APPEAL NO. 93649

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. Section 401.001 *et seq.* (1989 Act). On June 25, 1993, a contested case hearing was held. The hearing officer determined that CCB, the respondent (claimant), did establish good cause for her failure to give timely notice of her work-related knee injury to her employer. The hearing officer ordered that the appellant, (employer), is liable for workers' compensation benefits on this claim. The employer asserts that the claimant did not establish good cause for her failure to give notice of her injury to her employer in a timely manner. The employer argues that sufficient evidence does not support the hearing officer's conclusion that the claimant suffered an injury on _____. The claimant replies that the decision of the hearing officer is clearly supported by a preponderance of the evidence, and that she, the claimant, did have good cause for failure to file a timely notice of her injury.

DECISION

Determining that sufficient evidence exists in the record to support the hearing officer's decision and that the hearing officer did not abuse her discretion, we affirm.

The claimant worked as the Director of Quality and Standards for the (psychiatric center), which was operated by the employer. She testified that she injured herself on _____, while attending a required employee training session. The instructors at the training session showed the claimant how to engage in a two person take-down of violent patients. While acting the role of the patient, the claimant testified that when two male employees executed this two-person take down on her, she twisted her knee as she was brought to the ground. The claimant continued to work after this incident, and she did not report the incident to her employer right away. She testified that she did not think her knee injury was serious and that her knee would gradually get better like the bruises she sustained from the training session. The claimant testified she had a great deal of pressure to get work accomplished, and continued to believe the knee would get better on its own when she was able to slow down at work. On June 9, 1992, the claimant resigned.

By late September the condition of her knee had steadily worsened to such an extent that her knee would sometimes "buckle." The record reveals that the claimant first saw an orthopedist, Dr. K, for knee pain on September 24, 1992, and that the doctor's notes stated that her knee injury was related to an instructional course at work in

_____. Dr. K examined the claimant and prescribed Naprosyn, an anti-inflammation drug, for eight days and put her on an isometric exercise routine for her knee. On October 2, 1992, the claimant talked to Dr. K and said that she could notice no difference in the symptoms. Dr. K decided to try her on Medrol Dosepak to try to control the swelling. On October 4, 1992, the claimant filed her notice of injury. On November 2, 1992, Dr. K suggested an MRI would be helpful, and noted that if bursitis was the cause of her pain, the knee would need to be injected. Because of financial difficulties, the claimant testified that she has not had an MRI as of the date of the hearing.

The employer presented testimony of three witnesses who were at the training session. One of the men, a fellow employee that took down the claimant, said he did not see any sign of her having suffered an injury. Two training instructors, who were both present at the claimant's training session, both testified that they did not see any sign of an injury to the claimant's knee. All three of these witnesses for the employer testified that they noticed no sign of an injury to the claimant when they saw her around work, but all three also stated that they only each saw her a few times over the time of the claimant's employment.

The employer disputed that the claimant suffered an injury on _____. An "injury" is defined as "damage or harm to the physical structure of the body." Section 401.011(26). The claimant testified that she did suffer a knee injury on _____, and that this knee injury gradually worsened. The employer presented eye-witness lay testimony to contradict that the claimant suffered an injury. The only medical evidence presented supports the claimant's testimony that she did suffer a knee injury which gradually worsened. A "compensable injury" is defined as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). No issue has been raised that the training session was not in the course and scope of employment.

Under the 1989 Act, the hearing officer is the trier of fact at the contested case hearing, and the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Section 410.165(a). The trier of fact can believe all or part or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign their testimony, and then resolves the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993; Texas Workers' Compensation Commission Appeals No. 93155, decided April 14, 1993. As the fact finder, the hearing officer has the responsibility and the authority to resolve conflicts and inconsistencies in the evidence, to assess the testimony of the witnesses, and to make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657,

decided January 15, 1993; *citing* Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Where sufficient evidence supports a fact finder's conclusions and his findings are not so against the overwhelming weight of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); *citing* Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); In Re King's Estate, 150 Tex. 662, 664-665, 244 S.W.2d 660-661 (1951). The hearing officer found that the claimant did suffer an injury that arose out of the course and scope of her employment on _____. Sufficient evidence supports this finding.

Section 409.001 requires that the employee or a person acting on the employee's behalf must notify the employer not later than the 30th day after the date on which the injury occurs. "[T]he purpose of this statute is to give the insurer an opportunity immediately to investigate the facts surrounding an injury. . . . [T]his purpose can be fulfilled without the need of any particular form or manner of notice." DeAnda v. Home Insurance Co., 618 S.W.2d 529, 532 (Tex. 1980); *citing* Booth v. Texas Employers' Insurance Ass'n, 132 Tex. 237, 123 S.W.2d 322 (1938). The claimant did not report the injury within the statutorily required 30 days, but Section 409.002(2) expressly allows an exception for failure to give notice within the 30 days of the injury date when "the commission determines that good cause exists for failure to give notice in a timely manner. . . ." Good cause for delay is an issue relevant both to notice of injury and for delay in filing a claim for compensation. The Supreme Court of Texas has stated:

> The term good cause for not filing a claim for compensation is not defined in the statute, but it has been uniformly held by the courts of this state that the test for its existence is that of ordinary prudence, that is, whether the claimant prosecuted his claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Consequently, whether he has used the degree of diligence required is ordinarily a question of fact to be determined by the jury or the trier of facts. It may be determined against the claimant as a matter of law only when the evidence, construed most favorably for the claimant, admits no other reasonable conclusion.

Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 at 372 (1948). The burden of proof rests with the claimant to establish good cause. Lee v. Houston Fire & Casualty Insurance Co., 530 S.W.2d 294 at 296 (Tex. 1975).

Good cause for failure to timely report an injury within 30 days can be based upon the injured worker's not believing the injury is serious and his initial assessment of the injury as being "trivial," but this belief must be based upon a reasonably prudent person

standard. Texas Workers' Compensation Appeal No. 91030, decided October 30, 1991; Texas Workers' Compensation Appeal No. 93184, decided April 29, 1993; Baker v. Westchester Fire Insurance Co., 385 S.W.2d 447 at 449 (Tex. Civ. App.-Houston 1964, writ ref'd n.r.e). Good cause exists for not giving notice until the injured worker realizes the seriousness of his injury. Baker, *supra* at 449. In Appeal No. 91030, *supra*, the Appeals Panel affirmed a finding of a "good cause" excuse for the injured employee, who continued working until she began her new job. At the new job the injured employee found that her injury was disabling and prevented her from doing her new job, and she notified her former employer within a few days. Her injury occurred on (date of injury for Appeal No. 91030), but she believed her injury was trivial until a few days before she called her former employer's manager.

In the present case, the claimant testified that she believed her injury to her knee would get better over time, but that her knee pain in fact became worse forcing her to see a doctor. The record indicates that the claimant believed she had a "trivial" injury, not a "serious" injury. The hearing officer found as fact that the claimant did believe that her sore and swollen knee was a minor injury which would resolve itself.

A manifest and disabling condition of which a claimant is fully aware would be a condition which would lead any reasonably prudent person to protect his rights by filing a claim. Texas Employers' Insurance Ass'n. v. Portley, 263 S.W.2d 247, 250 (Tex. 1954). Portley, the injured worker, continued to work with a hurt foot despite several doctors' advice to Portley not to work because of the "serious nature" of the injury. *Id.* at 249. In Portley, the injured worker may not have thought the injury was serious, but the Texas Supreme Court said that the injured worker's mere statement that he did not regard the injury as serious "will not raise a fact issue when the facts themselves put the matter beyond the pale of reason or beyond belief by a prudent person." *Id*. at 250. Distinguishable in the present case, the claimant continued to work until she resigned. Her knee did not improve and gradually became worse. The employer offered no medical evidence to the contrary.

"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 files the claim. Lee v. Houston Fire & Casualty Company, 530 S.W.2d 294, 296 (Tex. 1975); Farmland Mutual Ins. Co. v. Alvarez, 803 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 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 & Casualty Insurance Co., 530 S.W.2d at 297; Moronko v. Consolidated Mutual Insurance Company, 435 S.W.2d. 846 (Tex. 1968). The Texas Supreme Court has decided:

> 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.

Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370, 373 (1948). Within 10 days of her first visit with the doctor and within two days of her second discussion with him, by telephone, she filed a notice of her injury. The hearing officer found that the claimant did establish good cause under the circumstances for her failure to give notice in a timely manner under the facts of this case.

The findings of fact made by the hearing officer are supported by sufficient evidence. The hearing officer, as the trier of fact, must look to the totality of the claimant's conduct to determine if she acted as a reasonably prudent person under the circumstances. The hearing officer found as fact that the claimant's knee was injured in the course and scope of her employment on _____. Sufficient evidence supports the hearing officer's conclusions that the claimant's failure to notify her employer timely was excused for good cause because the claimant did have a reasonable and continuing good faith belief that her injury was not serious. The hearing officer's decision was not against the great weight and the preponderance of the evidence. Pool v. Ford, 715 S.W.2d 629, 634 (Tex. 1986).

Finding no reversible error and finding sufficient evidence to support the challenged findings, we affirm the hearing officer's decision and order.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge