APPEAL NO. 991330

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 May 25, 1999. He determined that the respondent (claimant) had continuing good cause for not timely reporting her work-related injury of _____. The appellant (carrier) appeals this determination, contending that it is against the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Reversed and remanded.

The claimant worked in the self-insured's warehouse. She testified that on _____, as she lifted a box, she felt a pop in her hip. She said she did not think much about it and had no pain for a couple of weeks. Then, she said, her leg began to hurt. She self-medicated for the pain and, in a written chronology of events prepared by the claimant on February 24, 1999, wrote that "[a]fter several weeks, I started having severe pain in my left leg." The pain would not go away. So, on November 17, 1998, she saw Dr. B. He referred her for a lumbar MRI, which she underwent on November 19, 1998. The MRI disclosed herniation at L4-5. The claimant testified that on November 24, 1998, Dr. B's office called her and told her that she had a herniated disc. She said this was the first time she realized she had a work-related injury on _____. According to the claimant, when she was told about the herniation, she was "honestly kind of in shock for a few days . . . [that] . . . I was hurt as bad as I was." In her February 4, 1999, chronology, she wrote: "For about a week or so, I was in shock of what was happening to me and the severity of my injury." On November 30, 1998, she underwent an epidural steroid injection. The parties agreed that the claimant first gave her employer notice of this claimed injury on December 7, 1998.

Sections 409.001(a) and (b) provide that an employee shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs and that the notice may be given to an employee of the employer who holds a supervisory or management position. Section 409.002 provides, in part, that the failure to notify an employer as required by Section 409.001(a) relieves the employer and the employer's insurance carrier of liability unless the employer or the carrier have actual knowledge of the injury or the Texas Workers' Compensation Commission (Commission) determines that good cause exists for failure to provide notice in a timely manner. An employee who fails to give the employer notice of the injury within the 30-day period has the burden to show good cause for such failure. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). The test for good cause is that of ordinary prudence, that is, whether the employee has 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., 146 Tex. 381, 207 S.W.2d 370 (1948). In Texas Workers' Compensation Commission Appeal No. 94050, decided February 25, 1994, we observed the following: "Our review of the Texas case law reveals that the reasons or

excuses commonly recognized as 'good cause' include the claimant's belief that the injury is trivial, mistake as to the cause of the injury, reliance on the representations of employers or carriers, minority, and physical or mental incapacity, while the advice of third persons and ignorance of the law are frequently held not to constitute good cause." It has also been held that the existence of good cause must generally continue up to the time the otherwise untimely report of injury is made, although an immediate reporting is not required. Texas Workers' Compensation Commission Appeal No. 93677, decided September 21, 1993. Whether an employee has exercised that degree of diligence required under the ordinarily prudent person test is usually a question of fact for the fact finder. A claimant's conduct must be examined "in its totality" to determine whether the ordinary prudence test was met, and the reason for delay will generally be found in the claimant's own testimony. *See* Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ).

In the case we now consider, the claimant acknowledged that she did not report her injury by the 30th day after it occurred. The good cause for the delay in reporting asserted by the claimant included trivialization, or the good faith belief that the injury was not serious, unawareness that the cause of her leg pain was a low back injury, and "shock" that her injury was so serious. She also candidly acknowledged that she was not aware of the time limits imposed for reporting an injury. The hearing officer made the following findings of fact on which he based his good cause determination:

FINDINGS OF FACT

4. Claimant trivialized her injury, did not give it any significance and did not miss work.

5. Claimant did not know she was seriously hurt until the results of the MRI were given her on November 24, 1998.

The carrier appeals these determinations, contending that the finding of trivialization beyond 30 days was against the great weight and preponderance of the evidence and no good cause existed for failing to notify the employer "immediately" after November 24, 1998.[1]

We have serious reservations that the evidence established trivialization beyond 30 days because, in her own statement, the claimant described her pain as severe before she saw Dr. B, and this seriousness was what motivated her to make the appointment. Certainly, her assertion of "shock" on being told November 24, 1998, of the results of the MRI largely undermines any contention of trivialization beyond November 24, 1998, or after

[1]The dissenting opinion in this case would construe this latter point of appeal to be an assertion that a report of injury must be made "immediately" upon the termination of trivialization. The dispute resolution process is not controlled by strict rules of pleading. We believe that the dissenting opinion places a strained interpretation on the quoted language of the appeal, which we construe, based on a "fair reading of the appeal," Texas Workers' Compensation Commission Appeal No. 980598, decided May 11, 1998, to be simply an assertion that good cause did not extend to the date the injury was reported.

the steroid injection. The hearing officer discusses, but does not reduce the discussion to a formal finding of fact, the other contention of the claimant that good cause consisted of her lack of knowledge of what was causing the leg pain until she was given the results of the MRI. There was unrebutted evidence that she thought her leg pain came from sleeping on it the wrong way, that it may have been related to a back injury of a year before, or that she had no inkling that a back injury could cause leg pain. As noted above, a mistake about the cause of an injury may be a basis for good cause. We believe that the evidence supports of finding of good cause on the basis of a mistake or failure to connect the leg pain with the injury until November 24, 1998, when Dr. B's office made the connection for the claimant.

What concerns us is whether the claimant acted with ordinary or reasonable prudence in waiting another two weeks before reporting the injury. The hearing officer did not address in his findings of fact this period, nor did he identify the continuing good cause during this period. The evidence disclosed that the Thanksgiving holiday was November 26 and 27, 1998, but the claimant testified she worked the entire week after, from November 30 to December 4, 1998, even though she was in the self-described "shock." She also testified that she did not report the injury that week because the second level supervisor was "very busy."[2] Because we cannot agree that the evidence supports trivialization or ignorance of the cause of the injury after November 24, 1998, and because the hearing officer did not expressly address possible good cause in the period between November 24, 1998, and December 7, 1998, we reverse his determination of good cause up to the date of reporting the injury and remand this issue for further consideration and express findings of fact, based on the totality of the claimant's conduct during this period including her claim of "shock," as to what did or did not constitute continuing good cause from November 24, 1998, to December 7, 1998. *See* Texas Workers' Compensation Commission Appeal No. 931012, decided December 20, 1993, and Texas Workers' Compensation Commission Appeal No. 93677, decided September 21, 1993.

[2] According to the unrebutted testimony of the immediate supervisor, the claimant did not report the injury to her until January 7, 1999.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

DISSENTING OPINION:

I would affirm based on the fact that carrier only appealed the period after claimant received the MRI on November 24, 1998, in terms of having a duty to act "immediately" or show cause why she did not act immediately. This is an incorrect standard which claimant did not have to meet and should not be confused with a general appeal directed to a determination.

Joe Sebesta
Appeals Judge