

APPEAL NO. 010851
FILED JUNE 7, 2001

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 April 2, 2001. The appellant (claimant) appeals the hearing officer's determination that the claimant did not timely report his injury to his employer and that the claimant did not have good cause for failing to timely report his injury. The respondent (carrier) responded, requesting affirmance.

DECISION

The hearing officer's decision is affirmed.

Section 409.001(a) provides that for injuries other than occupational diseases, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer or carrier, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. The claimant has the burden to show that he timely reported his injury to his employer. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). To be effective, notice of injury needs to inform the employer of the general nature of the injury and the fact that it is job related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). Thus, where the employer knew of a physical problem but was not informed that it was work related, there was not notice of injury. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied). A claimant who fails to give timely notice of injury to his employer 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 the existence of good cause is that of ordinary prudence, that is, whether the claimant prosecuted his claim with that 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). Consequently, whether the claimant has used the degree of diligence required is ordinarily a question of fact for the trier of fact to determine.

There was conflicting evidence presented as to when the employer was notified that the claimant's injury was work related. Based on the conflicting evidence, the hearing officer determined that the claimant did not report his injury within 30 days and further determined that the claimant did not have good cause for not timely reporting his injury to his employer. The 1989 Act makes the hearing officer the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The claimant argues that, "If the State of Texas through the TWCC says the injury was not reported because it can only be reported in English, then it is denying its Spanish speaking citizens equal protection under the laws and the Labor Code is then unconstitutional on this point." Our decision does not stand for the proposition that an injury can only be reported to the employer in English. It merely stands for the proposition that the notice must be communicated sufficiently to comply with the requirements of the 1989 Act. In the instant case, the claimant's supervisor provided a statement that the coworker the claimant chose to use as an interpreter to report his injury told him that the claimant had not hurt his back at work. As the sole judge of the weight and credibility of the evidence, the hearing officer could determine that a work-related injury was not reported.

The Supreme Court of Texas held the 1989 Act constitutional in Texas Workers' Compensation Commission v. Garcia, 893 S.W.2d 504 (Tex. 1995). The Commission, an administrative agency of the State of Texas, does not have the power to determine the constitutionality of statutes. State Board of Pharmacy v. Walgreen Texas Co., 520 S.W.2d 845, 848 (Tex. Civ. App.-Austin 1975, writ ref'd n.r.e). The Appeals Panel's jurisdiction is limited to reviewing Commission CCH decisions and orders. Sections 410.202 and 410.203. We do not have the power to determine the constitutionality of statutes or rules, including the 1989 Act and the Commission rules. Texas Workers' Compensation Commission Appeal No. 92275, decided August 11, 1992; Texas Workers' Compensation Commission Appeal No. 951542, decided October 25, 1995.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge