APPEAL NO. 001552

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 May 19, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury in the form of an occupational disease; that the claimant is not barred from pursuing Texas workers' compensation benefits because she did not make an election to receive benefits under a group health insurance policy; that the date of injury is _____; that the claimant had good cause in waiting until October 29, 1998, to report her injury; and that the claimant did not fail to timely notify her employer. The appellant (carrier) appealed the findings of fact that the claimant acted as a reasonably prudent person in waiting until October 29, 1998, to report her injury arguing that good cause did not exist the entire time between the date the claimant knew her injury to be work related and the date she reported the injury to her employer; and that the claimant did make an informed choice between her group health insurance and workers' compensation benefits. The carrier appealed all the conclusions of law except as to the date of injury on the grounds of sufficiency of the evidence. The appeals file contained no response from the claimant. The finding that the date of injury was _____, was not appealed and is final. Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that she worked on an assembly line for over four years for the employer which required her to load small electrical parts and semiconductor chips on a PC computer board with her hands in a repetitive manner on a daily basis. She explained that in 1998 she began having pain in both wrists and also became pregnant. Her obstetrician, Dr. F referred her after seven months of pregnancy, to Dr. D, a hand specialist. The claimant presented to Dr. D on _____, who diagnosed carpal tunnel syndrome and de Quervain's syndrome and recommended surgery which the claimant declined, opting instead for steroid injections to control the pain. The claimant returned to Dr. D for a second visit on September 28, 1998.

After she saw Dr. D for the first time in June, the claimant stated she believed her problems were caused by her pregnancy, but after her child was born on July 17, 1998, she believed the problems to be work related. The claimant returned to work on September 2, 1998, and stated Dr. D told her to change her workstation when she saw him for the second time on September 28, 1998. She was asked again later on in the CCH as to when she knew her problems were work related. The claimant stated, "yeah, because my hand is hurt after the baby. I stop working. And after that, that's why I went to doctor, to see a doctor." In contrast to these statements, the claimant also testified that she told her supervisor, Mr. P, in September that she believed her wrist problems to be caused by her pregnancy.

The claimant returned to Dr. D for subsequent visits on October 26, 1998, and November 3, 1998, after which the claimant asserted Dr. D told her that her work was contributing to her tendinitis. The claimant acknowledged that by this time she had returned to work sometime after August 1998 and before October 26, 1998. (Payroll records admitted at the CCH reflect that the claimant had returned to work on September 2, 1998.) The parties stipulated that the claimant reported her injury to the employer on October 29, 1998. Thereafter she began treating with Dr. J because the employer changed health care insurers. Records from Dr. J reflect that the claimant presented to Dr. J for the first time on January 14, 1999, for an unrelated illness, but the claimant did subsequently receive treatment for her hand pain from this doctor.

The claimant testified that prior to October 29, 1998, and the subsequent filing of a claim for workers' compensation benefits, she had been using her group health insurance benefits for both the pregnancy and her hands. Ms. B, the company nurse, testified that she met with the claimant on October 1, 1998, to discuss her wrist problems which had continued after the birth of her child. Ms. B stated that she asked the claimant if her work was contributing to her problems, to which the claimant replied that "all I do is work with my hands." Ms. B obtained the name of the claimant's treating physician and later that day called and spoke with Dr. D's physician's assistant, Ms. M, who agreed to send information as to whether the wrist problems were work related. Ms. B explained that she followed up the request for information with a telephone call on October 8, 1998, to Ms. M who told her that at that time they did not have any indication that the claimant's medical problems were work related and medical service fees had been processed through the claimant's group health insurer. Ms. B testified that she learned the claimant was filing for workers' compensation benefits in January or February 1999.

Ms. P, who took over Ms. B's job, testified that she called Dr. D's office on November 4, 1999, after she received notice of a benefit review conference so she could be prepared for the meeting. She stated that she also spoke to Ms. M who told her that they still had the claimant's treatment listed for a nonwork-related matter and that the claimant had not sought treatment with Dr. D since November 1998. She subsequently received a letter in November 1999 from Dr. D dated October 21, 1999, which contained a statement that the claimant's problems were work related. When she received the letter, Ms. P stated that she called Dr. D and spoke to Ms. M asking her to explain the discrepancy in their earlier conversation. Ms. P related that Ms. M told her that the claimant had asked Dr. D to write the letter for her and she then denied that she had ever told Ms. P that the condition was not work related.

Dr. D wrote a letter dated October 21, 1999, indicating that he had diagnosed the claimant with bilateral first extensor compartment tendinitis on _____, which he felt was the result of her work as a microchip assembler. His letter reflects that the claimant presented for a second visit on September 28, 1998, and she did not return again until October 21, 1999, in order to obtain a letter from him documenting that her condition was work related to give to her attorney. By letter dated February 3, 2000, Dr. D stated that at no time was there a question that the claimant's work was not contributing to her problem,

but that it was the claimant's choice to go through her private health care insurance. Evidence admitted at the CCH contained a supervisory accident report written by Mr. P on September 29, 1998, in which he notes that the claimant asked for a wrist pad for pain which had begun in both wrists approximately seven months ago. He wrote: "[S]he thought the pain was related to her pregnancy at that time." He follows with the statement: "[T]here is no evidence to substantiate her claim contributed by her job."

The first issue tried by the parties was whether the claimant had sustained a compensable injury in the form of an occupational disease. The hearing officer entered a conclusion of law in the affirmative that the claimant had sustained a compensable injury in the form of an occupational disease; however, he made no formal findings of fact in support of this issue. The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. The claimant had the burden to prove that the injury occurred while she was engaged in or about the affairs of her employer and it was of a kind that originated in and had to do with the work for her employer. Texas Employers Insurance Association v. Goad, 622 S.W.2d 477 (Tex. App.-Tyler 1981, writ ref'd n.r.e.). We have previously held that underlying findings of fact may be implied from the evidence summary if the evidence supports such findings. *See* Texas Workers' Compensation Commission Appeal No. 92716, decided February 16, 1993. In this case, we infer the necessary finding from the Statement of the Evidence that "the claimant sustained a compensable injury to her wrists and hands caused by the PC board assembly work she performed." On this basis, we affirm the determination that the claimant sustained an occupational disease in the course and scope of her employment on _____.

We are concerned, however, with the conflicting findings of fact regarding notice to the employer. The hearing officer made a finding that the claimant knew or should have known that her hand pain may have been related to her employment on _____. The parties stipulated that the claimant first reported an injury to her employer on October 29, 1998. Neither party appealed these findings and they have become final by operation of law. Section 410.169. The hearing officer then made a finding that the claimant acted as a reasonably prudent person would have under the same or similar circumstances by waiting until October 29, 1998, to report her injury to her employer, as the claimant thought that her hand pain was related to her pregnancy. This statement inherently conflicts with the unappealed finding that she knew or should have known on _____, that her hand pain may have been related to her employment.

Sections 409.001(a)(2) and 409.002 provide that a carrier is relieved of liability for a work-related injury in the form of an occupational disease if the claimant fails to give the employer notice of the injury by the 30th day after she knew or should have known that the injury may be related to her employment unless the Texas Workers' Compensation Commission determines that good cause exists for the delay. Rather than deciding the fourth issue as to whether the carrier is relieved from liability because of the claimant's failure to timely notify her employer, the hearing officer submits further findings of fact as conclusions of law that the claimant did not fail to timely notify her employer and she had

good cause in waiting until October 29, 1998, to report her injury. The evidence and the hearing officer's own findings of fact as to date of injury combined with the parties' stipulation as to the date of the report of injury to the employer compel us to conclude that his finding/conclusion that the claimant did not fail to timely notify her employer is so against the great weight and preponderance of the evidence as to be clearly unjust and erroneous. We reverse this conclusion of law and render a decision that the claimant failed to give the employer timely notice of the injury.

Whether the claimant had continuing good cause for her failure to timely report her injury is then the proper inquiry which is determined by examining the facts after the claimant knew her injury to be work related. "Good cause" is a legal excuse for failure to timely notify the employer or to file the claim, and it has been held that good cause must continue to the date when the injured worker actually gives notice or files the claim. Lee v. Houston Fire & Casualty Company, 530 S.W.2d 841, 843 (Tex. Civ. App.-Corpus Christi 1991, no writ). An injured worker owes a duty of continuing diligence in the prosecution of his or her claim, and the claimant must prove that the good cause exception continued up to the date of filing. Texas Casualty Insurance Company v. Beasley, 391 S.W.2d 33, 34 (Tex. 1965). Even if a claimant at one point had good cause, the claimant must act with diligence to notify the employer of a claim or to file a claim. The totality of a claimant's conduct must be primarily considered in determining ordinary prudence. Lee v. Houston Fire and Casualty Insurance Company, 530 S.W.2d 294, 296 (Tex. 1975).

The Appeals Panel has refused to establish a standard that a claimant must "immediately" give notice to perfect a finding of good cause for delay in giving timely notice. Texas Workers' Compensation Appeal No. 93494, decided July 22, 1993. The Texas Supreme Court held in Hawkins v. Safety Casualty Company, 207 S.W.2d 370 (Tex. 1948) that:

> In all cases a reasonable time should be allowed for the investigation, preparation and filing of a claim after the seriousness of the injuries is suspected or determined. No set rule could be established for measuring diligence in this respect. Each case must rest upon its own facts.

In light of the unappealed finding that the claimant knew or should have known her hand pain to be work related on _____, the hearing officer should have entered other findings consistent with this finding of fact in determining whether the claimant had good cause in waiting until October 29, 1998, to report her injury. Good cause does not only arise from the trivial or serious nature of the injury, but the totality of the circumstances must be examined. Texas Workers' Compensation Appeal No. 93544, decided August 17, 1993.

In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the

great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

We conclude that the hearing officer's determination of good cause for untimely notice is so against the great weight and preponderance of the evidence as to be manifestly unjust. The hearing officer found that the claimant knew or should have known that her hand pain may be work related on _____. Therefore, the claimant had 30 days after _____, to report her injury to the employer which she did not do and thus, did not timely report her injury contrary to the finding by the hearing officer. We reverse this determination and render a decision that the claimant did not report her injury to the employer within 30 days of _____.

As stated earlier, good cause may excuse the late reporting, but the good cause must continue more or less up to the date the report was actually made. The hearing officer found that good cause existed until October 29, 1998, because the claimant attributed her hand problems to her pregnancy. Nonetheless, after the claimant delivered her child on July 17, 1998, there was no continuing good cause to believe that her problems were due to the pregnancy and the claimant testified that she knew her problems were work related after the delivery of her child because she continued to have pain when she returned to work on September 2, 1998. She returned to Dr. D on September 28, 1998, specifically because of the continuing problems with her hands after the birth of her child. We reverse as against the great weight and preponderance of the evidence the finding that the claimant acted as a reasonably prudent person under the same or similar circumstances by waiting until October 29, 1998, to report her injury to her employer, as she thought that her hand pain was related to her pregnancy and render a decision that the claimant not have good cause for her failure to report her injury to the employer after September 2, 1998, the date she returned to work, when she continued to have problems with her hands. The carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify her employer pursuant to Section 409.001(a)(2).

On the election of remedies issue, the standard is set out in the Supreme Court case of Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), wherein the court stated that the election of remedies doctrine may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of fact (3) which are so inconsistent as to (4) constitute manifest injustice. The carrier has the burden of proving an effective election of remedies, and whether an election has been made is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 972051, decided November 13, 1997. Critical to a finding of an election of remedies is the determination that the election of nonworkers' compensation remedies was an informed choice. Texas Workers' Compensation Commission Appeal No. 981226, decided July 20, 1998; Texas

Workers' Compensation Commission Appeal No. 990525, decided April 16, 1999. The mere acceptance of group health benefits is normally not sufficient in itself to establish an election of remedies. Texas Workers' Compensation Commission Appeal No. 001471, decided August 7, 2000.

The hearing officer found that the claimant did not make an informed choice between her group health insurance and her workers' compensation benefits. In addition, there was no showing by the carrier that such election constituted manifest injustice. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). For these reasons we find no error by the hearing officer in determining that the claimant was not barred from pursuing workers' compensation benefits because she elected to receive benefits under a group health insurance policy.

We affirm the findings of a compensable injury and no election of remedies. We reverse the findings of timely notice/good cause for untimely notice and render a decision that the claimant did not have good cause for her failure to give timely notice of her injury to the employer thereby relieving the carrier of liability for workers' compensation benefits.

Kathleen C. Decker
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Philip F. O'Neill
Appeals Judge