

APPEAL NO. 000038

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A consolidated contested case hearing (CCH) was held on December 10, 1999. The issue in Docket No. _____ was whether the _____, compensable injury was a producing cause of the appellant's (claimant) left knee problems on or after _____, and the issues in Docket No. _____ were whether the claimant sustained a compensable injury on _____; whether the second respondent (carrier 2) was relieved of liability because of failure to give timely notice to the employer; and whether the claimant had disability resulting from the injury sustained on _____, from April 16, 1999, through the present. The hearing officer determined that the _____, compensable injury was not a producing cause of claimant's left knee problems on or after _____; that the claimant sustained a compensable injury on _____; that carrier 2 was relieved from liability because of claimant's failure to timely notify his employer; and that the claimant had disability beginning on April 16, 1999, and continuing through the date of the CCH. Claimant has appealed findings of fact that state that he gave notice to his employer in early _____ that, he had sustained a new injury to his left knee, and that claimant's notice to his employer of a new injury in _____ was not timely and he did not have good cause in failing to timely notify his employer within 30 days of either June 15, 1999, or June 24, 1999. Claimant also appeals the finding that his compensable left knee injury of _____, was not a producing cause of his left knee problems on or after _____. Claimant asserted that the hearing officer's findings and conclusions were against the great weight and preponderance of the evidence. First respondent (carrier 1) urges that there is sufficient evidence to support the findings, conclusions and decision of the hearing officer. Carrier 2 responds that the findings and conclusions are not in error and should be affirmed.

DECISION

Reversed and rendered.

Claimant sustained a left knee injury in _____, subsequently had surgery, went through work hardening, was found to be at maximum medical improvement, and returned to work in March 1999. He testified he was able to do his full job when he returned to work but that he did experience some soreness, stiffness and limping from going back to work 10 hours a day. He testified that on _____, he was climbing up on a scaffold and when he placed his left knee on the scaffold, putting his full weight on the left knee in a rolling motion, he felt a sharp pain on the outside portion of his knee. He stated he put an ace bandage on it and continued working, although he was "hurting" and the knee was throbbing. He also indicated he work a brace that day on his leg. He states that when he got his paycheck later that day, his supervisor, AG, saw he was limping and "I told him that yeah I'd hurt this knee again, I wasn't gonna do anything all weekend . . ." but rest the knee; claimant said that he did not recall telling AG precisely how he hurt his knee. Claimant also stated that after he returned to work in March, he had mentioned to AG that his knee was

bothering him but he was able to perform his job and did not report any problems with his knee regarding being able to do his job. He states that the following Monday he called the office and told AG that "I don't know what I done to my knee, but I've hurt it again," and also that he had an appointment for April 22nd and was going to take off the rest of the week. He stated he did not know what was going on with his knee or whether he had a new injury, but the first injury was all on the inside of his knee and this time he was hurting all over the knee.

Claimant saw his doctor, Dr. B, and was taken off work because of his left knee. His wife took the work release to the office. Claimant states he called AG the next week and told him Dr. B indicated he (claimant) had injured his knee or hurt it again. A subsequent MRI was performed, and the claimant underwent arthroscopic surgery on June 15, 1999. After the surgery, Dr. B told the claimant's wife there was a new injury and discussed with the claimant on June 24, 1999, that there was old damage and there was new damage. Claimant stated he was not aware of the need to fill out any additional paperwork, that the supervisor had taken care of all the paperwork after his accident in _____, and that he had been in repeated contact with an adjuster for carrier 1 (the carrier he had been dealing with since his _____ injury), keeping them advised of the surgery, medical visits, and progress reports during the whole period. (The employer had changed workers' compensation carriers between the time of the _____ injury and the _____, injury, a fact that the claimant testified he was not advised of until the denial by carrier 1 in _____.) Also, the claimant stated that his benefits continued uninterrupted until _____ when he received a notice from carrier 1 that they were disputing compensability for the _____, injury, as the medical report submitted by Dr. B indicated it was a "new" injury.

After receiving the _____ notice that carrier 1 was disputing liability for the _____, injury, claimant contacted the adjuster and was told that all that had to be done was for a new incident report to be made out. Claimant states he called AG and told him that claimant had to have a new accident report submitted for the _____, incident and was told AG would take care of it. Nothing was being done and the claimant contacted CM, the employer's safety director, on August 18th and told her a new accident report needed to be submitted because Dr. B was indicating it was "50/50 old and new injury." Claimant stated he contacted CM again on August 24th and was told by CM that she would take care of it. CM testified that she had handled the claimant's _____ injury and claim; that she knew the claimant was off work after _____, related to his left knee; and that the first she knew it was a new injury was in August when the claimant came in and told her she needed to call carrier 1 so a new claim could be filed. She stated she had talked to AG the Monday following _____ and asked how the claimant was doing since his return to work. She states that AG told her the claimant had called him and that claimant had to go back to the doctor because he thought he had done too much too fast. She stated that she did not get the impression that there was any type of accident or new injury. CM indicated that she had received some medical reports from Dr. B relating to the _____ injury but did not remember receiving an April 22, 1999, report from him which indicated that claimant

injured his knee climbing on a scaffold, although the report noted a copy was sent to the carrier and employer.

Claimant's wife testified that she overheard her husband call AG on (the Monday following the date of injury), and state "I've done something to this knee"; "I don't know what I've done"; "I can hardly walk on it"; that he had a doctor's appointment for Thursday; and that he would not be at work. She stated that the first they knew of any new insurance company being involved was in August. She stated that the claimant called the adjuster and was told all he needed to do was "just have the company fill out an accident report and they would turn it over to the new carrier and everything would just roll over and be no problem." The claimant was released to light duty in September but the employer did not have any light-duty employment.

AG testified that he was aware of the claimant's injury in _____, but that he was not familiar with the _____, incident or claim. He denied that the claimant ever called him about it or that the claimant complained about his knee after returning to work in March 1999. He stated he saw the claimant in a mall in August and that this was the first he was aware of an _____, incident or that claimant had a second surgery. He indicated it was not on his mind at all that the claimant did not work after _____, and he never inquired. He also denied that he ever told CM that the claimant had called in on (the Monday following the date of injury) and talked to him.

Dr. B's medical reports clearly indicate that claimant's left knee condition at the time of the second surgery related to both the old injury and a new injury. Dr. B succinctly states in a September 19, 1999, letter:

[Claimant's] current condition is a result of a combination of a new injury and his previous injury. While at his arthroscopy he did have some residual from his previous injury, he had a completely new injury to a meniscus which was treated arthroscopically also. There is no way to assign 100% of this to any occurrence. It is about a 50/50 deal.

The hearing officer found that the claimant sustained an injury to his left knee on _____, while climbing onto a scaffold and that due to the claimant's left knee injury, he was unable to obtain or retain employment at wages equivalent to his preinjury wages beginning on April 16, 1999, and continuing through the date of the hearing. These findings are not appealed; however, claimant asserts error in the finding that in early _____, claimant notified his employer he had sustained a new injury to his left knee on _____, urging that the claimant gave adequate notice shortly after the _____, scaffolding incident. Claimant further appeals the finding that his notice of a new injury in early August was not timely and that he did not have good cause for failing to give timely notice, and that the _____, injury was not a producing cause of the claimant's left knee problem on or after _____. Essentially, in this latter finding, the hearing officer found that the claimant's inability to obtain and retain employment at his preinjury wage was not a result of his _____ injury on or after _____. Since he was working his full-time job at the

time of the injury on _____, we cannot conclude there was no or insufficient evidence to support this determination.

Notice of injury by a claimant to the employer need only provide information as to the general nature of the injury and that it is job related. Texas Workers' Compensation Commission Appeal No. 951548, decided November 1, 1995. Claimant urges that the evidence shows that the claimant gave the required notice of his injury to AG the day of the accident and the following Monday when he indicated his left knee was bothering him and that he hurt it again, although he did not know how or make had any reference to the job or the scaffolding incident. While AG denied these conversations existed and the safety director stated that AG told her he had talked to the claimant on (the Monday following the date of injury) the significant matter is that a job relationship or an incident of _____, was never mentioned. This is against the backdrop of the claimant having returned in March 1999 from a left knee injury (known by all the individuals involved here), with indications of some limping, stiffness and soreness from working all day. It is quite apparent that both AG and CM did not have any idea that any incident or new injury had occurred on _____, and this is expressed by CM when she stated that she "did not get the impression at all that there was any type of accident or new injury" and that her impression was that the claimant had extensive surgery and therapy, had returned to work full force which may have been a bit much and he needed to slow down. From the evidence before her, the hearing officer found that notice of the _____, injury was not given until early _____. This was a factual determination for the hearing officer to make and we cannot conclude from our review of the evidence and circumstances that the determination was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). While there was direct conflict in the evidence regarding claimant talking to AG on either the ____ or ____ of _____ about his knee, the claimant and his wife stated he did and CM and AG denied any such conversation. The evidence supports an inference that at no time was any reference to the _____ incident as being a job-related injury (from an incident on _____.) Carrier cites Texas Workers' Compensation Commission Appeal No. 951857, decided December 18, 1995, a repetitive trauma case involving knee injuries in support of its position. The Appeals Panel held that timely notice was given where the supervisor acknowledged that the claimant had complained to him about his knees to the point of limping and that he related it to job functions of climbing ladders. The hearing officer could find significant distinction between that case and the facts of the case before her. We do not agree that that case is controlling under the evidence and factual determinations made by the hearing officer.

The hearing officer also determined that the claimant did not have good cause for failing to notify the employer of a new injury until sometime in early _____. Under the particular circumstances of this case, we conclude the determination that the claimant did not have good cause for not giving notice of a new injury until early _____ is against the great weight and preponderance of the evidence and was an abuse of discretion. Aside from the fact that there was a great deal of confusion by all the parties as to the nature of the claimant's left knee condition from _____, on, the circumstances clearly indicate

that all parties proceeded on the premise that the claimant had ongoing problems from his _____ injury. Although claimant stated he felt pain as he climbed onto the scaffolding and that it seemed his knee had expanded from the _____ injury, it is also clear that he has stiffness, soreness, a limp, and wore a brace after returning to work in March. That his _____ injury still affected his left knee even after the _____, scaffolding incident is shown by the uncontroverted medical records and opinion of Dr. B, who stated that the claimant's condition related to both, although there was new injury to a part of the knee. Although the employer was not sure it got all the medical records which indicated a relationship to both the _____ and _____, injuries, it was aware through CM, if no one else, that the claimant was having recurring left knee problems that took and kept him off work. Through all this, the claimant continued regular contact with carrier 1's adjuster, and continued to receive his workers' compensation benefits with no indication that anything needed to be done. It was only when carrier 1 advised him in _____ that it was then disputing a "new injury" from _____, and that they would no longer pay benefits because it was a new injury (although Dr. B clearly stated the claimant's left knee condition at that time was attributable to both injuries), that claimant was told by carrier 1 to have a new report filed. Claimant states, and there is no contrary evidence, that this was the first that he was aware the employer had changed carriers between the _____ injury and the _____, injury. We conclude that under these circumstances, the determination that the claimant did not have good cause for not giving notice of the new _____, injury until August and immediately following carrier 1's notice of dispute, is against the great weight of the evidence and is an abuse of discretion. Generally, the test for good cause has been stated to be whether the claimant acted as a reasonably prudent person would have acted under the circumstances. Texas Casualty Insurance Co. v. Beasley, 391 S.W.2d 33 (Tex. 1965). In Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948), the court stated that a good cause standard is whether the claimant prosecuted the claim with that degree of diligence that an ordinarily prudent person would have exercised under same or similar circumstances. Good cause has been found where a claimant, relying on assurances that "everything is taken care of," did not file a claim within the time limits. Moronka v. Consolidated Mutual Insurance Co., 435 S.W.2d 846 (Tex. 1968). We have noted that a misstatement of a material fact can be a basis for a determination of good cause. See Texas Workers' Compensation Commission Appeal No. 93342, decided June 9, 1993. See also, Texas Workers' Compensation Commission Appeal No. 950036, decided February 17, 1995, where factors relating to good cause are discussed. Under the particular circumstances of this case; that is, (1) that the employer was aware of the prior injury and that the claimant was being treated and off work for his knee condition following the _____ incident; (2) the lack of being informed or having knowledge that there was a new workers' compensation carrier; (3) the fact that both injuries were related to the claimant's knee condition as uncontrovertedly stated by Dr. B; (4) the fact that the claimant was in regular contact with the adjuster for the carrier that had always handled his claim; (5) that he continued to receive benefits without interruption; and, (6) that immediately after he received the dispute by the carrier in _____ and upon being advised to get a new report made out and it would be taken care of, he went to the employer to get a new report based on a new injury, we conclude that the overwhelming weight of the evidence shows good cause on the part of the claimant for the late notice of

the "new" injury of _____. Thus, we find that to hold "no good cause shown" was an abuse of discretion and we reverse that finding and conclusion and render a new decision that the claimant had good cause for failing to timely notify his employer until early _____. Good cause having been shown, we reverse the decision that carrier 2 is relieved from liability and hold that carrier 2 is liable for benefits under the 1989 Act for the compensable injury of _____.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge