APPEAL NO. 950148

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On September 15, 1994, a hearing was held in (city), Texas, with (hearing officer) presiding. The record, upon initial review, did not include all the audio tapes of testimony so Texas Workers' Compensation Commission Appeal No. 941399, decided December 1, 1994, remanded the case for construction of the record. Thereafter, the missing audio tape was located and an adequate record existed for review. The hearing officer added the missing tape and signed an order on December 30, 1994, adopting and republishing his original opinion without another hearing. The hearing officer held that claimant fell on (date of injury), but did not sustain a compensable injury. He also found that claimant did not timely report an injury and had no good cause for her delay. Claimant asserts that medical evidence, some of which was not offered at the hearing but is attached to the appeal, and her own testimony show that the fall caused injury. She also asserts that she gave notice of injury within 30 days to "(Cr)." While she does not dispute the conclusion of law addressing good cause, as she does such conclusions addressing injury and timeliness of notice, reference was made within her appeal to good cause based on reliance upon "medical advice rendered by" (Dr. G). Carrier replies that evidence attached to the appeal that was not in the record should not be used and that the hearing officer's decision should be affirmed.

DECISION

We affirm, as reformed.

Claimant is a surgery technician at (employer); she started her employment in March 1994 and asserts injury on (date of injury). At the hearing she described the incident as involving her foot slipping in the employer's parking garage as she was entering her car. She fell, twisting, against the bottom part of the doorway, made of metal. When referred to her statement of July 13, 1994, which said that as her foot slipped she "landed on the edge of the seat", she then testified that with one foot in the car her other foot slipped causing her to first contact the seat and then the doorway panel. She stated that she already had an appointment to see Dr. G on April 11, 1994, so she delayed medical attention until then. She added that she did not seek added medical care for two months because she was not under the employer's health plan until that time.

Claimant at the hearing did not offer the record of Dr. G, but carrier did. The hearing officer discussed Dr. G's document with both carrier and claimant in an effort to understand the markings made thereon. Dr. G's April 11, 1994, note was read as indicating a second condition addressed (the first was bronchitis) of "left leg pain" with the next word possibly being sciatica, and followed by medications. There is no history shown indicating that claimant fell or injured her left leg, even though Dr. G recorded claimant's family medical history and claimant's history of surgery to the right hip. No entry indicates Dr. G advising claimant relative to her leg pain.

Claimant did provide three documents from (Dr. S) dated in August and September 1994. In the August statement, Dr. S said that he had first seen claimant on June 24, 1994. He added that when claimant saw him in June, she gave a history of a fall getting into her car at work in April (the initial June 24th note of Dr. S was offered by carrier; it related a history of back pain and hip pain for three months - on June 24, 1994; it also related the history of her hip surgery, but made no reference to an injury, a car, or to April). In addition, claimant offered a short note of Dr. G dated September 12, 1994, which says that he saw her on April 11th and she reported "subjective left sided pain on the paralumbar area. . . ."; he prescribed medication.

Claimant's appeal contains statements of Dr. S dated in October and December 1994. Neither references a new study that changed a prior medical opinion regarding her condition. Dr. S refers to an MRI that confirms disc bulging at the L5-S1 level, but does not state the date of this examination. The MRI in evidence as carrier's exhibit 5, dated June 17, 1994, indicates "mild degenerative diffuse disc bulging" at the L5-S1 level. While the new medical documents of Dr. S were prepared after the hearing, there is no evidence that with diligence they could not have been produced at the hearing. As a result, it is not necessary to remand for the fact finder to consider them. *See* Texas Workers' Compensation Commission Appeal No. 93943, decided December 2, 1993, and Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). This case has been previously remanded.

In addition to the medical records of Dr. G and Dr. S made at the time they first saw claimant, that do not record a history of injury on (date of injury), carrier also provided records of (Dr. L) and (Dr. Gr). Dr. L, on June 21, 1993, records a history of hip pain for three months; also recorded by Dr. L was "and last week, she started having pain in her low back radiating into her buttocks. . . ." (emphasis added). She had seen Dr. Gr on June 15, 1994; he recorded, on June 15, 1994, "for the past four months this lady has suffered with low back pain which radiates to her right and left hip." He also referred to recent pain on the back of the left thigh and outside of the left leg. Neither Dr. L nor Dr. Gr mentioned anything about a fall, or a car, or April 1994.

When asked at the hearing when she first realized that it (her back and leg complaint) was a work-related condition, she answered, "the 17th of June." At that time she said someone explained the MRI findings to her. Until then, she stated that she thought she had a hip problem. (The MRI of June 17th, in addition to a disc bulge at L5-S1, shows "mild diffuse disc bulging" at L4-L5 and degenerative changes at T10-11 and T11-12). She later testified that she did not report an injury on June 17th because she did not know it was work related. She added that Dr. G had taken her off work on June 14th. Her testimony at the hearing clearly indicated that she first reported injury in July; she did not testify that she reported an injury to "[Cr]" as her appeal states. Her recorded statement of July 13, 1994, does say in answer to a question whether July 6th

was the first time she reported injury, "I was under another senior tech. guidance and at that time . . . the tech that I worked with . . . two techs that I worked with in my neuro rotation were (G) and (unclear) . . . they both knew that I had had . . . I had been working with a lot of pain and I had discussed it with (G) at one point after it happened but I didn't give much thought to it and he didn't give much thought to it either that it would be work related." The evidence includes no statement and no testimony from any senior tech.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. As the fact finder he could choose to give more weight to medical records prepared at the time the physician saw the claimant than to a medical statement prepared months later that reflects back upon the earlier event. (*See* Tex. R. Civ. Evid. 803 (6) and (7), which provide for use of records made at the time of the event to show what was communicated or not communicated.) He could question why Dr. L, who claimant saw on June 21, 1994, did not record any injury four days after claimant states that she knew that her fall had caused injury. The hearing officer could also question, not just the absence of a history of injury in any of these doctor's initial records, but also the reference to claimant's pain since February. In addition, claimant continued to work and did not seek additional medical attention, after seeing Dr. G on April 11th, until June. The hearing officer was sufficiently supported by the evidence in stating that the MRI showed no herniated disc and only mild disc bulging.

Texas Workers' Compensation Commission Appeal No. 92058, decided March 26, 1992, affirmed a hearing officer's decision that found no injury when similar complaints had been made prior to the fall in question. That opinion commented that an accident does not necessarily equate to an injury. In the case under review, the determination of the hearing officer that claimant did not sustain a compensable injury is sufficiently supported by the evidence.

Claimant's assertion in her appeal that she told a senior tech of the injury, without specifying when she told him, is not supported by any testimony on that point at the hearing but is contradicted by her testimony at the hearing which showed she first reported the incident in July. The only evidence is a reference in a statement by claimant as quoted previously; that statement also contains no specifics as to date of any conversation or evidence that the person told was in a supervisory capacity. The determination by the hearing officer that claimant did not notify her employer within 30 days after April 11, 1994, as required by Section 409.001, is sufficiently supported by the evidence.

Claimant testified at the hearing that she did not think the injury from the fall was serious, that she thought it was related to her other problem with her hip, and on appeal states that Dr. G advised her either that her injury was minor or not serious. She adds that she did not seek medical attention again until the pain was "excruciating." Because she at first thought, based in part on medical advice, that the injury was trivial and did not correctly ascribe it to the fall, she delayed notifying her employer. With medical records

indicating that claimant obtained medical care, after the initial visit, no later than June 15th when she saw Dr. G and with her assertion that her pain was excruciating at that time, the hearing officer could conclude, based on sufficient evidence, that on June 15, 1994, claimant no longer thought the injury to be trivial. In addition, claimant testified that she knew the pain was from the fall on June 17th, but did not give notice until July. Texas Workers' Compensation Commission Appeal No. 92661, decided January 28, 1993, affirmed a finding of no good cause for late notice when claimant knew of the seriousness of the injury on February 28th and stated notice was given on March 12th. Determinations as to the existence of good cause are generally ones of fact for the hearing officer to make. The test is whether a claimant used the diligence of an ordinarily prudent person. The basis for the good cause for delay must continue until the time notice is given. *See* Texas Workers' Compensation Commission Appeal No. 93544, decided August 17, 1993. Only if the determination indicates an abuse of discretion will the hearing officer's decision relative to good cause be overturned. *See* Texas Workers' Compensation Commission Appeal No. 931012, decided December 20, 1993. The determination that claimant did not show good cause is sufficiently supported by the evidence.

We note that Finding of Fact No. 15 that claimant did not have disability (*see* Section 401.011(16) for the definition of disability conditioning it upon a determination of compensable injury) is consistent with the decision and order that carrier is not liable for benefits, but inconsistent with a conclusion of law that appears to say "claimant sustained disability." Also noted is the hearing officer's Statement of Evidence in which he says, "[s]ince it was found that the claimant did not sustain a compensable injury, the claimant could not have disability." We find that the decision and order, insofar as they are based on a determination as to disability, are sufficiently supported by the evidence and the applicable finding of fact; the conclusion of law erred in omitting the word "no" before the word disability, and it is hereby reformed to read "no disability." The decision and order are otherwise sufficiently supported by the conclusions of law, the findings of fact, and the evidence of record, and are affirmed. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge