2) that although claimant did not timely report his injury to the employer, he had good cause for failing to do so (trivialization), (3) that claimant had disability (as defined in Section 401.011(16)) "since January 4, 1999," and (4) that claimant had not made an election of remedies.

Appellant (carrier) appealed several of the hearing officer's findings on all four issues, contending that claimant's sore shoulder was due to weight lifting, that claimant had not mentioned that his sore shoulder was work related and since he asked for a change in job assignment he had not trivialized the injury, that claimant did not have disability for several reasons (no compensable injury, had in fact worked elsewhere and that claimant had the ability to obtain and retain employment) and that claimant had made an election of remedies by filing for medical benefits with his group health carrier. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from the claimant.

DECISION

Affirmed.

Claimant was employed by (employee) employer, as a "preloader" sorting and loading packages. It is undisputed that a portion of the job entailed sorting parcels weighing from a few ounces up to 70 pounds and placing them on different conveyor belts at a rate of over 1,000 per hour. Claimant testified that the rapid overhead lifting caused him to sustain a repetitive trauma injury to his right shoulder. Claimant testified that when he realized that sorting the parcels caused him to experience shoulder pain he reported to his supervisors, Mr. T and C, Mr. P on _____, that his shoulder was hurting and was there something else he could do. Claimant's job duty was modified to that of a loader where he was still required to handle the parcels but apparently at a slower rate as the loader would walk from one place to the truck to load the parcels. Claimant continued working through the busy holiday rush season. Claimant testified that when he punched in on January 4, 1999, he was put back to sorting and when he told Mr. P he could not do that job because of his sore shoulder he was told to go home and not return until he was 100% fit for duty. It is undisputed that the following evening, Mr. T, who was also a neighbor and friend, came to claimant's home to inquire about claimant's sore shoulder. Mr. T testified that during a conversation with claimant's father, he learned that claimant was asserting a work-related repetitive trauma injury. Mr. T said that he had assumed that claimant's prior complaints of shoulder soreness were due to claimant's activities as a weight lifter and personal trainer. Subsequently, claimant saw his family doctor, Dr. S, on January 12, 1999. Dr. S returned claimant to a light-duty status but claimant stated that the employer did not

have any light-duty jobs except for work-related injuries. During the time during which claimant is claiming disability, he testified that he had some casual employment as an ID checker and security person at one club (receiving only meals and an occasional "loan") and a few days at another club as a "bouncer" but that club was too "rowdy." In addition he has been certified as a personal trainer and testified that he works with about seven people. In evidence is a videotape showing claimant lifting some weights. We note the video is of poor quality, flickers and was taken through a storefront window. Large portions of the second part dealt only with the layout of a fitness gym. How much weight to give this video is solely within the province of the hearing officer. (Section 410.165(a)). Claimant testified, and the hearing officer noted, that claimant "has modified his workout in such a manner that it does not place any stress on his injured shoulder."

A progress note dated January 12, 1999, apparently by Dr. S, notes shoulder pain "in August [1998]" lifting objects above shoulder height, that when that activity was discontinued claimant's "shoulder improved and when he returned to working that similar job began had [sic] problems after one day." Dr. S notes "actual injury date _____" and that claimant is not to return to full duty. In a report dated March 16, 1999, Dr. S repeats many of the same observations, notes that an MRI showed "a labral tear" and refers claimant to Dr. J "for orthopedic consultation." In a report dated March 9, 1999, Dr. J notes the "MRI shows an anterior labral tear of the glenoid, which may be a normal variant" and gave claimant rotator cuff strengthening exercises "and have him decrease his workouts at the gym." In a report dated April 14, 1999, Dr. J said he found evidence of "rotator cuff tendinitis from repetitive action" and has "no reason to doubt this occurred while performing his work duties." Dr. J wrote carrier by letter dated April 27, 1999, explaining:

> In response, the reason why the gym workout is mentioned in my first dictation is that we need to specifically train muscle for this entity to resolve, and the use of other muscles can be counterproductive to this goal. Seventy percent of patients with [claimant's] symptoms are cured with conservative treatment of specific strengthening exercises. Therefore, the use of a gym can be extremely important in one's rehabilitation. I do not believe that this problem will come to surgery.

Claimant said that Mr. P told him not to file a workers' compensation claim and when the carrier denied his claim he filed for medical benefits under his group health coverage. Claimant testified that he lost his group health coverage on March 31, 1999, and the doctors have not been paid since.

Regarding an injury in the course and scope of employment, claimant testified the high-speed lifting and sorting caused him to sustain a right shoulder injury. Claimant's testimony is, at least in part, supported by the medical reports. Although carrier points out that claimant had engaged in weight lifting in high school and had resumed that activity in the fall of 1998, it is undisputed that claimant complained of shoulder pain in November of 1998 and the employer accommodated him by assigning him work which did not have the high-speed requirement but did require lifting/loading parcels. Whether claimant sustained

his shoulder injury weight lifting or in his job sorting is entirely a factual determination for the hearing officer to resolve. The hearing officer resolved that dispute in claimant's favor and that decision is supported by the evidence.

Regarding the reporting of the injury, claimant contends that he reported the injury to Mr. T and Mr. P on _____. Whether claimant reported a work-related injury or only soreness in his shoulder is problematical. The hearing officer found that claimant's complaints and employer's supervisors "being aware of Claimant's off-the-job activities" (weight lifting) was not sufficient to give the employer notice of a workers' compensation injury. Generally, a claimant must report an injury to his employer within the requisite 30-day period, Section 409.001, unless there is good cause for the failure to timely report the injury. Section 409.002(2). The question of good cause for failure to timely report an injury is a question for the fact finder. Texas Workers' Compensation Commission Appeal No. 93550, decided August 12, 1993. A claimant must act with diligence in notifying the employer of a claim. Texas Workers' Compensation Commission Appeal No. 93649, decided September 8, 1993. A reasonable time should be allowed for the preparation and filing of a claim after the seriousness of the injury is suspected or determined. Appeal No. 93649. The claimant has the burden to prove good cause. Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994. The test for good cause is that of ordinary prudence or "that degree of diligence that an ordinary person would have exercised under the same or similar circumstances," and it is within the purview of the hearing officer to determine what ordinary prudence is under the circumstances. *Id*. A reason or excuse generally recognized as good cause for late reporting is the belief of the employee that the injury is trivial. Appeal No. 94114. Good cause must continue to the date when the worker actually files the claim. Appeal No. 93649, *supra*. The hearing officer commented:

> Claimant's own testimony negates the possibility that he did not realize that his injury was related to his employment; however, since Claimant was able to continue working and did not find it necessary to seek medical treatment until early January of 1999, it appears that Claimant did not consider his injury serious until that time, and therefore will be found to have had good cause for failing to timely report his injury, provided that the good cause he has established continued until the time the injury actually was reported. Since [Mr. T], who was employed in a managerial position with Employer, was advised of the alleged work-related nature of Claimant's injury very shortly after Claimant's on-the-job injury required him to begin missing work and seek medical treatment, it appears that Claimant's good cause for failing to timely report his injury did last until the time that it was reported, and workers' compensation benefits therefore are payable on account of Claimant's on-the-job shoulder injury of _____.

Carrier argues that when claimant requested a change of duties in November 1998, "[s]uch a condition is not a trivial matter which would require notice of an injury." The hearing officer thought not and we decline to hold that finding error as a matter of law or so against

the great weight and preponderance of the evidence as to be clearly wrong. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

With regard to disability, that term is defined as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Having previously affirmed the hearing officer's findings that claimant sustained a compensable injury and had good cause for failing to timely report that injury, we address carrier's argument that claimant "was continuing to work other jobs" (checking IDs at two clubs and working as a personal trainer). That may be, but it is uncontroverted that the wages he received from such occasional work, helping friends, did not meet the requirement of earning his preinjury wage. Although carrier argues that claimant "is not earning wages as he has chosen to accept other forms of compensation" (such as meals and an after work drink), there is no evidence that had he chosen to be paid, that amount would be anywhere close to his preinjury wage. Further, claimant returned to work with the employer on January 4, 1999, and was prepared to continue his modified duties as a loader but was told that he would have to work as a sorter or not at all. Claimant's medical evidence supported that he had a light-duty release rather than a full-duty release. We have noted that a light-duty release is evidence that disability continues. Texas Workers' Compensation Commission Appeal No. 970597, decided May 19, 1997. Whether a claimant has disability can be proven by claimant's testimony alone if believed and generally is a factual determination within the province of the hearing officer.

Last, carrier contends that by filing for medical benefits claimant had made an election of remedies. Factually, we note that claimant filed his claim on January 20, 1999, and carrier denied "the claim in its entirety" on February 16, 1999. Consequently, with carrier denying liability, claimant was not even presented with the possibility of two or more inconsistent remedies. *See* Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980) for the standards of election of remedies. Further, as the hearing officer noted, the burden of proof is on the carrier to prove that claimant made "an informed choice" between two or more inconsistent remedies, and carrier failed to do so. We reject carrier's contentions on this point.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge