APPEAL NO. 002106

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 June 30, 2000. The issues at the CCH were date of injury, the existence of a compensable injury, disability, timely reporting of the injury to the employer, filing of a claim for compensation within one year, and whether the injury extended to the claimant's low back. The hearing officer held against the appellant (claimant) on most of the issues before him. The claimant appealed the hearing officer's determinations, requesting that the Appeals Panel reverse most of the hearing officer's decision and render a decision that he did sustain a compensable injury on _____, that he had disability resulting from that injury, and that he is entitled to benefits under the Act. The respondent (carrier) responds that the hearing officer's determinations are supported by the evidence and requests that we affirm the hearing officer's decision.

DECISION

Affirmed.

At the outset, it is noted that the claimant has appealed all but one of the hearing officer's findings of fact, including the stipulations entered into by the parties. The only conclusions of law not appealed by the claimant were the jurisdiction and venue determinations. The claimant appealed the following conclusions of law:

3. Claimant did not suffer an injury on _____.

4. Claimant did not report an injury of _____ to employer within thirty days of _____.

5. Claimant did not file a claim for compensation within one year of _____ and did not have good cause for his failure to do so.

6. The filing period for the claim for compensation was not tolled.

7. Claimant did not suffer disability as a result of an injury on _____.

8. Claimant did not suffer a compensable back injury.

The claimant was working for (employer) on March 13, 1998, and continued working for the employer through _____. From March 13, 1998, through May 14, 1998, the employer had no workers' compensation insurance. On _____, the employer obtained workers' compensation insurance coverage through the carrier.

The claimant testified that on _____, as he was shoveling feed off a hopper trailer, he was thrown off balance and, as he tried to regain his balance by using the shovel, his right hand folded backwards, popped loudly, and began to swell. He returned to work the next day and continued working although there was lingering pain and swelling in his right wrist. The claimant testified that he was able to continue working because after March 14, 1998, the loads were no-touch loads which did not require him to use a shovel or other tool to help in unloading his cargo.

In late _____ or early _____, the season for the no-touch loads ended and the claimant began to haul loads which required that he use a rubber mallet on the side of the trailer to knock loose any of the load that might stick. The claimant testified that after he began using the mallet he began to experience increasingly severe pain in his right wrist until he could no longer stand it. After the season for the no-touch loads ended, the claimant again began to haul loads that had to be shoveled or knocked loose. On _____, the claimant was unloading corn at a feedlot and was hammering on the side of the hopper with the rubber mallet when his hand began to swell. The claimant argues on appeal that the great weight and preponderance of the evidence proves that he sustained either a distinct injury to his right wrist on _____, in the form of an aggravation injury, or that he sustained a repetitive trauma injury to his right wrist and knew or should have known that he sustained a work-related injury to his wrist on _____.

In support of his argument, the claimant points to two medical reports. The first, offered into evidence as Claimant's Exhibit No. 6, is a hand-written response on a letter sent to Dr. M. The letter posed the following question:

> Please advise me whether [the claimant] suffered an exacerbation of the right wrist or an aggravation of the right wrist, that being further damage or harm to the physical structure of his body. An aggravation is a new injury for workers' compensation purposes. An exacerbation is not.

Someone, ostensibly Dr. M, wrote the following on the bottom of the letter:

> He had a new injury in _____.

The second document which the claimant asserts as proof of an aggravation injury or a specific trauma injury is a report from Dr. W, a Texas Workers' Compensation Commission (Commission)-selected required medical examination doctor. The Commission asked Dr. W to address causation and the relationship between the _____, incident and the _____, incident. Dr. W's report set forth the questions, and his answers to those questions, as follows:

> Question 1: The parties of the claim acknowledge the claimant had an incident to his right wrist on _____. The question is as follows: Is it possible that the claimant could have suffered a slight fracture of the wrist at

that time, and then continued to work with no problems for another four (4) months?

Answer: I believe that the patient sustained an injury to his right wrist on _____. I do not know the degree of that injury, i.e., was it a complete separation or just a partial tear. The patient continued to work for the next four (4) months, but he did have a problem with his wrist. He worked between _____, and _____, and he was using his hand during that time. He told me that he was in pain all the time and that his wrist swelled, and he got to the point where he could no longer handle it any more.

Question 2: On _____, the claimant contends another incident/repetitive use that caused an aggravation of a pre-existing condition. Is it possible that this could happen, i.e., a slight fracture on _____, no problems for four (4) months, then after constant use or a specific incident on _____ caused an aggravation (new injury)?

Answer: Yes, that is possible. Following his injury on _____, the patient continued to work for four (4) months. If he sustained an incomplete tear of the scapho-lunate ligament, then it is possible that the continued use over the next four (4) months finally lead to a complete tear of the scapho-lunate ligament and his resultant problem. It's very possible that he had an incomplete tear and that on _____, a new injury lead to the complete tear of the scapho-lunate ligament. It's also possible that if he had an incomplete tear of the scapho-lunate ligament on _____, that repetitive use over the next four (4) months finally lead to a complete disruption of the scapho-lunate ligament.

It was undisputed that the claimant and the employer believed that the claimant had sustained a work-related injury on _____; that the claimant did not begin to lose time from work until _____; that the claimant has received medical and income replacement benefits which were paid by the employer; and that the claimant first filed a claim for workers' compensation benefits in February 2000, and an amended claim in _____. The primary dispute between the parties, one resolved in favor of the carrier, was whether the claimant had sustained a new injury after _____.

The hearing officer determined that the claimant had not sustained an injury on _____, did not report an injury of _____, to his employer, and did not file a claim for compensation for an injury of _____, within one year of the date of the alleged injury. It is noted that the hearing officer did not make a specific conclusion of law on the issue of the date of injury. With the hearing officer's determination that the claimant did not sustain an injury on _____, and the hearing officer's finding of fact that the claimant suffered an increase in pain on _____, not a new injury, it appears that a determination that the date of the alleged injury was _____, was inadvertantly omitted. Since neither the claimant nor the carrier have appealed the omission of a finding

on the date of injury, we do not reach that error, but infer that the date of injury, as determined by the hearing officer, is _____.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). 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). In evaluating the evidence before him, the hearing officer concluded that the claimant had failed to prove that he had sustained additional damage or harm to the physical structure of his body after the acknowledged injury of _____. With no objective evidence of the physical condition of the claimant's right wrist prior to _____, and the claimant's report to Dr. W that he had continued to have pain and swelling in the right hand from _____, until he could finally stand it no longer, the hearing officer could conclude that the claimant's symptoms grew gradually worse over the course of time, but that the worsening of the symptoms did not equate to a preponderance of the evidence that there was additional damage or harm to the claimant's wrist.

The hearing officer concluded that the claimant did not advise his employer within 30 days that he believed that he had sustained a separate and distinct injury on _____. That determination is adequately supported by the evidence before the hearing officer. We note that the hearing officer made no findings on whether there was good cause for the claimant's failure to report an injury within 30 days, but since the evidence is sufficient to support the hearing officer's determination that there was no injury on _____, we find no reason to remand this case to the hearing officer for further findings.

The claimant asserts that although it was undisputed that he did not file a claim for compensation within a year of the date of injury, the great weight and preponderance of the evidence proves that he had good cause for doing so and that the duty to file within one year was tolled by the employer's failure to advise the carrier of a work-related injury.

Section 409.003 of the Act provides:

> Sec. 409.003. CLAIM FOR COMPENSATION. An employee or a person acting on the employee's behalf shall file with the commission a claim for compensation for an injury not later than one year after the date on which:
>
> (1) the injury occurred; or
>
> (2) if the injury is an occupational disease, the employee knew or should have known that the disease was related to the employee's employment.

Section 409.004 of the 1989 Act then sets out the consequences of a failure to file a claim in a timely manner. It states:

> Sec. 409.004. FAILURE TO FILE A CLAIM FOR COMPENSATION. Failure to file a claim for compensation with the commission as required under Section 409.003 relieves the employer and the employer's insurance carrier of liability under this subtitle unless:
>
> (1) good cause exists for failure to file a claim in a timely manner; or
>
> (2) the employer or the employer's insurance carrier does not contest the claim.

It is unclear whether the claimant asserts that he had good cause for failing to file a claim because he was unaware that he had sustained an injury or because he was unaware that the injury might be compensable. Generally, the test for good cause has been stated to be whether the claimant acted as a reasonably prudent person would have acted under the circumstances. Texas Casualty Insurance Co. v. Beasley, 391 S.W.2d 33 (Tex. 1965). In Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948), the court stated that the good cause standard is whether the claimant prosecuted the claim with that degree of diligence that an ordinarily prudent person would have exercised under same or similar circumstances. The claimant testified that he was unaware that he could assert a new injury until he spoke with a lawyer in New Mexico on or about February 18, 2000. In Texas Workers' Compensation Commission Appeal No. 93102, decided March 22, 1993, the Appeals Panel noted that a belief that compensation is not payable for a particular injury does not constitute good cause for delay in filing, *citing* Allstate Insurance Co. v. King, 444 S.W.2d 602 (Tex. 1969). In Texas Workers' Compensation Commission Appeal No. 94129, decided March 18, 1994, we found that a claimant's lack of knowledge that a repetitive trauma was compensable or that the employer carried workers' compensation coverage did not constitute good cause for her failure to file a claim within one year. In this case, the claimant evidently believed that he had sustained an injury in _____, that the injury had worsened in _____, and was unaware of the possibility of claiming a

new injury. The hearing officer did not abuse his discretion in finding that the claimant did not have good cause for failing to file a claim for compensation within one year of the date of the alleged injury.

The claimant appeals the hearing officer's determination that the time for filing a claim for compensation was not tolled. Section 409.008 then provides for a period of tolling of limitations if the employer fails to file a report of injury. That section provides:

> Sec. 409.008. FAILURE TO FILE EMPLOYER REPORT OF INJURY; LIMITATIONS TOLLED. **If an employer or the employer's insurance carrier has been given notice or has knowledge of an injury** to or the death of an employee and the employer or insurance carrier fails, neglects, or refuses to file the report under Section 409.005, the period for filing a claim for compensation under Sections 409.003 and 409.007 does not begin to run against the claim of an injured employee or legal beneficiary until the day on which the report required under Section 409.005 has been furnished. [Emphasis added.]

the claimant asserts that the employer should have known that he had sustained a work-related injury on or about _____, or _____ (the date cited by the claimant in his appeal), or _____, because he had worsening symptoms, told his employer that he needed medical care, sought medical care, and was taken off work due to the right upper extremity injury. The claimant argues that the employer's knowledge of significant changes in the claimant's medical condition constituted actual notice or a report of an injury to the employer. It was undisputed that the claimant did not report a new injury, an aggravation of a preexisting condition, or anything other than a _____ injury to the employer until February 2000. We have previously held that to be effective a notice must advise the employer of the general nature of the injury and that the injury may be related to the employment. While the employer in this case may have believed that the claimant was suffering from a work-related injury that occurred in _____, and knew that the claimant was having worsening symptoms, the evidence before the hearing officer was factually insufficient to prove that the employer had either actual knowledge or notice that the claimant was asserting that he had sustained a work-related injury in _____.

Only were we to conclude, which we do not in this case, that the hearing officer's determinations in this matter were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The claimant appealed the hearing officer's determination that he did not sustain a compensable back injury. The claimant had offered evidence that he did not have any back problems until after he went into the hospital for surgery to his right wrist. He testified that after he awoke from surgery, he had a pinched nerve in his back and testified that his doctor had told him that it might have happened as he was being moved from one table to another in the operating room. Although the claimant's low back condition is mentioned several times in the medical records, the possible cause of the problem is not fully addressed.

In a chart note dated January 29, 1999, Dr. M wrote:

> [The claimant] is now seven weeks out status post a right scapho trapezial trapezoid fusion. He was set up a week ago for an EMG nerve conduction study for his left lower extremity due to significant pain and weakness into his left leg. Apparently this began immediately after having been in a supine position on the operating room table during his surgery and has significantly bothered him since then.

In a chart noted dated February 26, 1999, Dr. M stated:

> Also we are awaiting his decision to get with [Dr. G]. I do feel that he has a significant S1 nerve root compression. I also feel that it is certainly work related in the sense he never had any symptoms until he was placed prone on the operating room table and, therefore, I think it is related to his injury in that respect.

In a chart note dated May 25, 1999, Dr. M notes that the claimant's recovery from a scaphotrapezial trapezoid has been complicated by an S1 radiculopathy. Unfortunately, there was no evidence available to the hearing officer from which he could conclude that the low back injury was caused by the medical treatment, other than what could well have been coincidental timing of the surgery and the onset of symptoms. The hearing officer found that the claimant's low back problems were not part of the compensable injury, and that there was no connection between the surgery and the low back complaints. We find that the hearing officer's determination is not against the great weight and preponderance of the evidence.

Additionally, the claimant's appeal of the determination that he did not sustain a compensable back injury is necessarily contingent upon his prevailing on the issue of whether the right upper extremity injury was compensable. There is sufficient evidence to support the hearing officer's determination that the right upper extremity problems were not the result of the alleged injury of _____. Since the medical treatment which was rendered was not for a compensable injury, the back injury which is alleged to be the result of that treatment is likewise noncompensable.

There being no abuse of discretion and sufficient evidence to support the hearing officer's determinations in this matter, the Decision and Order is affirmed.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge