APPEAL NO. 93711

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ? 401.001 *et seq.* (1989 Act). On July 8, 1993, a contested case hearing was held. The issues presented and agreed upon were: (1) whether claimant was injured within the course and scope of his employment with (employer) _____; (2) whether claimant timely reported his alleged injury or had good cause for failing to do so; and (3) whether claimant has experienced any disability as the result of his alleged injury. The hearing officer determined that appellant, claimant herein, had sustained an injury in the course and scope of his employment, that he did not report his injury to his employer within 30 days, that claimant's initial good cause for failure to report his injury did not continue until August 25, 1992, and that the claimant did not have disability, as defined by the 1989 Act.

Claimant contends the hearing officer erred and that good cause, once found, continued until the injury was reported. Claimant requests we reverse the hearing officer's decision. Respondent/cross-appellant, carrier herein, contends the hearing officer erred in finding an injury and on the matter of notice responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The evidence set out in the hearing officer's Statement of Evidence is a fair and accurate statement of the case, and accordingly we adopt it for purposes of this decision. Briefly summarizing, claimant testified he was a "loader operator" for (employer), the employer. Claimant stated that on _____, while getting off the loader, a log rolled and he suffered a puncture wound approximately the size of a dime, getting back on the loader. Although the wound was bleeding, claimant states he just wrapped paper around it and did not report it as he did not believe it was serious. Claimant testified he told his wife about the injury that evening and she treated it with peroxide and betadine. Claimant stated he thought this wound would heal as several other injuries he had sustained in the past had healed. Claimant testified he continued to work, and between the date of the injury and July 1992, the wound would alternately get worse and then improve. Claimant and his wife testified that about half the time claimant would be limping and complaining of the pain. Claimant and his wife testified the injury grew steadily worse during July and into August. Claimant testified around August 25th, he told his supervisor (and employer's owner), CS, that he needed to go see the doctor in (City 1). Both claimant and CS agree that upon claimant's return from (City 1), CS asked how claimant's leg was. Claimant expressed dissatisfaction with the doctor he had seen and it is undisputed that CS suggested claimant see Dr. B. Claimant saw Dr. B on September 2, 1992, and Dr. B diagnosed an infection, "mashed" the wound and took claimant off work. Claimant testified the pain became so severe that he went to the hospital emergency room (ER) on the "following Friday." The ER doctor again "mashed" the wound, prescribed medication and instructed claimant to remain off work. Claimant testified his left leg continues to hurt and

swell, sometimes gives way under him and that he is unable to work.

Claimant concedes he did not report his injury within 30 days of its occurrence, stating he thought it would heal as other injuries had done. Claimant testified he told CS he had injured his leg on the job "a week or two" before he saw Dr. B. According to the claimant, a coworker was present when he told CS he ". . . had hurt my leg coming off the loader--getting off the loader." Claimant stated he told CS that he ". . . had hurt it several months before that." CS testified claimant never told him he had a work-related accident although CS concedes he knew claimant was having trouble with his leg when claimant asked for time off to go to (City 1), knew claimant had gone to (City 1) to have the leg looked at and subsequently referred claimant to Dr. B. CS testified he never asked how claimant had injured his leg and claimant never told him it was work related. CS testified that he had paid Dr. B for claimant's visits, had paid the ER bill and had given claimant cash to cover his rent and some living expenses.

Claimant's wife testified basically supporting claimant's testimony and stating that claimant's injury had been sufficient to keep him up some nights. She also stated she believed the injury would heal as had other prior injuries. Claimant's wife stated that in July 1992, the injury became worse and she suggested that claimant see a doctor because the injury was not healing.

The medical evidence consisted of an ER report dated 9-04-92 indicating a history of an injury "4 months ago" to the left lower leg. The wound was apparently cleaned, claimant given medication and referred to Dr. B for follow-up. An Initial Medical Report (TWCC-61) from Dr. B dated 10-20-92 for a visit on 8-31-92 indicates a "trauma injury to leg 4 months ago. Lesion over medial distal tibial area, chronically festered and draining purulence at times." A treatment plan of "leg rest, no work X 10 days with office visit in 10 days" was prescribed. Claimant testified he saw Dr. B three times, once each in August, September and October. In a note dated October 20, 1992, Dr. B states "[i]n reference to item #16 dates (apparently making reference to the TWCC-61), this patient . . . was asked to call back on Wed., Sept. 30. 1992, to report progress or request for ortho referral. [Claimant] did not call my office and make any report."

Carrier, at both the CCH and on appeal, contests that a work-related injury occurred at all.

The hearing officer found that claimant sustained a puncture wound to his leg while getting off a loader on _____, that claimant did not initially realize that the injury he received on _____, was a serious injury, that in late July 1992, claimant's injury began to show signs of infection, that claimant first reported his injury to his employer on or about August 25, 1992, that claimant's initial good cause for failure to report his injury did not continue until claimant reported his injury on or about August 25, 1992, and that from August 25th until the end of 1992, claimant was unable to obtain and retain employment at

wages equivalent to the wage he earned prior to _____, but this inability was not the result of a compensable injury. The hearing officer concluded that while claimant had sustained an injury within the course and scope of his employment, that claimant did not timely report his injury and did not have good cause for failing to timely report the injury and that consequently claimant had not experienced disability.

Claimant's principal contention of error is that good cause once found, continued until his report of injury in August 1992, and that the "hearing officer did not state when such a good cause exception would fail." In Texas Workers' Compensation Commission Appeal No. 93544, decided August 17, 1993, we said "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 owed 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, *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 Appeal No. 93494, decided July 22, 1993. 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). Although the claimant may have initially had good cause, the hearing officer as the finder of fact determined that the claimant could not have believed his injury was trivial after late July 1992, when claimant's leg obviously took a turn for the worse. Good cause does not only arise from the trivial or serious nature of the injury, but the totality of the circumstances must be examined. The hearing officer determined that the claimant did not establish good cause for his failure to give notice in a timely manner under the facts of this case.

In the circumstances of this case, claimant's testimony was that his leg became worse in July and began to concern him when puss started coming from the wound. Claimant's wife testified that claimant at that time said ". . . he was going to talk to his boss man about it getting bad . . . ." The hearing officer could, and apparently did, find in late July claimant's injury had become so bad that it could no longer be trivialized. As noted

above we have declined to establish a standard that a claimant must "immediately" give notice upon realizing the injury was no longer trivial. Similarly, we decline to establish a standard, as claimant appears to suggest we do, that a "reasonable time" be 30 days and that as a matter of law we say that a period of 30 days ". . . between discovering the seriousness of the injury and reporting it falls within the time period applied by the [1989 Act]." It is within the province of the hearing officer to determine, under the totality of the circumstances, whether 30 days is reasonable and each case must rest on its own facts. We cannot, as a matter of law, say that the hearing officer abused her discretion in finding that waiting 30 days, or so, was unreasonable and the good cause for failure to report the injury did not continue until August 25th.

Regarding carrier's appeal and contention that a work-related injury was not proven by claimant, we note claimant has testified to that fact and is supported by his wife's testimony and the history recorded on the medical reports. As we noted in Appeal No. 93544, *supra*, 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 4710.165(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' n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993; Texas Workers' Compensation Commission Appeal 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 Worker's Compensation Commission Appeal No. 92657, decided Jan. 15, 1993; *citing*, Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

We find that there is sufficient evidence to support the hearing officer's determinations that the claimant's failure to notify his employer was not excused for good cause because claimant did not have a reasonable and continuing good faith belief that his injury was not serious and would heal itself after latter July 1992. Because we are affirming the hearing officer on this point, the issue of whether claimant had disability, as defined by the 1989 Act, is moot and is not discussed. The hearing's officer decision was not against the great weight and the preponderance of the evidence. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

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

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Susan M. Kelley
Appeals Judge