

APPEAL NO. 991882

On July 29, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether respondent (claimant) sustained an injury on or about _____; (2) what is the date of injury; (3) whether appellant (carrier) is relieved of liability under Section 409.002 because of claimant's failure to timely notify his employer under Section 409.001; and (4) whether claimant has had disability from August 25, 1998, to "the present." The hearing officer decided that: (1) claimant sustained a compensable back and right ulnar nerve injury on _____; (2) claimant had good cause for late reporting and carrier may not avoid liability for benefits for late reporting; and (3) claimant had disability from August 25, 1998, continuing until July 29, 1999, the date of the CCH, and is entitled to temporary income benefits for that period. Carrier requests that the hearing officer's decision on all disputed issues be reversed and that a decision be rendered in its favor on those issues. Claimant requests affirmance.

DECISION

Affirmed.

Claimant testified that on _____, he was working as a crew chief and as an insulator and was on the top off an eight-foot ladder when the boom of a crane knocked him off the ladder and onto the street. Claimant said that MF was working with him on the day of the accident. Claimant said that he reported the accident to MJ, the superintendent, on the day of the accident and that he told MJ that his beeper was broken but that he was okay. Claimant said that he also called his wife on the day of the accident and told her about the accident. Claimant said that he continued to work after the accident. Claimant said that he had a little pain after the accident but that it was minor, that about a week later his right arm and hand would get numb, that he told MJ about his arm problem, and that MJ told him that it was probably muscle spasms from the fall. Claimant said that he did not think he had a serious injury.

MF did not testify that he saw claimant fall or get knocked off the ladder, but did testify that claimant was on the ladder and that it later appeared to him that claimant had fallen. Claimant's wife testified that claimant called her on _____, and told her about the accident he had at work that day.

Claimant went to the (the clinic) on August 25, 1998, and ED, a physician's assistant, noted complaints of arm and hand numbness and back pain and gave an assessment of paresthesias in the median nerve. In a work-status letter dated August 25, 1998, ED wrote that she had advised claimant to abstain from gripping activities with the right hand for at least eight to 16 days and noted that claimant could return to work on August 26, 1998, with those restrictions. In a work-status letter dated September 1, 1998, ED noted that claimant could return to work on September 2, 1998, with no restrictions. In

a report dated September 14, 1998, which is signed by Dr. L and Dr. M, the date of accident is stated as _____, and it is noted that claimant fell on his right hand and right side when he was knocked off the ladder and that he had back pain since the accident and right upper extremity numbness three weeks after the incident. In a clinic evaluation form dated October 22, 1998, claimant wrote that a crane knocked him off an eight-foot ladder and that his pain started slowly and then began to bother him a lot.

On October 26, 1998, Dr. G wrote that claimant indicated that he was knocked off the ladder on _____, and that he broke his fall with his right arm. Dr. G noted that claimant's examination and symptoms were suggestive of a lumbosacral strain and that an electromyography (EMG) and nerve conduction study (NCS) of the right upper extremity should be done. Dr. A reported that an EMG/NCS of claimant's right upper extremity done on October 29, 1998, showed ulnar neuropathy at the elbow. Beginning on October 26, 1998, claimant underwent several weeks of physical therapy on his lumbar region. Claimant said that on or about November 16, 1998, a water pipe burst at his home and that he and a relative had to dig a hole. That incident is noted in the physical therapy reports. When asked whether he aggravated his back injury, claimant said "yes." On March 3, 1999, claimant underwent an operation by Dr. GA, which consisted of a submuscular transposition of the ulnar nerve of the right elbow and the repair of the flexor pronator mass of the right elbow. On March 18, 1999, Dr. GA noted that claimant would be seeing a therapist for six weeks. In April 1999, Dr. G noted an impression of lumbar sacral sprain and referred claimant to a chiropractor.

Carrier put into evidence time reports that, according to MJ's testimony, reflect that claimant worked with MF on _____, but did not work with MF on July 30 or 31, 1998.

Claimant stated that his job at the time he was injured was heavy-duty work; that his preinjury hourly wage was \$9.75; that he gave the restricted-duty work-status letter of August 25, 1998, to MJ; that MJ told him that he could not work with one hand; that he could not recall if he went back to work after ED wrote the return-to-work letter of September 1, 1998, but that he went back to the doctors and they "withheld" him again; that he reported his injury to MJ; that he hired his attorney on September 10, 1998; that after he hired his attorney, he found out that he had been terminated from employment because he had not been going to work; that after his accident he thought his pain would go away but that it did not and he went to the clinic on August 25, 1998; that from his last day of work, which MJ said was August 25, 1998, until May 1999 he was unable to work due to his injuries; that the last week in May 1999 he got a doctor's release, apparently to return to work; that when he was off work he did not file for unemployment benefits because he was unable to work; that the last week in May 1999 he obtained a job at a church school doing janitorial work, which he described as easy work, for \$7.00 per hour; that he is not able to perform the heavy-duty work he was doing at his previous job; and that Dr. GA told him that it would be one and a half to two years before he regains full strength in his right arm.

MJ testified that day after injury date, claimant reported the incident to him and that claimant's pager was broken, but that claimant said he was fine and did not report an injury;

that between _____, and August 25, 1998, claimant continued to work and did not complain to him of pain; that claimant gave him an "off-work" slip from the clinic, which MJ identified as the work-status letter which released claimant to return to work with the restriction of no gripping with the right hand; that claimant did not tell him that the work-status letter was due to having been knocked off the ladder; that claimant told him that he was having numbness in his hands that was possibly related to diabetes and was going to have tests done; that he received the September 1, 1998, work-status letter, which released claimant to work with no restrictions; that claimant did not show up for work after August 25, 1998; that he terminated claimant on September 8, 1998, because claimant did not show up for work and because he learned from another employer that claimant was looking for work; and that he first learned that claimant was claiming a work-related injury on September 11, 1998. Claimant said he called another employer to help a friend find work.

Section 401.011(26) defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease." Section 401.011(10) defines a "compensable injury" as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Claimant had the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Claimant also had the burden to prove that he sustained disability as defined by the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. In workers' compensation cases the issues of injury and disability may generally be established by the testimony of the claimant. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.).

The hearing officer found that claimant fell from the ladder on or about _____, landing on his right arm; that claimant's activity working on the ladder on _____, was an activity that furthered the business affairs of the employer; that claimant had an injury to his right elbow, a nerve entrapment, in the incident at work on _____, and injured his back; and that claimant's _____, injury caused him to be unable to obtain and retain employment at wages he earned before _____, beginning August 25, 1998, and continuing until the date of the CCH on July 29, 1999. The hearing officer concluded that claimant sustained injuries in the course and scope of his employment on _____, and that claimant had disability from August 25, 1998, continuing until the date of the CCH on July 29, 1999. The hearing officer decided that claimant had a compensable back and right ulnar nerve injury on _____, and that he had disability from August 25, 1998, continuing until July 29, 1999, the date of the CCH.

There is much conflicting evidence regarding the issues of injury, disability, and date of injury. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in

the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. Appeal No. 950084. We conclude that the hearing officer's decision that claimant sustained a compensable back and right ulnar injury on _____, and that he had disability from August 25, 1998, continuing until the date of the CCH, July 29, 1999, is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Section 409.001(a) provides that, for injuries other than occupational diseases, an 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 the injury occurs. Section 409.002 provides 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 employer or employer's insurance carrier have actual knowledge of the employee's injury, the Texas Workers' Compensation Commission determines that good cause exists for failure to provide notice in a timely manner, or the employer or the employer's insurance carrier does not contest the claim. The claimant has the burden to prove that he timely reported his injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). A claimant that fails to give timely notice of injury 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.).

Good cause for delay is an issue which may arise both as to notice of injury and filing a claim for compensation. In Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948), the court stated that the test for the existence of good cause is that of ordinary prudence and that whether the claimant has used the degree of diligence required is ordinarily a question of fact to be determined by the trier of fact. In Texas Casualty Insurance Company v. Crawford, 340 S.W.2d 110 (Tex. Civ. App.-Amarillo 1960, no writ), the court stated that the law is well settled that a bona fide belief that injuries are not serious is sufficient to constitute good cause for delay.

The hearing officer in the instant case determined that claimant reported his injury to the employer no later than September 11, 1998, and that claimant had good cause for failure to report the injury up until September 11, 1998, based upon trivialization of the injury. The hearing officer decided that carrier may not avoid liability for benefits for failure to timely report an injury. Carrier contends that, if claimant had good cause, it would have ended on August 25, 1998, when he sought medical care and was put on restricted duty. In Texas Workers' Compensation Commission Appeal No. 93711, decided September 10, 1993, the Appeals Panel noted that Texas case law has held that good cause must continue to the date when the claimant actually files his claim, that a claimant owes a duty of continuing diligence in the prosecution of his claim, and that the totality of a claimant's

conduct must be primarily considered in determining ordinary prudence. However, the Appeals Panel also stated in Appeal No. 93711 that the Appeals Panel has refused to establish a standard that a claimant must "immediately" give notice to perfect a finding of good cause for delay in giving notice, citing Hawkins, *supra*. In Hawkins, the court stated:

In all cases a reasonable time should be allowed for the investigation, preparation, and filing of a claim after the seriousness of the injuries is suspected or determined. No set rule could be established for measuring diligence in this respect. Each case must rest upon its own facts. This court refused an application for a writ of error in Texas Employers' Ins. Ass'n v. Fowler, Tex. Civ. App., 140 S.W.2d 545, where recovery was allowed upon a jury finding of good cause when 23 days elapsed from the time the claimant was advised for the first time that his injuries were serious until his claim was filed. These delays subsequent to the visitation of knowledge of the true facts, and the delays prior thereto, are ordinarily elements of prudence to be considered by the jury or the trier of facts in finally determining the question of good cause.

We cannot conclude that the hearing officer's decision in favor of claimant on the notice of injury issue is not supported by sufficient evidence or that it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Dorian E. Ramirez
Appeals Judge