APPEAL NO. 041034
FILED JUNE 24, 2004

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 April 12, 2004. The hearing officer determined that the respondent (claimant) sustained a compensable repetitive trauma injury to his left shoulder; that the date of the claimant's injury is on or about _____; and that the claimant had continuous good cause for his late report of the injury to the appellant (self-insured) and, therefore, the self-insured is not relieved of liability herein under Section 409.002. The self-insured appealed the hearing officer's determinations regarding compensability and good cause. The appeal file does not contain a response from the claimant. The hearing officer's determination regarding the date of injury has not been appealed and has become final. Section 410.169.

DECISION

Reversed and rendered.

We deal first with the hearing officer's determination that the claimant had continuous good cause for his late reporting of the injury to the self-insured and that the self-insured is not relieved of liability herein under Section 409.002, as our decision on the good cause issue is dispositive of the case.

The claimant asserts that he sustained a repetitive trauma injury to his left shoulder due to the repetitive heavy work he performed for the self-insured, and that he didn't report the injury until October 28, 2003, because he trivialized the injury. It is undisputed that the claimant first reported the injury to the self-insured on October 28, 2003. Under direct examination, the claimant testified that he didn't know his shoulder condition was work related until November 7, 2003, when he had an MRI and his doctor informed him that the injury was work related. Under cross-examination, the claimant testified that he saw a doctor on _____, due to shoulder and knee pain; that at that point, he felt his shoulder pain was due to his work activities and told the doctor the same; and that the doctor told him he might have sprained a muscle.

A letter from the claimant's treating doctor dated January 30, 2004, indicates that she has been treating the claimant for left shoulder pain since October of 2002. The doctor states:

> I saw [claimant] initially in October 2002 at which time he complained of left shoulder pain. At that time [claimant's] shoulder pain was attributed to the position he kept his arm in while driving truck at work. At his visit in April 2003, [claimant] complained of continued left shoulder pain that had been present for several months. [Claimant] was treated with anti-inflammatory medicines without significant improvement. [Claimant] was

seen again in August 2003 and still complained of shoulder pain; he was subsequently referred to an orthopedic specialist and diagnosed with a torn rotator cuff.

On August 29, 2003, the claimant was seen by the orthopedic specialist and given an injection in his left shoulder. On February 12, 2004, the claimant underwent a left shoulder arthroscopic acromioplasty and rotator cuff repair.

Under the facts of this case, we find that the hearing officer erred in her determination that the claimant had continuous good cause for his late reporting of the injury to the self-insured and, therefore, the self insured is not relieved of liability under Section 409.002, and that the claimant sustained a compensable injury. The hearing officer based her decision upon a finding that the claimant trivialized his injury until he learned that it could be serious.

The 1989 Act provides that failure to notify the employer by the 30th day after the date on which the injury occurs relieves the employer and its insurance carrier of liability unless, among other things, the Texas Workers' Compensation Commission determines that good cause exists. Section 409.002(2). The test of good cause is whether the employee acted as a reasonably prudent person would have acted under the same or similar circumstances. Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ). Further, it is well settled that a claimant's good faith belief that his injury is trivial, with no medical evidence to the contrary, constitutes good cause. Farmland, *supra*. Reliance upon a physician's diagnosis has also been held to constitute good cause. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 92084, decided April 15, 1992, and cases cited therein.

It was the claimant's testimony and position at the hearing that he did not realize the full seriousness of his injury until after he saw the results of the MRI; that until that time he had thought it was just a muscle pull or strain. However, he also testified that he was aware that his job was causing his left shoulder pain as early as October 2002, and that he treated with his doctor for the problem since that time. Records from the claimant's treating doctor indicate that he was treated with medications, that at times his pain level was "very painful," and that the problem was severe enough for an orthopedic referral in August 2003. While it is believable that the full extent of the claimant's injury was not realized until the November 11, 2003, MRI, we cannot say from the evidence before us that the claimant was told by any doctor prior to that time that his condition was not serious. In fact, the claimant's treating doctor felt it was severe enough on August 25, 2003, to make the above-mentioned orthopedic referral. *Compare* Travelers Insurance Company v. Rowan, 499 S.W.2d 338 (Tex. Civ. App.-Tyler 1973, writ ref'd n.r.e.), which involved a delayed diagnosis of a work-related skin condition ("It is not realistic to assume from the record that she should have known something which her doctors did not ascertain for two years"); Allstate Insurance Company v. Maines, 468 S.W.2d 496 (Tex. Civ. App.-Houston [14th Dist.] 1971, no writ), wherein a doctor diagnosed a condition as being caused by something other than an industrial accident.

Moreover, the exact or specific nature of an injury or disease does not have to be known before an injured employee can be charged with taking the action of a reasonably prudent person. As we wrote in Texas Workers' Compensation Commission Appeal No. 93184, decided April 29, 1993:

> This does not mean . . . that a claimant can persist indefinitely with a severe and debilitating pain, which causes him to leave work and actively seek medical treatment, and still contend that he deemed such an injury to be "trivial." When an injury's effects cause severe and continuing pain, and an inability to do previous levels of work, following an incident at work, the fact that a claimant's doctor cannot state that a condition is related to work will not preclude the trier of fact from finding that the claimant should have appreciated both the seriousness and work-relatedness of an injury. [Citation omitted].

As we also stated in that decision, "we do not believe that the reasonably prudent person standard requires concrete medical diagnosis," citing Texas Employers' Insurance Ass'n v. Allen, 519 S.W.2d 194 (Tex. Civ. App.-Corpus Christi 1975, writ ref'd n.r.e).

Based upon the record before us, any good cause due to trivialization by the claimant ended, at the latest, on August 25, 2003, when his treating doctor referred him to an orthopedic specialist due to the pain in his left shoulder, which the claimant knew was being caused by his work activities. We find it is at that point that a reasonably prudent person would have realized that his or her complaints and symptoms were not "minor," and that good cause ended as of that date. The claimant had the obligation to report the injury to the self-insured within a reasonable amount of time after August 25, 2003.

It is undisputed that the claimant failed to report the injury to the self-insured until October 28, 2003, over 60 days after his "good cause" ended. The Appeals Panel and case law have held that good cause must continue to the date that the injured worker actually gives notice. Lee v. Houston Fire & Casualty Company, 530 S.W.2d 294, 296 (Tex. 1975); Farmland, *supra*. An injured worker owes a duty of continuing diligence in the prosecution of his claim, and that claimant must prove that the good cause exception continued to the date of notice. 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 give the required notice or 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, *supra*; Moronko v. Consolidated Mutual Insurance Company, 435 S.W.2d 846 (Tex. 1968). 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 Commission Appeal No. 93494, decided July 22, 1993. The Texas Supreme Court in Hawkins v. Safety Casualty Co., 207 S.W.2d 370, 373 (Tex. 1948) stated:

> 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.

Under the facts of this case, we cannot say that the delay of over 60 days after good cause had ended until the date the claimant reported his injury to the self-insured was reasonable.

Our review of the record indicates that the great weight of the evidence outweighs the hearing officer's determination and that thus she abused her discretion in finding continuous good cause for the claimant's failure to timely give notice. Texas Workers' Compensation Commission Appeal No. 941363, decided November 23, 1994. We accordingly reverse the hearing officer's decision and order and render a new decision that the claimant did not have good cause for his failure to timely notify the self-insured of a work-related injury, and that the self-insured is thus relieved of liability on this claim.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

COUNTY JUDGE
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Daniel R. Barry
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. Upon my review of the record, I would affirm the hearing officer’s decision.

_____
Edward Vilano
Appeals Judge