APPEAL NO. 991704

Following a contested case hearing held on July 15, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent (claimant) sustained a compensable injury on _____; that claimant did not report an injury to the employer within 30 days after the injury but that good cause exists for failing to timely report the injury; and that claimant had disability commencing on November 7, 1998, and continuing through the date of the hearing. The appellant (carrier) has requested our review of these determinations, asserting that the evidence is insufficient to support them. The file does not contain a response from the claimant.

DECISION

Affirmed in part, reversed and rendered in part.

Claimant, who said he spoke "very little" English, testified through a Spanish language translator that he had worked for the employer as a welder for just over five years when, on _____, he hurt his back lifting a very heavy axle at work. He said that when he pulled, he felt pain in his mid-back and hip area. Claimant further testified that he went to another town that day and obtained an appointment with Dr. KB for three days later; that he told Dr. KB, whom he saw only once, that his back hurt a lot; and that Dr. KB thought he had "a cold." Dr. KB's "Excuse Slip" dated "11-11-98" states that claimant was seen that day and is unable to return to work because of "bronchitis." Claimant indicated that Dr. KB did not speak Spanish but that his secretary did.

Claimant said he was next seen by Dr. SB, an oncologist, who "found something in [his] blood" and referred him to another doctor. Dr. SB's report of November 25, 1998, to Dr. KB states that claimant, then 52 years of age, presented with weakness and difficulty breathing and that he also complained of tingling in the low back which extends around the waist bilaterally at about T11 to T12, which is worse when lifting at work, and which occasionally radiates down the lower extremities. Dr. SB's impression was Lymphocytosis (probable chronic lymphocytic leukemia); the tingling that claimant described; and food hanging up occasionally when swallowing. The December 10, 1998, report of MRI scans ordered by Dr. SB stated the impression as significant disc degenerative changes and facet arthropathy within the lower lumbar spine with broad based protrusion of disc material at L5-S1 displacing the left L5 nerve root, spinal stenosis at L4-5, and less pronounced changes at L3-4 and L2-3. Dr. SB's note of "4-30-99" states that claimant was having chronic back pain when seen on November 25, 1998; that scans revealed abnormalities; and that he referred claimant to a neurosurgeon, Dr. M, who referred claimant to a pain specialist, Dr. CS. Dr. SB wrote on May 6, 1999, that he does not feel that claimant's back pain and/or injury are related to his leukemia and that for this reason he referred claimant to a neurosurgeon.

Claimant further testified that in February 1999 he began to receive treatment for his back injury from Dr. CS and that although he is now getting therapy, his medications were discontinued and his back hurts more. Dr. CS's February 8, 1999, initial report states that claimant was referred for evaluation of low back pain and right leg pain with numbness and weakness that he sustained an on-the-job injury on or about "_____," referring to claimant's lifting a heavy axle which made his preexisting back pain worse. Dr. CS's assessment included lumbar radicular syndrome, right sciatica with protruding disc at L3-4; relative spinal stenosis with bulging disc at L4-5; herniated nucleus pulposus at L5-S1; chronic lymphocytic leukemia; and degenerative facet joint disease L2-S1.

Claimant also testified that he had not returned to work since the accident and indicated that he had been taken off work by Dr. KB and Dr. SB. Dr. CS wrote on March 17, 1999, that the carrier has denied a series of three lumbar epidural steroid injections; that since he has been caring for him, claimant has been unable to work; and that claimant is taking two medications which can cause sedation and interfere with the ability to concentrate and carry out mechanical tasks. On May 4, 1999, Dr. CS reported essentially the same information concerning claimant's inability to work.

Concerning the timely notice of injury issue, claimant testified that when he lifted and pulled and hurt his back on _____, he told his helper, Mr. IM, that he hurt his back and that Mr. IM sent him to Mr. JM to have him interpret for claimant so that claimant could report the injury to supervisor Mr. D. Claimant stated that he told Mr. JM to tell Mr. D that "I had hurt myself there and that my back was hurting a lot"; that the three of us (claimant, Mr. JM, and Mr. D) were together; and that Mr. JM indicated he had done so. Claimant stated that while he would sometimes speak to Mr. D in English, such conversations were about work matters.

Mr. JM, also testifying through the Spanish language interpreter, stated that Spanish is his first language and that he speaks "a little" English; that he witnessed the occurrence of claimant's injury with claimant lifting some heavy pipes and stating that his back felt bad; that claimant told him to go with him to tell the supervisor that he was feeling bad; and that, in claimant's presence, he told Mr. D that claimant "had a pain in his back."

Mr. D, the welding supervisor and claimant's supervisor, testified that claimant spoke "some" English and he could communicate with claimant; that claimant never complained of back problems but did wear a back brace under his clothes; and that the pipes claimant lifted probably weighed approximately 50 pounds. Mr. D further stated that on _____, he went to claimant's work station to check on his work; that claimant said, in English, that he "didn't feel good" that day; and that he asked claimant if claimant wanted him to call Ms. H in the front office about getting a doctor's appointment and that claimant declined. Mr. D stated that the next day, claimant worked a half day, said he had a doctor's appointment, and has not returned to work. He further testified that he learned from the front office that claimant brought in a doctor's slip from Dr. KB for bronchitis; that he learned later that month that claimant had leukemia; and that he first became aware of a back injury in February 1999. Mr. D testified that at no time did Mr. JM, who is not a supervisor, come to him and indicate that claimant had a work-related injury. He stated that had an injury been

reported by claimant, an accident report would have been prepared and that "the Spanish supervisor," Mr. A, can help employees complete these reports.

Ms. H, whose duties include personnel, accounting, and workers' compensation claims, testified that although claimant does not speak much English, she had been able to communicate with him. She stated that Mr. JM did not translate for claimant "but he had translated for other people" and that "if there was a problem, he would come with that person and speak for them." She further stated that claimant knew about Mr. A's acting as a translator. Ms. H also mentioned that when claimant brought in the doctor's slip for bronchitis, he did not mention a back injury.

During the carrier's closing statement, the hearing officer asked the carrier to comment on the role of Mr. JM as an agent of the employer and the carrier maintained that Mr. JM was not the employer's agent in that he had neither express or implied authority from the employer to act as the employer's agent and that claimant could have gone to Mr. A for translation. The carrier also argued that claimant did not establish good cause for an untimely reporting of the back injury, apparently referring to "trivializing" the injury, because he said he complained to both Dr. KB and Dr. SB about his back before being seen by Dr. CS.

The hearing officer stated as a "Finding of Fact" that claimant "sustained an injury in the course and scope of his employment on _____" and as a "Conclusion of Law" that claimant "sustained a compensable injury on _____." As can be seen, the "finding of fact" differs only slightly from the legal conclusion. The Appeals Panel has had occasion in the past to comment on the difference between findings of fact and conclusions of law, both of which are statutorily required of hearing officers. *See* Texas Workers' Compensation Commission Appeal No. 92230, decided July 17, 1992. However, the carrier's challenge is to the sufficiency of the evidence to support a finding in claimant's favor on the injury issue. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). Applying our standard of appellate review, we do not find the hearing officer's determination of the injury issue to be so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Concerning the disability issue, the hearing officer found that "[d]ue at least in part to his on-the-job injury of _____, commencing on November 7, 1998, and continuing through the date of this hearing, Claimant has been unable to obtain and retain employment at wages equivalent to his pre-injury wage." The carrier appeals this finding on the grounds that the claimed injury was not timely reported and thus is not compensable. Disability is defined in Section 401.011(16).

Section 409.001(a) provides in part that "[a]n employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the

30th day after the date on which: (1) the injury occurs; . . . [Emphasis supplied.]" Section 409.002 provides in pertinent part that 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 Texas Workers' Compensation Commission determines that good cause exists for failure to provide notice in a timely manner. Concerning the timely notice of injury issue, the hearing officer made the following findings:

FINDINGS OF FACT

3. Claimant did not speak English sufficiently to feel comfortable making a report of injury in English, and so he described the injury to [Mr. JM] in Spanish and asked [Mr. JM] to make the report of the injury to the supervisor in English.

4. Although he was not an official translator, it was the ordinary course of business for the employer for [Mr. JM] to translate on behalf of Spanish-speaking employees.

5. The report made by [Mr. JM] as translator was insufficient to constitute notice of injury as required by the Act.

6. Claimant relied on the translation services of [Mr. JM] in making the report of injury, and it was reasonable for him to do so.

7. The employer did not receive notice of Claimant's injury until February, 1999, when an inquiry was made by Claimant's treating doctor.

CONCLUSION OF LAW

4. The Claimant did not report an injury to his employer within 30 days after the injury, but good cause exists for failing to report the injury timely.

In his discussion of the evidence, the hearing officer states, in part, as follows:

Claimant asked [Mr. JM] to explain to the supervisor that Claimant had hurt his back performing his duties. Claimant did not feel that he had adequate English to tell the supervisor that he was hurt, and the supervisor did not speak Spanish. [Mr. JM] regularly translated for other employees, although the employer had not designated him as an interpreter.

From the testimony of [Mr. JM], his report to the supervisor fell short of adequacy for a report under the Labor Code. Claimant thought that a report of injury had been made, but the employer did not document the injury until February of 1999, when inquiries were made by the treating doctor.

> If the translator were to be found to be an agent of the employer, then the injury would have been reported on _____. If not, then Claimant had good cause for the delay in reporting, because he was present with the translator when the conversation was had with the supervisor, and assumed that the message had been adequately conveyed.

In Texas Workers' Compensation Commission Appeal No. 91030, decided October 30, 1991, the Appeals Panel, considering an appealed issue concerning whether the employee showed good cause for not reporting her injury to the employer within 30 days, stated that Article 8308-5.02(2), now Section 409.004, is similar to the good cause provision under prior law, Article 8307, Sec. 4a (repealed), and that good cause is an issue which may arise both as to notice of injury and to the filing of a claim for compensation. We cited from the decision in Hawkins v. Safety Casualty Company, 207 S.W.2d 370 (Tex. 1948) as follows:

> The term "good cause" for not filing a claim for compensation is not defined in the statute, but it has been uniformly held by the courts of this state that the test for its existence is that of ordinary prudence, that is, whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Consequently, whether he has used the degree of diligence required is ordinarily a question of fact for the jury or the trier of facts. It may be determined against the claimant as a matter of law only when the evidence, construed most favorably for the claimant, admits of no other reasonable conclusion.

In Applegate v. Home Indemnity Company, 705 S.W.2d 157, (Tex. App. Texarkana 1985, writ dism'd), where a jury finding against good cause was upheld, the court stated the following:

> The purpose of [the notice section] of the Worker's Compensation Act is to give the insurance carrier an opportunity to immediately investigate the facts surrounding the injury. [Citations omitted.] Yet, the test, well-established by precedents, is not whether the insurer was harmed by the delay, but rather whether or not the injured worker was prudent in his beliefs that caused the delay. Such a test has the effect of punishing a worker for his poor judgment or ignorance, even though no harm resulted from his inaction. Nevertheless, this court is bound to abide by the jury's finding by numerous precedents unless the jury's finding is against the great weight and preponderance of the evidence and reasonable minds could not differ as to the conclusion to be derived therefrom. [Citation omitted.]

In Texas Workers' Compensation Commission Appeal No. 94050, decided February 25, 1994, another case in which the Appeals Panel considered an appealed issue of timely notice of injury, the Appeals Panel's review of Texas case law revealed 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 often held not to constitute good cause." We also noted that the court in Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ) observed that a claimant's conduct must be examined "in its totality" to determine whether the ordinary prudence test was met. *And see* Texas Workers' Compensation Commission Appeal No. 93544, decided August 17, 1993.

In Texas Workers' Compensation Commission Appeal No. 93677, decided September 21, 1993, the Appeals Panel stated the following:

> Ordinarily, a hearing officer's finding of fact will not be disturbed on appeal unless the evidence to support the finding is so weak or the finding so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. [Citation omitted.] The test for reversal of a finding of good cause is even more stringent and, as we have held, is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 91120, decided March 20, 1992. [*And see* Texas Workers' Compensation Commission Appeal No. 931012, decided December 20, 1993.]

In Appeal No. 93677, *supra*, the Appeals Panel upheld a finding of good cause based on the claimant's testimony concerning her "trivialization" of the injury, stating that her testimony "provides some probative evidence on which the hearing officer could base his findings and precludes us from setting aside the finding of the hearing officer as being arbitrary and without any basis in the record."

