APPEAL NO. 001912

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 July 24, 2000. With regard to the issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable left knee injury on _____ (all dates are 1999 unless otherwise noted), that the claimant "gave timely notice" of his injury and that the claimant had disability from October 15 to January 5, 2000.

The appellant (carrier) appeals all three issues, pointing to conflicting evidence regarding the injury, arguing that the claimant had clearly not given timely notice, that the claimant did not have good cause for failing to timely report his injury, and that since the claimant did not have a compensable injury, the claimant did not have disability and in any event the claimed disability period was not clearly identified. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The appeals file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The evidence is certainly in conflict. The claimant was employed as a truck driver and he testified that on _____, he fell about nine feet off a flat bed truck, injuring his left knee. Most of the claimant's testimony was that he "fell" off the truck. The claimant testified that the fall was witnessed by a coworker whose name he believed was "Santos" or "Soto." The claimant's supervisor, SR, testified that he had spoken with another employee, a Mr. A, who spoke very little English, but who said the claimant at one time had "jumped" from his truck (perhaps because he was afraid of getting hit by some wood) without any injury. SR also testified that the bed of the truck was only five to five and one-half feet high. Dr. D, the claimant's treating doctor, and surgeon, in a report dated April 6, 2000, wrote:

> [The claimant] was initially evaluated on 10/11/99. At that time, he complained of pain, popping, and giving way of the left knee since he fell off a truck at work on _____. He subsequently underwent arthroscopy of the left knee on _____ and was found to have torn medial and lateral menisci. I feel that the injury was due to his fall of _____.

The hearing officer found that the claimant "jumped off a truck injuring his left knee." The carrier points to the inconsistencies between falling nine feet and jumping or stepping off the truck two feet. In any event, these are inconsistencies and contradictions for the hearing officer, as the sole judge of the weight and credibility of the evidence, to resolve. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). He did so by giving credence to a portion of the hearsay testimony of Mr. A but found that the claimant had sustained an injury. The hearing officer

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). We find the hearing officer's decision on this issue supported by sufficient evidence.

It is undisputed that the claimant continued working after _____ and that he had a conversation with SR on August 20. What was said is in dispute. The claimant said that he reported his knee injury. SR said that the claimant only asked him whether using the truck clutch could cause a knee injury and that he told the claimant that he did not think so. The claimant sought medical attention for his knee from Dr. T on August 23. In a report of that date Dr. T diagnosed a nonspecific osteoarthritic condition and released the claimant to return to duty. The claimant again sought medical treatment for his knee on September 10 from (clinic). A clinic note of that date indicates that the claimant's injury "may be work related with use of clutch on truck" with an _____ date of injury. The Employer's First Report of Injury or Illness (TWCC-1) indicates an injury was reported on September 10. The claimant next saw Dr. D on _____. Dr. D, in a "Return to Work" slip of that date returned the claimant to work with restrictions. The claimant testified that Dr. D told him that he had a work-related injury due to the fall off the truck and that he would need surgery. The carrier agrees that the claimant reported a work-related injury on _____, but contends that the notice was not timely. The claimant makes clear that he is not claiming trivialization as good cause but rather that he did not know the cause of his knee injury. The claimant cited Texas Workers' Compensation Commission Appeal No. 970602, decided May 16, 1997, where the Appeals Panel wrote:

> The test for the existence of good cause is that of ordinary prudence, that is, "whether the claimant 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). The existence of good cause is essentially a fact question, Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, 1992, and the "totality of a claimant's conduct must be primarily considered in determining ordinary prudence." Texas Workers' Compensation Commission Appeal No. 93544, decided August 17, 1993. Reasons commonly recognized as establishing good cause included trivialization of the injury, that is, a bona fide belief that the injury is not serious, mistake as to the cause of the injury, reliance on the representations of employers or carriers that further action by the claimant is not necessary, or some mental or physical incapacity. [Emphasis added.]

The hearing officer found:

FINDING OF FACT

5. The Claimant acted as a reasonably prudent person would have under the same or similar circumstances, in waiting from _____, to _____, to report the injury to his Employer, as

> he was unsure whether the injury was from jumping from the truck on _____, or whether the left knee injury was the result of using the truck clutch.

The carrier contends that the claimant only reported a knee condition, rather than a work-related injury, on _____, and asserts that the claimant did not have good cause of trivialization. The carrier also faults the hearing officer for using the term "reasonably prudent person" rather than "ordinary prudence." We find no merit in carrier's argument on these grounds. However, we hold that the hearing officer's Finding of Fact No. 5 is incorrect as a matter of law. While we agree that a mistake as to the cause of the injury can constitute good cause, in this case the claimant is simply arguing that because he does not know which of two job-related activities caused the knee injury he had good cause for not reporting either of the job-related activities to the employer. We hold that as a matter of law that is incorrect because in either case claimant knows the knee injury is job related whether it be from jumping from the truck or using the clutch. We reverse the hearing officer's finding of fact, conclusion of law and decision and render a new decision that the carrier is relieved of liability under Section 409.002 because the claimant failed to give timely notice pursuant to Section 409.001 and that no good cause exists for failure to provide timely notice. We do not retreat from our comment in Appeal No. 970602, *supra*, that a mistake as to cause of injury can constitute good cause, but the mistake must be regarding whether another noncompensable event which may have caused the injury, not which of the two work-related events occurring in the same general time frame, was the cause of the claimed injury.

Last, regarding disability, the claimant continued to work, at least until _____, when he saw Dr. D. The claimant's testimony is vague regarding a start date of disability; however, he did state that he worked reduced hours beginning about a week before his knee surgery, which was on October 22. The hearing officer adopted October 15 as the beginning date of disability. The claimant had an arthroscopic partial medial and lateral meniscectomy to repair meniscal tears on October 22. In evidence are "Return to Work" slips from Dr. D dated December 10, returning the claimant to work without restrictions that date and another slip dated January 6, 2000, returning the claimant to work without limitations effective January 10, 2000. Clearly, the hearing officer accepted the claimant's testimony as supported by Dr. D's January 6, 2000, "Return to Work" slip rather than the December 10 slip. We have frequently noted that disability can be established by the claimant's testimony alone. In this case, the hearing officer's decision regarding disability is sufficiently supported by the evidence.

Although we are affirming the hearing officer's determinations on the issues of injury and disability, we are reversing the hearing officer's decision that the claimant gave timely notice or had good cause for not giving timely notice and we render a new decision that carrier is relieved of liability because the claimant failed to give timely notice of his injury to the employer pursuant to Section 409.001 and no good cause was established for failure to give such timely notice.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge