APPEAL NO. 000788

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 13, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable left knee injury in the course and scope of his employment; that horseplay was not a producing cause of the injury; that the claimant had good cause for his late reporting of the injury to his employer; and that the claimant had disability due to his injury. The carrier (appellant) appeals these determinations, asserting factual and legal insufficiency. The appeals file contains no response from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant was a forklift operator. He worked for (Employer 1), with duty as a contract employee at (Employer 2). He testified that on the morning of _____, he was at a copying machine copying time cards and talking to Mr. G, an employee of Employer 2. About 20 feet away was Mr. S, also an employee of Employer 2. Mr. G and Mr. S directed the claimant in the tasks he was supposed to do. According to the claimant, Mr. L, another forklift operator and employee of Employer 1 came up to him from the side unannounced and "kneed" the claimant in the left knee. The claimant started to fall but was caught by Mr. G. The claimant said he felt immediate intense pain in his left knee and experienced swelling. He apparently worked the rest of his shift doing office work and went home. The next morning, he said, he could not get up or come to work because of his knee problem. On May 25, 1999, he went to an emergency room where the initial diagnosis was knee sprain. Eventually, he was diagnosed with torn ligaments. On July 30, 1999, he underwent an operation for torn ligaments.

The claimant returned to work sometime shortly after the incident. He testified, without contradiction, that Mr. G and Mr. S told him that if an injury were reported to either employer the claimant and maybe others would be fired for horseplay. As a result, at the instigation of Mr. G and Mr. S, they all agreed according to the claimant that the claimant would say he was injured at home and all four (the claimant, Mr. G, Mr. S and Mr. L) would stick to the same story about how it happened to avoid discovery of the truth. Mr. G and Mr. S reportedly promised to take care of the claimant by providing him light duty. Presumably, the entire scheme was concocted on the belief that Mr S and Mr. G could "take care of" the claimant until he was able to return to regular work. Unfortunately, it did not turn out that way. Mr. G and Mr. S were asked by their supervisors why the claimant was doing light office work when he was contracted to be a forklift operator. Having no answer to this question, Mr. G and Mr. S could no longer cover for the claimant and told him on June 22, 1999, that he had to work regular duties or leave.

At this point, the claimant decided to report the true story of his injury to Mr. F, his supervisor with Employer 1. He called Mr. F's secretary on June 23, 1999, and finally was able

to contact Mr. F by phone on June 29, 1999, for a meeting the next day. At the meeting the next day, the claimant told Mr. F how he really injured his knee. Mr. F testified that this meeting took place on June 30, 1999, as the claimant said and that this was the first time he was told what actually happened. Mr. F further testified that he saw the claimant on the premises of Employer 2 on June 8, 1999, obviously limping. He said he asked him what had happened and the claimant said he hurt himself at home. Mr. F said he pressed the claimant more than once about whether he was injured on the job and the claimant always denied it. Mr. F also said he knew that Employer 2 did not have a policy of light duty for non-work related injuries, but did not question the claimant about this because he believed the claimant was a good worker and that this was an informal accommodation of him by people in the work area. Mr. F also testified that he was the claimant's supervisor, not Mr. G and Mr. S, but that the claimant was told by Mr. G and Mr. S what items to move with his forklift.

Mr. L did not testify, but in a transcribed written statement said he and the claimant were just having fun and were involved in "horseplay."

It was not disputed that the claimant sustained a left knee injury in the manner claimed. Section 406.032(2) provides that a carrier is not liable for compensation if the employee's "horseplay was a producing cause of the injury." To avail itself of this defense the carrier has the burden of proving that the claimant was an active participant in the horseplay and not a passive victim of it. Texas Workers' Compensation Commission Appeal No. 992855, decided February 3, 2000. Whether horseplay was a producing cause of the injury presented a question of fact for the hearing officer to decide. In the case we now consider, the recorded statement of Mr. L refers to horseplay and at least implies that an atmosphere of horseplay existed at the work site. In addition, the conduct of Mr. G and Mr. S, as represented by the claimant, made little sense in the absence of such background, that is, if there was no horseplay going on, there would be no need to lie about the circumstances of the injury. No evidence was presented about the circumstances leading up to this incident in the few moments preceding it or from which the hearing officer could conclude that the incident causing the injury was part of a more or less unbroken stream of horseplay. In the absence of such evidence, the hearing officer concluded that the claimant "was not engaged in horseplay that was a producing cause of the injury." Conclusion of Law No. 4. Clearly the evidence was subject to varying inferences. However, under our standard of review of factual determinations of hearing officer, we find the evidence sufficient to support the determination that horseplay was not a producing cause of this injury. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

Critical to this case was the determination of the hearing officer that the claimant had continuing good cause for not timely reporting his injury. In this regard, we note that the hearing officer, at least impliedly, determined that neither Mr. G nor Mr. S were persons to whom effective notice of an injury could be given.[1] In doing so, she apparently rejected the

[1]Section 409.001 provides that the notice may be given to the employer or an employee "of the employer" who holds a supervisory or management position.

notion that Mr. G and Mr. S somehow became agents of Employer 1 for purposes of receiving notice of an injury. Rather, she found that notice was given on June 30, 1999, at the meeting between the claimant and Mr. F, and that the claimant had good cause up to this time for not timely or earlier reporting his injury to Mr. F or to Employer 1.

Section 409.001 requires generally that an employee notify the employer of an injury not later than 30 days after the injury occurs. Failure to do so absent good cause relieves the employer and carrier of liability for benefits. Section 409.002. We have pointed out that the purpose of the notice provision is to give the carrier the opportunity to expeditiously investigate the circumstances of the claimed injury and determine whether it is compensable or not. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). The test of good cause is that of ordinary prudence, that is, whether the employee has prosecuted the claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Company, 207 S.W.2d 370 (Tex. 1948). Commonly recognized good cause excuses include trivialization of the injury, mistakes about the cause of the injury, reliance on the representations of employers or carrier, young age of the claimant, reliance on medical advice, and physical or mental incapacity. Ignorance of the law or reliance on the advice of third parties are generally not considered good cause. *See* Texas Workers' Compensation Commission Appeal No. 94050, decided February 25, 1994. Whether good cause exists in any case is a question of fact for the hearing officer to decide and is reviewed under an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 990494, decided April 22, 1999.

In the case we now consider, the hearing officer found in Finding of Fact No. 19 good cause based on the following: (1) that the claimant acted reasonably in believing that Mr. G and Mr. S "were appropriate persons to notify"; (2) that he acted reasonably in believing that Mr. G and Mr. S would inform Employer 1 of his injury; (3) that he acted reasonably in following the instructions of Mr. G and Mr. S to work light duty "without revealing to anyone else the true cause of his injury"; and (4) that he acted reasonably in reporting the true cause of the injury to Mr. F upon learning that Mr. G and Mr. S "were abandoning him."

In appealing this determination, the carrier argues essentially that good cause can never be found in intentionally deceptive conduct on the part of the claimant. Indeed, the overwhelming weight and tenor of the evidence in this case is that the fabrication was devised for the one purpose of preventing either employer from ever learning the true cause of the injury. Mr. G's, Mr. S's, and the claimant's conduct do not make sense in any context but that of purposeful deception. It seems to us unlikely that the claimant would be relying on Mr. G and Mr. S to report the true cause of the injury to Mr. F or to Employer 1 when the objective was to conceal this information. Similarly, we can hardly conceive that good cause could reside simply in the claimant=s continuing to effect the purpose of the fabrication by doing the light duty assigned him by Mr. G and Mr. S or in his finally reporting the truth to Mr. F once he could no longer keep the benefit of his bargain with Mr. G and Mr. G.

There remains the other reason cited by the hearing officer as good cause, that is, that it was reasonable for the claimant to believe he could satisfy the notice requirement by reporting to Mr. G and Mr. S. Again, we stress that the hearing officer did not find that either Mr. G or Mr. S were appointed agents of Employer 1 to receive notice of a work-related injury. While it is plausible that good cause can be based on the mistaken belief that a third person is a properly designated agent for such notice, such good cause can exist in those circumstances only if the claimant believes or has no reason not to believe that the agent will fulfill the purposes of the agency relationship and transmit the information to Employer 1. In this case, as the carrier points out, the claimant actively agreed with Mr. G and Mr. S that notice would **not** be transmitted to the employer. Put another way, the claimant clearly relied on Mr. G and Mr. S, if they were agents to receive notice, not to send the notice on to the employer. The point of this scheme was to avoid giving notice by creating a deception. Under these facts, that good cause cannot be premised on such intentional deception until the claimant is backed into a corner by the deception and then decides to rely on the truth. For these reasons, we find the determination of good cause by the hearing officer constituted an abuse of discretion.

We affirm the finding that horseplay was not a producing cause of the injury. We reverse the determination of good cause for untimely notice and render a decision that the claimant failed without good cause to give timely notice of his work-related injury. Because the claimant failed to meet the notice requirements of the 1989 Act, the claimed injury, though work related, was not compensable. We, therefore, also reverse the determinations that the injury was compensable and that the claimant had disability.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

CONCUR IN RESULT:

Judy L. Stephens

Appeals Judge