In Texas Workers' Compensation Commission Appeal No. 93057, decided February 25, 1993, the decision stated that "Appeals Panels have applied 'broad' and 'ungrudging' interpretations of provisions of the 1989 Act, e.g., in whether a given set of facts meets certain notice requirements. [Citations omitted.]"

The hearing officer has apparently determined that although claimant did not report the injury to the employer through Mr. JM's discussion with Mr. D on _____, because of the lack of information that claimant's back was hurt at work, claimant had good cause for not reporting the injury until sometime in February 1999, when Dr. CS's office made inquiries of the employer. That good cause apparently consists of Mr. JM's translating for other employees "in the ordinary course" of the employer's business, albeit he was not designated by the employer as a translator, and it being "reasonable for the claimant to rely on Mr. JM to convey notice. The carrier takes issue with the hearing officer's findings that Mr. JM translated in the ordinary course of the employer's business and that claimant reasonably relied on the accuracy of Mr. JM's translation to provide adequate notice of injury.

The flaw in the hearing officer's rationale is the notion that claimant is somehow not responsible for the adequacy of Mr. JM's translation of his attempt to provide Mr. D. with

notice that he had injured his back at work that day. Mr. JM, a coworker, testified that he spoke little English and he used the translator at the hearing. The evidence established that claimant knew of Mr. JA, the Spanish-speaking supervisor. Notably, the hearing officer did not find that Mr. JM was the employer's agent in providing the translation to Mr. D. If Mr. D was anyone's agent on that occasion, he was the claimant's agent. Under the hearing officer's reasoning, an injured employee can simply tell a coworker, who does some ad hoc translating for fellow employees from time to time, to tell the supervisor that the employee was injured on the job and if the coworker's notice falls short of constituting notice of a work-related injury, the injured employee has good cause for late reporting because it was reasonable for the employee to assume the report would be adequate.

We determine the hearing officer's finding that it was reasonable for claimant to rely on Mr. JM's translation services in making the report of injury to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain and King, *supra*. We further determine that the hearing officer abused his discretion in concluding that claimant had good cause for not timely reporting the injury. Because claimant failed to provide timely notice of his injury as provided for in Section 409.001, the carrier is relieved of liability for that injury as provided for in Section 409.002.

The findings that claimant sustained an injury in the course and scope of employment on _____, and that due at least in part to his on-the-job injury of _____, he was unable to obtain and retain employment at wages equivalent to his preinjury wage commencing on November 7, 1998, and continuing through the date of the hearing are affirmed. However, we reverse the conclusion that claimant sustained a compensable injury on _____, and that good cause exists for failing to timely report the injury.

The decision and order of the hearing officer are reversed and a new decision is rendered that the carrier is not liable for claimant's injury of _____.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

DISSENTING OPINION:

I respectfully dissent.

A finding of fact is a conclusion drawn from facts without exercise of legal judgment. Standing alone, a finding of fact does not have any legal consequences. Fact finders must weigh the evidence presented and must determine each controlling question of fact that is a matter of controversy in the proceeding. Thompson v. Railroad Commission, 150 Tex. 307, 240 S.W.2d 759 (1951). On appeal, a finding of fact is reviewed to determine if it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. A conclusion of law is a finding determined through application of rules of law based on facts found in a finding or findings of fact. Many of the provisions of the Administrative Procedure Act do not apply to proceedings before the Texas Workers' Compensation Commission (Commission). The Commission has looked to the substance of determinations of hearing officers and has not insisted on the clear distinction between findings of fact and conclusions of law. Nonetheless, in deciding an appealed issue of good cause for not timely reporting an injury, the Appeals Panel must determine what is a finding of fact and apply the "against the great weight and preponderance of the evidence" standard of review to that factual determination and determine what is a conclusion of law and determine whether the hearing officer abused his discretion in applying the law to a fact or facts that were found. In the case before us, the claimant, who spoke very little English, asked another employee, who apparently spoke and understood English a little better than the claimant, to report an injury to a supervisor, who did not speak Spanish, and was present when the report was made on his behalf. Portions of the findings of fact set forth in the majority opinion are conclusions of law. In my view, the evidence is sufficient to support the purely factual determinations made by the hearing officer and he did not abuse his discretion in applying the law to those factual determinations. I would affirm the determination that the claimant had good cause for not timely reporting the injury to his employer.

_____

Tommy W. Lueders
Appeals Judge