APPEAL NO. 941656

This appeal is brought 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 November 7, 1994. The issues before him were: (1) what is the date of injury pursuant to Section 408.007 of the 1989 Act, the date the appellant, cross-respondent (claimant), knew or should have known, that the disease may be related to his employment; (2) did the claimant sustain a compensable injury in the form of an occupational disease (silicosis); (3) did the claimant report the injury to his employer on or before the 30th day after the date of injury, and if not, does good cause exist for failing to report the injury timely; (4) did the claimant sustain disability; (5) did the employer tender a bona fide offer of light duty employment, entitling the respondent, cross-appellant (carrier) to adjust the post-injury earnings to reflect the wages of this position; (6) did the claimant file a claim for compensation with the Texas Workers' Compensation Commission (Commission) not later than one year after the date of injury. The hearing officer determined that: (1) the date of injury, the date the claimant knew or should have known that his occupational disease of silicosis might be related to his employment, was in 1991 and cannot now be reliably determined with any greater specificity; (2) the claimant sustained a compensable injury in the form of the occupational disease of silicosis in 1991; (3) the claimant did not report the injury to his employer within 30 days after the date of injury and did not have good cause for not reporting his injury to his employer until _____; (4) the claimant sustained disability commencing on June 1, 1994, and continuing through the date of the CCH; (5) the employer did not tender a bona fide offer of light duty employment entitling the carrier to adjust the post-injury earnings to reflect the wages of the position; and (6) the claimant filed a claim for compensation with the Commission on July 11, 1994, and not later than one year after the date of injury. The claimant appealed requesting that we reverse the finding of fact that he did not act as a reasonable person in delaying the reporting of his occupational disease until after April 7, 1994, and the finding that good cause did not exist for his failing to report his occupational disease until after April 7, 1994. The carrier appealed urging that the findings of the hearing officer that the claimant sustained a compensable injury, that the claimant did not realize the seriousness of his condition until April 7, 1994, that the claimant timely filed a claim, and that the employer did not make a bona fide offer of employment are not supported by sufficient evidence and are against the great weight and preponderance of the evidence. A response has not been received from either party.

DECISION

We affirm in part and reverse and remand in part.

The claimant testified that for about 25 years he worked in a quarry. The employer obtained the quarry about five and one-half years ago and the claimant worked as superintendent of the quarry. The claimant said that he went to Dr. P in 1991 and does not remember much about it. He said that he knew what silicosis was and that it was not bothering him bad. He testified that he went to Dr. P in June 1993, had a chest x-ray, and

does not recall much about the visit. He said that it was dry and dusty during the winter of 1993 and spring of 1994 and he had a lot of problems. He said that he would cough and cough and thought he might choke to death. He said that he went back to Dr. P and was told that he had silicosis from the rock dust and had to get out of the rock dust. He said that he thought that if he did not take any more rock dust it would not bother him the rest of his life. He said that shortly after he saw Dr. P on April 7, 1994, he received a report on silicosis cases that really got his attention. He testified that he tried to convince himself that he would be OK and that he could continue to work. On _____, he wrote a letter to his employer advising that he would not be able to work past May 31, 1994, because he had been diagnosed with silicosis and was told that he must get out of the rock dust. The claimant said that he talked with Mr. M, the employer's director of safety and industrial relations, in June 1994. He said that Mr. M offered him a job in truck scales, that he checked with Dr. P, and could not take the job because there was some rock dust from the trucks. The claimant said that he took cortisone pills for two months, was checked by Dr. P, and was told that he had lost 8% more of his lungs, and should not go around any rock dust. He testified that in July 1994 he went to look at the work site, saw that it was still dry and dusty, and told his employer that he would not be coming back. He said that he could work when it is warm, but that he could not work when the air is heavy from being cold or having moisture in it because he has problems breathing and could not work. The claimant introduced two letters from Dr. P. In a letter dated October 13, 1994, Dr. P stated that the claimant has progressive exertional dyspnea due to chronic silicosis and that this is an accumulative condition sustained from his long years of employment at employer. In a letter dated October 26, 1994, Dr. P wrote:

> [Claimant] is a patient of mine. He has progressive exertional dyspnea due to chronic silicosis. On April 7, 1994, I advised [claimant] he must stay away from rock dust because of the effect it would have on his condition. On July 25, 1994, I re-examined [claimant], at which time found that his condition had worsened. [Claimant] was again advised to stay completely away from rock dust. [Claimant's] chronic silicosis is an accumulative condition sustained from his long years of employment at [employer] and has produced a definite degree of disability.

The carrier introduced six pages of medical records from Dr. P; the letter from the claimant to the employer advising that he would not be able to work past May 31, 1994, because of silicosis; and letters dated June 21, 1994, and June 30, 1994, from the employer to the claimant concerning future employment. The carrier also called Mr. M. He testified that the claimant was a quarry superintendent for the employer. He said that after he received a letter from the claimant in May 1994 he sent the claimant a letter offering him light duty employment in the truck scale area in an enclosed area. He said that he and the claimant never got into the details of the light duty job and that the claimant rejected the offer. He said that about 100 trucks go over the scales each day, that there is some dust, but not as much dust as in the field area. He testified that the employer has dust masks

and respirators available and is not aware of any other claims for silicosis from employees of the employer. He said that each quarry is inspected twice each year. Medical records from Dr. P indicate that he saw the claimant in May 1991 for pain in the claimant's neck, shoulder, back, and legs. The record also reflects "[c]hronic pneumoconiosis-etiology unclear." An entry dated October 15, 1991, contains "PULMONARY SILICOSIS." Entries dated January 27, 1993, June 8, 1993, and September 17, 1993, contain "PNEUMOCONIOSIS/SILICOSIS." An x-ray report dated September 17, 1993, contains "BILAT. PNEUMOCONIOSIS, MOD. IMPROVED." The parties stipulated that the claimant filed his claim with the Commission on July 11, 1994.

We first address the issue of whether the claimant sustained a compensable injury. The burden of proof is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. While a claimant's testimony alone may be sufficient to prove an injury, the testimony of a claimant is not conclusive but only raises a factual matter for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. Where the subject of an injury is not so scientific or technical in nature as to require expert testimony, lay testimony and circumstantial evidence may suffice to establish causation. However, in cases such as the one before us where the matter of causation is not an area of common experience, expert testimony may be essential to satisfactorily establish the link or causal connection between the condition and employment. Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. The carrier argues that the claimant failed to prove as a matter of reasonable medical probability as opposed to possibility, speculation, or guess that the exposure to silica through inhalation caused his medical problems and cites Texas Workers' Compensation Commission Appeal No. 93774, decided October 15, 1993, and Texas Workers' Compensation Commission Appeal No. 94350, decided May 9, 1994. In Appeal No. 94350, *supra*, the claimant's treating doctor testified at the hearing and the hearing officer found that the claimant did not sustain a compensable injury, and the Appeals Panel found the evidence to be sufficient to support that finding. In Appeal No. 93774, *supra*, the claimant was seen by several doctors including one at the request of the carrier and the Appeals Panel affirmed a determination of the hearing officer that the claimant sustained a compensable chemical inhalation injury. Review of these two Appeals Panel decisions does not indicate that the hearing officer did not properly apply the law to the facts in the case before us. In Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994, we held that a party not bearing the burden of proof on an issue may, or may not, produce evidence to counter the evidence of the other party. The claimant introduced the two letters from Dr. P and the carrier introduced six pages of medical reports. The claimant testified to what Dr. P told him and the carrier cross-examined the claimant about what Dr. P told him.

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.). 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). An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the finder of fact even if the evidence would 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). We find that the factual determination that the claimant sustained a compensable injury in the form of the occupational disease of silicosis is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust as to warrant reversal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The date of injury for this occupational disease will be addressed separately.

We next look to the issue of whether the employer made a bona fide offer of employment to the claimant. Tex. W. C. Comm'n 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5) sets forth the requirements for a bona fide offer of employment. Mr. M testified about the offer of employment and two letters concerning the offer were admitted into evidence. Dr. P advised the claimant to stay away from the work dust and wrote that the claimant must stay completely away from rock dust. Mr. M testified that there is not as much dust at the scales as in the field, inferring that rock dust would be present. Also there is no indication that everything that Mr. M testified to concerning the offer of employment was communicated to the claimant and therefore could not be considered to be part of the offer of employment. We find the evidence to be sufficient to support the determination of the hearing officer that the employer did not tender a bona fide offer of light duty employment.

We now look to the issues of timely notifying the employer and timely filing a claim. The carrier requested that the Appeals Panel review timely reporting of the injury to the employer and timely filing a claim with the Commission with the emphasis on good cause for not timely notifying the employer. In Finding of Fact No. 7 the hearing officer found:

> 7. The date of injury for Claimant's occupational disease of silicosis was in 1991, and the date of injury cannot now be reliably determined with any greater specificity.

We have stated, especially when timely notice is an issue, that it is essential for the hearing officer to find a date of injury as defined in the 1989 Act for the type of injury. See our recent decision, Texas Workers' Compensation Commission Appeal No. 941505, decided December 22, 1994. In Texas Workers' Compensation Commission Appeal No. 941374, decided November 23, 1994, Judge Nesenholtz wrote:

> What troubles us is the fact that the hearing officer did not find a date certain

> as the date of injury, stating the latter to be "August of 1993." Under the Act, a date certain is the triggering point for the running of several time periods, including notice of injury (which, as noted earlier, must be no later than the 30th day after the date of injury, Section 409.001) and the calculation of average weekly wage (determined basically with reference to the 13 weeks immediately preceding the date of injury, Section 408.041). Depending upon the circumstances, temporary income benefits (TIBS) may be paid with reference to a date of injury (if disability continues for longer than one week, weekly income benefits begin to accrue on the eighth day after the date of injury, Section 408.082(b)), and an employee's eligibility for TIBS, impairment income benefits, and supplemental income benefits terminates on the expiration of 401 weeks after the date of injury (Section 408.083). Calculation of the forgoing time periods with certainty would be impossible with reference only to a month and year.

In the case before us, there is testimony of the claimant and some medical records. As indicated earlier, the records contain entries such as "chronic pneumonoconiosis-etiology unclear" and "PNEUMONOCONIOSIS/SILICOSIS." Even though the hearing officer found that the claimant's date of injury "was in 1991" which is a considerable time before the claimant notified the employer of his occupational disease, we reverse the determination of the hearing officer on the date of injury and remand for a specific date of injury to be determined.

Until a specific date of injury is determined, determinations on timely reporting the injury to the employer and timely filing a claim with the Commission and, if appropriate, good cause for not timely notifying or filing, cannot be made. The 1989 Act on Section 409.001(a) provides that an employee or a person acting of the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs or, if the injury is an occupational disease, the date the employee knew or should have known that the injury may be related to the employment. The 1989 Act further provides that failure to notify an employer as required by the statute relieves the employer and its insurance carrier of liability unless, among other things, the Commission determines that good cause exists for failure to provide notice in a timely manner. Section 409.002(2). Whether a claimant has good cause for failure to timely report an injury is a question of fact for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 92081, decided April 14, 1992. The guiding test is whether the claimant prosecuted his or her claim with that degree of diligence which a person of ordinary prudence would have exercised under the same or similar circumstances. Texas Workers Compensation Commission Appeal No. 93797, decided October 21, 1993. In determining whether good cause exists, the Texas Supreme Court wrote:

> 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, 372 (1948). It has been held that the good cause must continue to the date when the injured worker actually gives the notice or files the claim. 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 giving notice or filing the claim. Texas Workers' Compensation Commission Appeal No. 93544, decided August 17, 1993. Ignorance of the statutory requirements has been held not to excuse the failure to timely provide notice. Appeal No. 93797, *supra*. In Texas Worker's Compensation Commission Appeal No. 93649, decided September 8, 1993, the Appeals Panel was faced with a good cause issue in which the claimant initially thought an injury was "trivial." In Appeal No. 93649, *supra*, Judge Sebesta wrote:

> 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.
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> Hawkins v. Safety Casualty Co. 146 Tex. 381, 207 S.W.2d 370, 373 (1948). Within 10 days of her first visit 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 May 6, 1992. 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, as the trier of fact, must look to the totality of the claimant's conduct to determine if he acted as a reasonably prudent person under the circumstances. Appeal No. 93544, *supra*.

The determinations of the hearing officer concerning timely filing a claim are confusing. The findings of fact and conclusions of law on this issue are as follows"

FINDINGS OF FACT

7. The date of injury for Claimant's occupational disease of silicosis was in 1991, and the date of injury cannot now be reliably determined with any greater specificity.

17. Claimant filed a claim for compensation with the Commission on July 11, 1994.

CONCLUSIONS OF LAW

3. Claimant sustained a compensable injury in the form of the occupational disease of silicosis in 1991.

8. Claimant filed a claim for compensation with the Commission not later than one year after the date of injury.

The decision and order of the hearing officer is as follows: "Claimant did not report his injury within 30 days and did not have good cause for the delay. Carrier is not liable for benefits, and it is so ordered." It appears that the hearing officer ordered that the carrier was not liable for benefits only because the claimant did not timely notify the employer of his injury and did not have good cause for not timely notifying the employer. The carrier requests that we determine that the claimant did not file his claim within one year after the date he knew or should have known his alleged disease was related to his employment.

Since a determination of a specific date of injury has not been made, it is premature for the Appeals Panel to render a decision on the issues of whether the claimant timely notified the employer of his injury and whether the claimant timely filed a claim with the Commission, and if appropriate, whether good cause exists for not timely notifying the employer or not timely filing a claim.

We affirm the determinations of the hearing officer that the claimant sustained a compensable injury and that the employer did not make a bona fide offer of employment. The determinations of the hearing officer concerning date of injury, timely notifying the employer of the injury, and timely filing of a claim with the Commission are reversed and

remanded for the hearing officer to make findings of fact and conclusions of law not inconsistent with this decision. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge