APPEAL NO. 991952

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 August 10, 1999. He determined that: the appellant (claimant) sustained an injury in the form of an occupational disease; the claimant's date of injury pursuant to Section 408.007 is _____; the claimant did not report the injury in a timely manner to the employer, and did not show good cause for such failure to report; the respondent (carrier) is relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer; the claimant is not barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy; and the claimant had "disability" from March 24, 1999, through the date of the CCH. The claimant appeals, urging that he had good cause for failing to timely report an injury, and the issue should be reversed and rendered. In the alternative, the claimant urges that there should be a reversal and remand concerning the date of injury and nature of the injury. The carrier replies that the hearing officer correctly concluded that the date of injury is _____, that the claimant did not report an injury in a timely manner and did not establish good cause for failing to do so, and that the hearing officer's decision should be affirmed.

DECISION

Affirmed.

The claimant worked as a pick-up and delivery driver for the employer. He testified that he sustained an occupational disease, rotator cuff tears, as a result of repetitive lifting and cranking dollies. The claimant said that he began to experience shoulder pain in spring 1998 and sought medical treatment on _____, with Dr. K. According to the claimant, he was told that his problem was bursitis and he related it to "getting older." The claimant asserts that it was not until February 1999 that he learned that he had rotator cuff tears which were caused by his work, and as soon as he learned of the seriousness and nature of the injury, he reported it. Not appealed is the hearing officer's finding that on March 26, 1999, the claimant reported the injury to the employer.

On _____, Dr. K states ". . . has some bilat. shoulder pains. Does a lot of rotary movement in his driver work, involving closing and opening valves that are controlled by large wheel. . . . Suggest examine the ergonomics of work station and try to modify how work is done, and to reduce the oblique strain on shoulder areas." Dr. K's assessment was rotator cuff tendonitis bilateral. The claimant testified that it is possible that he told Dr. K that it was the rotary motion causing the shoulder pain. On June 19, 1998, Dr. K's records reflect "bilat. Shoulder pains since has been doing work as a truck driver in town instead of long haul trucking . . . there was no improvement in his shoulder status." Dr. K's assessment was bicipital tendonitis bilateral. On June 19, 1998, the claimant had a bilateral shoulder MRI performed which revealed stress-related or degenerative changes in the acromioclavicular joints bilaterally. Dr. K referred the claimant to Dr. S. In July 1998 Dr. S diagnosed impingement of both shoulders and gave the claimant an injection of

Celestone in both bursa. The claimant testified that the injections helped and his shoulders stopped hurting. On September 21, 1998, and October 6, 1998, the claimant sought treatment for his shoulder condition with Dr. K, who referred to the claimant's condition as bilateral shoulder impingement syndrome.

On February 15, 1999, the claimant returned to Dr. K with pain in both of his shoulders and received an injection in both shoulders. Dr. K referred the claimant to Dr. D who examined the claimant on March 11, 1999, and recommended an MRI of both shoulders to rule out a rotator cuff tear. An MRI of both shoulders was performed and on March 29, 1999, Dr. D states that the claimant had a tear in both the left and right shoulder. On May 13, 1999, the claimant had rotator cuff surgery on the right shoulder.

Section 409.001 requires that an employee notify the employer of an injury not later than the 30th day after which the injury occurs or, if the injury is an occupational disease, the date the employee knew or should have known that the injury may be related to the employment. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. The date of injury for purposes of an occupational disease is "the date on which the employee knew or should have known that the disease may be related to the employment. [Emphasis added.]" Section 408.007. The date of injury is when the injured employee, as a reasonable person, could have been expected to understand the nature, seriousness, and work-related nature of the disease. Commercial Insurance Co. of Newark, N.J. v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.). While a definite diagnosis from a doctor is not required, neither is the employee held to the standard of a doctor's knowledge of causation. *See* Texas Workers' Compensation Commission Appeal No. 91097, decided January 16, 1992. The date of the first symptoms will not necessarily constitute the date of injury.

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. Good cause is defined as whether the claimant has exercised the degree of diligence of an ordinarily prudent person in prosecuting a claim. Texas Workers' Compensation Commission Appeal No. 92075, decided April 7, 1992. Trivialization of an injury, that is, a bona fide belief that the injury is not serious, is commonly considered good cause for a delay in reporting. Texas Workers' Compensation Commission Appeal No. 91066, decided December 4, 1991. Good cause must continue up to the date when the claimant actually notifies the employer. Appeal No. 93649*, supra*.

The hearing officer made the following findings of fact:

FINDINGS OF FACT

15. On _____, the claimant knew or should have known that the injury to his shoulders may be related to his employment.

16. The Claimant did not timely report his injury to his employer as required by Section 409.001.

17. The Claimant did not act as a diligent and prudent person, when he failed to report the work related injury in a timely manner.

18. As early as _____, and as late as 7-14-98, the claimant knew or should have known the seriousness of the injury to his shoulders.

Conflicting evidence was presented as to the date that the claimant knew or should have known that his shoulder injury may be related to his employment. The claimant argues that the hearing officer did not make a specific finding on what the occupational disease injury was, and that if it was found to be rotator cuff tears, the date of injury is wrong, because on _____, no one suspected that the claimant had rotator cuff tears. The claimant sought medical treatment with Dr. K on _____, and was diagnosed with rotator cuff tendonitis. A diagnosis of an injury does not necessarily remain the same and the hearing officer did not err in finding that the claimant sustained an injury to both shoulders, without specifying a diagnosis. A specific diagnosis of rotator cuff tears was not required for a determination of the date of injury. Based on the testimony of the claimant that it was possible that he told Dr. K that it was the rotary motion causing the shoulder pain, Dr. K's diagnosis of rotator cuff tendonitis, and Dr. K's notes which indicate that he advised the claimant to examine the ergonomics of his work to reduce strain on his shoulders, we find sufficient evidence to support the hearing officer's determination that the date of injury is _____.

The hearing officer applied the correct standard in determining whether good cause was met and it was a question of fact for him to resolve. It was up to the hearing officer to judge the claimant's credibility and to determine what weight to give his testimony. Despite the claimant's assertion that he had bursitis, the medical evidence does not indicate such a diagnosis was ever made. Dr. K diagnosed rotator cuff tendonitis on _____. Although the claimant asserts that he did not know the seriousness of the injury, a rotator cuff tear, the claimant received injections in his shoulders and medical treatment with three different doctors over a period of 11 months prior to reporting the injury. The hearing officer, after considering all of the evidence, including the claimant's testimony that he did not lose any time from work, resolved the issue against the claimant. We find sufficient evidence to support the hearing officer's finding that the claimant did not show good cause for failure to timely report the injury and the carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify the employer.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We conclude that the hearing officer's decision is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

DISSENTING OPINION:

I respectfully dissent and would find good cause for the failure to report this injury. I believe that the facts that must be evaluated for good cause are what a worker knows and understands at the time, and not from the "glow" that 20/20 hindsight casts over the situation. This seems to me to be a textbook trivialization case. Repetitive trauma conditions, as opposed to specific accidents, often have no bright line prior to evaluation by a physician. And, for most civilians, "seriousness" equates to a condition in which time from work is lost. Most reasonably prudent people do not run to the employer to report ailments and aches and pains, whose cause is as likely as not due to the aging process, when there will be no consequence to the employer, as there is when work time will be lost.

I might also suggest that a longer range "macro" view of the import of this case should be taken. The defensive position of the carrier means, essentially, that people whose work ethic lends them to continue to work for the employer should be punished with deprivation of benefits for injuries incurred in service for the employer. The claimant in this case must surely wonder if indolence would have served him better, as the decision in this case may well leave him deprived of regular health insurance benefits as well. This lesson may well not be lost on claimant's coworkers, and thus the "victory" obtained by the

employer and carrier in this case may well result in greater loss of benefits and increased premium down the line.

Finally, as the claimant argues, the decision here cuts against the liberal construction of the 1989 Act and our position, even before Albertson's, Inc. v. Sinclair, 984 S.W.2d 958 (Tex. 1999), that matters relating to notice and exceptions thereto should be liberally construed. We cannot reasonably charge a civilian with knowing something about his injury that the doctors who treated him at the time did not.

_____
Susan M. Kelley
Appeals Judge