

APPEAL NO. 991921

Following a contested case hearing on August 10, 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 appellant/cross-respondent (claimant) sustained an injury in the course and scope of his employment with the respondent/cross-appellant (self-insured) on _____, and that he did not timely report the injury to the self-insured and did not have good cause for failing to do so. Claimant has requested our review, asserting in essence the insufficiency of the evidence to support virtually all the findings of fact supportive of the conclusion that he failed to timely report the injury and did not show good cause for the untimely reporting. The self-insured responded, urging that the evidence is sufficient to support the challenged findings. The self-insured has also requested our review of the determination that claimant sustained an injury in the course and scope of his employment on _____, asserting evidentiary insufficiency.

DECISION

Affirmed.

We note at the outset that although the hearing officer's decision and order fails to reflect it, Mr. S was called as a witness by claimant and testified.

Not disputed are findings that on _____ (all dates are in 1999 unless otherwise stated), claimant mowed the soccer field and surrounding areas of the (center) maintained by the self-insured as part of its facilities; that he mowed the premises with a riding lawn mower for at least three hours; that his act of mowing the lawn at the center furthered the business interests of the self-insured; and that after he mowed the soccer field he felt significant pain which radiated down his left leg.

Claimant testified that while employed by the self-insured in the maintenance of the center, he injured his back in _____ when he was pulling on a pole vault stand and tripped; that he recovered from that injury; that his duties included driving a three-reel mower to mow the grass on the soccer field and surrounding area; that on _____ he mowed the field for approximately four hours, getting on and off the mower periodically to empty the basket; that when he completed the task and got off the mower, he felt pain shooting down his leg; that the pain down the leg was new and different and unlike the back strain pain he had previously experienced; that he knew because of this pain that he had a new injury; and that he went to see his family doctor, Dr. R, who wanted him to see a neurosurgeon. However, claimant later stated, when asked about the injury date and other information he crossed out and changed on the Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) he prepared, that he did not know whether it was the old injury or a new injury until after he talked to a doctor.

Claimant further stated that he reported the pain on _____ to Mr. S, his supervisor; that on January 28th he told Ms. S, the self-insured's adjuster, that he had pain radiating down his leg from riding the reel mower on _____; that after some discussion with him and the employer's nurse, Ms. R, Ms. S sent him to Dr. B; and that Dr. B determined that he sustained a new injury. Claimant also testified that an MRI report of January 20th revealed a herniated disc; that he received the MRI report by February 5th; and that he "formally" reported the injury to the self-insured on _____.

Ms. S testified that when claimant came to her on January 28th, he was seeking treatment for his _____ injury and indicating that he was having continued symptoms from that injury; that claimant's last treatment for that injury was in March 1997 and he denied any intervening event but did indicate that he bowled regularly; that claimant never mentioned an incident at work; that she obtained his file and discussed claimant's request with him and with Ms. R; and that she and Ms. R determined that claimant should be seen by Dr. B for a determination on whether his pain related to his _____ injury. Ms. S also said that she called Mr. S and asked if claimant had reported a new injury on _____ and that Mr. S replied that claimant said he had back pain but did not relate it to a new injury. She further testified that the self-insured first learned of claimant's having a new injury when he gave his recorded statement on _____.

A January 20th x-ray report states the impression as degenerative changes of the lumbar spine and normal SI joints. A February 5th MRI report states the impression as a disc herniation at L4-5; congenital spinal stenosis; disc bulging at L3-4 and T12-L1; Schnorr's nodes and borderline disc bulge at L1-2 and L2-3; and diffuse facet degenerative changes. Dr. R's records reflect that he first saw claimant for complaints of back pain on January 12th; that he saw claimant again on February 5th at which time the MRI report was discussed and he gave the report to claimant; and that claimant indicated that he wanted "to claim this under workmen's compensation."

Dr. B's February 11th report states that claimant was last seen in early April 1997 for his February 5, 1997, back injury; that claimant has been working his full duties since that time and has had intermittent back pain with an occasional radiation of pain down the left thigh to above the knee; and that claimant denied any pain, numbness or tingling below the knee until about three to four weeks ago when he was using a riding lawn mower. Dr. B's impression, having reviewed the MRI report, was low back pain with left lower extremity radiculopathy and multilevel disc bulges and large herniation at L4-5 to the left with nerve root impingement. Dr. B further stated that "it is difficult to relate this problem to his low-back injury of two years ago that was considered a strain at the time and which required eight weeks of treatment in that claimant has had no intervening treatment and has been working full duty since that time."

In claimant's _____ recorded statement, he was asked by Ms. S if he was alleging a new back injury. Claimant responded that he had felt the injury was related to the prior injury but that the self-insured sent him to a specialist who felt the injuries are not related, and that he sustained another injury since pain down his leg started after getting off

the mower. Claimant also stated that he had not reported a new injury on _____ nor when he saw Ms. S on January 28th because he "thought it was the same pain" from the prior injury.

Claimant had the burden to prove with a preponderance of the evidence that he sustained the claimed new back injury of _____, which the self-insured maintained was a flare-up of his _____ injury. The hearing officer found that as a result of his operating the self-insured's riding lawn mower on _____, claimant sustained an injury to his lower back, separate and distinct from the injury he sustained to his lower back on February 5, 1997. 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 including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of the hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. We are satisfied that the hearing officer's finding on the new injury meets this standard of review and is sufficiently supported by the evidence.

Concerning the issue of timely notice, the hearing officer found that claimant did not report a new injury of _____ to Mr. S, Ms. S, or to Ms. R; that claimant notified the self-insured he sustained a new injury on _____; and that _____ is more than 30 days after _____. In her discussion of the evidence, the hearing officer makes, in essence, the following additional findings: "At the time he learned of the results of the MRI on February 5, 1999, the Claimant had a duty to report an injury sustained on _____. He did not do so until February 22, 1999, and he provided no good cause for waiting over two (2) weeks before making his report." Section 409.001 requires that an employee notify the employer of an injury not later than the 30th day after the date the injury occurs. Section 409.002 provides that an employee's failure to so notify the employer relieves the employer and insurance carrier of liability unless the Texas Workers' Compensation Commission determines that good cause exists for failure to provide notice in a timely manner.

Claimant argued to the hearing officer on the notice issue that he first reported an injury to both Mr. S, on or about _____, and to Ms. S, on January 28th; that should the hearing officer believe that he was merely reporting recurring back pain which could be attributable to his 1997 injury, then he reported a new injury on _____ after learning from the MRI report he received on February 5th that he had new damage to the physical structure of his body; and that his _____ report of injury to the self-insured "was well within 30 days" of his learning on February 5th that he had new damage or harm to his body. However, claimant did not get a new 30-day period in which to report the injury after learning on February 5th that he had a new injury. Rather, since the 30-day period following the _____ injury had passed, he was obliged to show that his good cause for not reporting the injury within 30 days, namely, not knowing whether he had actually sustained a new injury, continued to the time he notified the self-insured of the new injury

on _____. The Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 950148, decided March 3, 1995, that a determination as to the existence of good cause is generally one of fact for the hearing officer to make; that "[t]he basis for the good cause for delay must continue until the time notification is given. See Texas Workers' Compensation Commission Appeal No. 93544, decided August 17, 1993"; and that "[o]nly if the determination indicates an abuse of discretion will the hearing officer's decision relative to good cause be overturned. See Texas Workers' Compensation Commission Appeal No. 931012, decided December 20, 1993." *And see* Texas Workers' Compensation Commission Appeal No. 93815, decided October 22, 1993. We are satisfied that the evidence sufficiently supports the challenged findings of the hearing officer on the timely notice issue.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge