

APPEAL NO. 000400

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 January 19, 2000. The issues at the CCH were whether the respondent (claimant) sustained a compensable injury; the date of injury; and whether the claimant reported an injury to the employer not later than the 30th day after the injury and, if not, does good cause exist for failing to report the injury timely. The hearing officer determined that on _____, the claimant sustained a compensable injury and that good cause exists for the claimant's failure to give the employer timely notice of his work-related injury, and ordered appellant, (carrier 1), to pay medical benefits. Carrier 1 appeals, urging that the claimant did not meet his burden of proof that he sustained a compensable injury, and that the claimant was aware that he had reinjured himself no later than _____ and did not report a new injury at that time. Carrier 1 has no complaint with the hearing officer's finding that the date of injury is _____. The claimant replies that he agrees with the hearing officer's decision and it should be affirmed. Respondent, (carrier 2), replies that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable injury to his low back on _____, which was paid by carrier 2. The claimant received medical treatment from Dr. G and had a lumbar laminectomy performed at L4-5 on February 7, 1997. In May 1997 the claimant returned to regular duties as a truck driver, driving eight hours per day. The claimant testified that after he returned to work he had occasional backaches, but no difficulty walking and no numbness or loss of feeling in his legs. The claimant testified that on _____, while working on the back of a spreader truck trying to straighten out the tarp, he slipped and caught himself from falling, but did not realize that he had injured himself. The claimant said that he thought his pain was related to the _____, injury and would go away, but after the pain continued to worsen, he sought medical treatment with Dr. S on August 13, 1998.

The claimant received no medical treatment between May 1997 and August 1998. Dr. S's chart note indicates that the claimant had numbness in his hands and feet, and pain in the back of his legs for two months. The claimant sought medical treatment with Dr. G on September 1, 1998. Dr. G's medical records state that the claimant said that "about three and a half to four months ago while at work he grabbed to support himself and slipped and grabbed an object above his head to keep from falling." Dr. G diagnosed a recurrent herniated disc at L4-5 and in a letter dated October 2, 1998, states that "[i]n my opinion this is still related to the initial worker's [sic] compensation injury. Certainly any further provocation caused by heavy lifting, etc. can exacerbate or worsen the pre-existing

condition.” Dr. G’s records indicate that the claimant’s L5-S1 nerve roots are compromised, and the claimant has a positive straight leg raise, antalgic limp, and severe radiculopathy. Dr. G has recommended spinal surgery, a decompression and fusion.

According to the claimant, no doctor has told him that he sustained a new injury on _____. The claimant testified that based on what his doctors told him, he thought that his problems were related to the _____, injury. According to the claimant, he did not realize that he had sustained a new injury until he learned at a benefit review conference (BRC) on January 5, 1999, that an aggravation of an old injury was a new injury, and was instructed by the benefit review officer to file a new claim. The parties stipulated that the claimant reported an injury to the employer on January 6, 1999. The employer had workers’ compensation insurance coverage with carrier 1 on _____.

Carrier 1 asserts that the claimant did not sustain an injury on _____, because the claimant had a gradual onset of symptoms, and because Dr. G states that the claimant did not sustain a new injury. Carrier 1 argues that even if the claimant trivialized the injury for some period of time, the claimant knew that carrier 2 had denied further medical benefits and was asserting that he had sustained a new injury when he received a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) filed on September 28, 1998. According to carrier 1, this TWCC-21 put the claimant on notice of a new injury on _____, and the claimant failed to report the injury to the employer until January 6, 1999. The claimant testified that he knew that carrier 2 was denying his medical benefits, and that is why he requested the BRC which was held on January 5, 1999.

The claimant had the burden to prove that he injured himself as claimed on _____. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.- Texarkana 1961, no writ). Whether he did so was a question of fact for the hearing officer to decide. Texas Workers’ Compensation Commission Appeal No. 93449, decided July 21, 1993. The aggravation of a prior injury may be a compensable injury in its own right if the aggravation occurred in the course and scope of employment. See Texas Workers’ Compensation Commission Appeal No. 941577, decided January 9, 1995. However, “there must be an active incident or sequence of incidents which are alleged to have resulted in the enhancement, acceleration or worsening of the pre-existing condition,” as distinguished from a “mere recurrence of symptoms inherent in the etiology of the preexisting condition that has not resolved.” Texas Workers’ Compensation Commission Appeal No. 94168, decided March 25, 1994; Texas Workers’ Compensation Commission Appeal No. 94428, decided May 26, 1994.

The hearing officer was the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). The hearing officer resolved contradictions in the evidence for the claimant and concluded that the claimant did meet his burden of proving he sustained a compensable injury. The hearing officer was presented with the medical opinion of Dr. G indicating that the claimant had not sustained a new injury, despite medical evidence indicating that the claimant had sustained new damage to the physical structure

of his body and was suffering new symptoms, and the claimant's testimony that his symptoms changed after _____. The hearing officer found the claimant's testimony credible and determined that on _____, the claimant sustained an injury to his back when he slipped while tying down a tarp on a truck for the employer.

Section 409.001 requires that an employee notify the employer of an injury not later than the 30th day after which the injury occurs. 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. An employee who fails to give the employer notice of the injury within the 30-day period 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.). The test for good cause is that of ordinary prudence, that is, whether the employee has prosecuted his claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948). Good cause must continue up to the date when the claimant actually notifies the employer. Texas Workers' Compensation Commission Appeal No. 93649, decided September 8, 1993.

We acknowledge that whether a condition is a continuation of an old injury or is a new injury through aggravation, triggering the requirement for timely notice of injury can be a very difficult question and a close call in a given case. Texas Workers' Compensation Commission Appeal No. 94610, decided June 24, 1994. With the difficulty in determining such an issue and the frequent disagreement between experts on the issue, it is difficult to attribute special knowledge on the part of a claimant. The hearing officer resolved that the claimant had good cause for failing to give the employer timely notice of his work-related injury. The hearing officer states that the claimant initially trivialized his injury and then believed it was a continuation of his prior compensable injury, until the January 5, 1999, BRC. Although the claimant was certainly aware that carrier 2 was denying his medical bills in _____, Dr. G was relating the claimant's condition to the (1st date of injury), injury. The hearing officer found the claimant's testimony credible that he had no knowledge that he had sustained a new injury until the BRC on January 5, 1999.

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 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); 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 that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Elaine M. Chaney
Appeals Judge