

APPEAL NO. 000637

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 November 2, 1999. The hearing officer determined that the respondent (claimant) suffered an injury in the course and scope of his employment on _____; that the appellant (carrier) is not relieved of liability for the claim since the claimant had good cause for his failure to report the injury prior to July 16, 1999; and that the claimant had disability from May 11, 1999, through the date of the CCH. The case was remanded in Texas Workers' Compensation Commission Appeal No. 992701, decided February 7, 2000, for the hearing officer to consider the theories advanced by the parties and determine whether the carrier is relieved of liability pursuant to Section 409.002 due to the claimant-s failure to timely notify his employer pursuant to Section 409.001, and to determine whether the claimant had disability. No new hearing was held. The hearing officer on remand determined that the claimant timely reported his injury and had good cause for his failure to report the injury. The hearing officer did not make a determination on the disability issue. The carrier appeals, urging that the hearing officer-s decision should be reversed because it is against the great weight and preponderance of the evidence. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The claimant testified that on _____, while he was repairing automotive brakes, he lifted some disks, injuring his lower back. According to the claimant, he reported the injury to Mr. C, a supervisor, on _____, and Mr. C told him to seek medical attention. The claimant sought medical treatment with Dr. H on May 11, 1999, and testified that he told Dr. H how he was injured. The claimant testified that Dr. H gave him an off-work slip which he took to his foreman, Mr. M, on May 11, 1999, and he told Mr. M that he had been injured at work on _____. The claimant testified that he has been unable to work as a result of the injury from May 11, 1999, through the date of the CCH.

The claimant testified that he sustained two prior compensable injuries, an injury to his lower back in _____ which required lumbar surgery performed in January 1990, and an injury to his neck on _____, which also required surgery. The claimant received treatment from Dr. H for the injury of _____, and was off work from 1992 until 1996. The claimant said that he did not injure his lower back on _____, and did not have any complaints of low back pain from 1992 to 1999. According to the claimant, he did not pursue medical treatment in May 1999 with the carrier for the _____, i njury and never told Mr. M that the carrier for the _____, injury was denying his medical treatment.

The carrier presented the testimony of Mr. M, the claimant's supervisor. Mr. M testified that when the claimant brought him an off-work slip on May 11, 1999, he asked the claimant if he was injured at work, the claimant denied being injured at work, and the claimant stated that he was injured back in _____. According to Mr. M, the claimant brought him another off-work slip on May 25, 1999, and it was his understanding that the claimant's medical care was for the _____, injury. Mr. M testified that the first time he learned that the claimant was claiming an injury on _____, was when he received a telephone call from the claimant in mid-June 1999. According to Mr. M, the claimant told him that the carrier for the _____, injury had denied his claim; that his lawyer had advised him to file a new claim; and that he had reported the injury to Mr. C on _____.

On May 12, 1999, Dr. H completed a Specific and Subsequent Medical Report (TWCC-64) for a date of visit of May 11, 1999, which states "[t]he patient returns today and reports over last three weeks has been having increasing severe pain about back. He is working at (employer), states that with bending and lifting he is developing increasing pain that is worsening." On May 22, 1999, the claimant had a lumbar and thoracic MRI performed which revealed a herniation at the L5-S1 level. On May 27, 1999, Dr. H completed a TWCC-64 which indicates a date of injury of _____, but the date has been marked through. Dr. H's off-work slips dated May 11, 1999, and May 25, 1999, reflect a date of injury of _____. On July 16, 1999, Dr. H completed an Initial Medical Report (TWCC-61) reflecting a date of visit of May 11, 1999; a date of injury of _____; and that the claimant "was re-injured at work on _____." On July 16, 1999, Dr. H also completed a TWCC-64 for a date of visit of May 25, 1999, indicating a date of injury of _____. The records of Dr. H indicate the claimant received treatment on January 5, 1999, for the injury of _____. Dr. H's records indicate that on January 5, 1999, the claimant had complaints of "increasing exacerbation of back pain with the colder weather."

The carrier appeals the following findings of facts and conclusions of law which pertain to the notice issue:

FINDINGS OF FACT

3. Claimant did not initially realize that he had a new injury, believing this was a continuation of an old injury from _____ or an injury in 1989.

* * * *

5. There was no way for Claimant to know he had a new injury rather than an exacerbation of pain from his old injuries.

6. Claimant's injury of _____ would be a repetitive trauma injury considering the two prior injuries to the back.
7. Claimant reported the injury to [Mr. M] on June 15, 1999 per instructions from his attorney.
8. Claimant did this as a precautionary measure and not because of actual knowledge of a new injury.
9. Claimant behaved as a reasonably prudent person in reporting the injury on June 15, 1999.
10. Claimant subsequently learned of the MRI results and the probability that he had suffered a new injury on _____.
11. Claimant's report was timely since [it was] within thirty days of his first knowledge of an injury.
12. Claimant would have good cause for failing to report an injury until at least the first date he could know he suffered an injury.
13. Claimant's treating doctor did not change his records to reflect a new date of injury until July 16, 1999.
14. Claimant first saw a doctor for an injury of _____ on July 16, 1999.
15. Claimant trivialized his injury until he saw the doctor for it.
16. Claimant had good cause to believe his back pain was the result of his prior injury until July 16, 1999 when his doctor told him the MRI from May 22, 1999 demonstrated a new injury.

CONCLUSIONS OF LAW

4. Carrier is not relieved of liability for this claim since Claimant had good cause for his failure to report the injury until July 16, 1999 which is subsequent to the actual date Claimant reported the injury.
5. Carrier is not relieved of liability for this claim since Claimant reported his injury within thirty days of the date of injury.
6. Claimant behaved as a reasonably prudent person in reporting his injury on June 15, 1999 as a precautionary filing.

For an accidental injury that is not an occupational disease, Section 409.001(a)(1) and (b) requires that the injured employee give notice of an accidental injury to a person in a supervisory or management capacity within 30 days. For an occupational disease, the 30 days runs from the date that the employee first knew, or should have known, that he might have an injury related to employment. Section 409.001(a)(2). Failure to give timely notice, 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). While subjective appreciation of a work-related injury may be a factor in considering good cause for not timely reporting an injury to the employer, it does not shift the deadline for notice of an accidental injury forward in time.

In Texas Workers' Compensation Commission Appeal No. 94050, decided February 25, 1994, we observed the following: "Our review of the Texas case law reveals that the reasons or excuses commonly recognized as 'good cause' include the claimant's belief that the injury is trivial, mistake as to the cause of the injury, reliance on the representations of employers or carriers, minority, and physical or mental incapacity, while the advice of third persons and ignorance of the law are frequently held not to constitute good cause." Whether an employee has exercised that degree of diligence required under the ordinarily prudent person test is usually a question of fact for the fact finder. A claimant's conduct must be examined "in its totality" to determine whether the ordinary prudence test was met, and the reason given for delay will generally be found in the claimant's own testimony. See Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ).

The claimant litigated his claim on the theory that he sustained an accidental injury occurring as a result of a specific event occurring on a date specific. The hearing officer's determinations that the claimant was picking up disc brakes on _____, when he felt pain in his low back, and injured his low back when he suffered a recurrent disc herniation on _____, were affirmed in Appeal No. 992701, *supra*. However, the hearing officer on remand resolves the notice issue on a theory of a repetitive trauma injury "since this is a second injury to the same area." Section 401.011(36) defines repetitive trauma injury as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." The fact that the claimant sustained a second injury to the same area, does not constitute a repetitive trauma injury.

The hearing officer resolved the notice issue on the basis that the claimant sustained a repetitive trauma injury and the time for reporting ran from the date that the claimant knew or should have known that he sustained a new injury, the date he learned from Dr. H that the MRI showed a herniation. As we stated in Appeal No. 992701, *supra*, no evidence was presented indicating when the claimant was informed of the MRI results. The claimant did

not assert that he did not initially realize that he had a new injury, did not assert that he initially believed that he was suffering from a continuation of an old injury, and did not assert that he trivialized the injury until he saw the doctor on July 16, 1999. It was the claimant's testimony that he sustained an injury on _____; he reported it that day; and he told Dr. H of the mechanism of injury on May 11, 1999. The hearing officer incorrectly ran the 30 days for notice to the employer from the date of a repetitive trauma injury, and should have ran the 30 days from the date of injury, _____.

The hearing officer also resolved the notice issue on the basis that the claimant reported the injury on June 15, 1999, per the instructions of his attorney; that he did it as a precautionary measure, although he did not have actual knowledge of a new injury; and that good cause was shown for the delay. Mr. M testified that in mid-June the claimant called and said that his lawyer had advised him to file a new claim. The claimant did not testify that his attorney advised him to report an injury, nor did he provide any reason for the delay in reporting. The claimant's condition was serious enough that he was taken off work on May 11, 1999, and did not work thereafter. A reasonably prudent person who said that he sustained an injury on _____; sought medical treatment on May 11, 1999; and was taken off work would have recognized the nature and seriousness of the injury and reported the injury within 30 days of _____.

We have already remanded this case one time and cannot do so again. Section 410.203(c). Based on the foregoing, we conclude that the determinations regarding the notice issue are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we reverse them. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We reverse and render a decision that the carrier is relieved of liability pursuant to Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001; that the claimant did not sustain a compensable injury on _____; and that because the claimant did not sustain a compensable injury, the claimant did not have disability.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge