

APPEAL NO. 950297

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 in (city), Texas, on January 11, 1995, with (hearing officer) presiding as hearing officer. With respect to the issues before her, the hearing officer determined that the respondent (claimant) did not report his injury in a timely manner, that the claimant had good cause for his failure to make a timely report of the injury, and that the claimant had disability from April 27, 1994, through July 11, 1994, and from September 14, 1994, through the date of the CCH held on January 11, 1995. The appellant (carrier) requested review urging that the determination of good cause for the late reporting of the injury is so against the great weight of the evidence that it should be overturned and that the claimant has not established the presence of a compensable injury and therefore the claimant cannot have disability. A response from the claimant has not been received.

DECISION

We affirm.

The claimant, a machinist for the employer, testified that on (date of injury), he opened the drawer of a file cabinet to get additional heavy material to make parts, that the cabinet leaned toward him, that the top drawer also opened, that he tried to hold the cabinet up from a squatting position but was not able to do so, that he jumped back to keep it from falling on him, and that the lower drawer that he had opened kept the cabinet from falling all the way over. He said that (Mr. M) and (Mr. G) helped him put the cabinet back in an upright position. He said that he completed the shift without difficulty. He testified that he told his supervisor, (Mr. C), about the incident and told him that the cabinet needed to be cleaned out. He said that Mr. G cleaned it up about two or three weeks later. The claimant testified that he went to (Dr. W), his family doctor, on July 21, 1993, because his left side was bothering him. He said that he thought that it might be caused by stress and that Dr. W checked to see if he had an ulcer. The claimant said that Dr. W performed a complete physical including an EKG and did not find anything wrong with him. He said that as time went on he felt worse and went to (Dr. E), a chiropractor. He said that Dr. E performed chiropractic treatment that relieved the pain at the time, but that the pain would return after two or three hours. He testified that he did not know what the pain was related to and quit seeing Dr. E because she was not doing him any good. He said that on March 29, 1994, he went back to Dr. W who prescribed exercises. He testified that he did the exercises for about a week, got worse, and went back to Dr. W. He said that Dr. W referred him to (Dr. D), a back surgeon, who he first saw on April 19, 1994. He said that Dr. D took him off work, decided to try injections in his spine before performing surgery, and referred him to (Dr. S) for the injections. He said that when he found out from Dr. D what his problem was, he called Mr. C and told him that his spine was out of line from birth and that when the cabinet fell his spine slipped. He said that it took the doctors 10 months to find out what was wrong with him. He said that he had difficulty communicating with Dr. D and went to (Dr. H) and (Dr. M) and that Dr. M performed a spinal fusion on him on September 14, 1994.

On cross-examination he testified that he told his supervisor about the cabinet falling but he did not tell him about the injury because he did not know that he was hurt. He answered questions about his visits with doctors and denied knowing that he had injured his back until he was seen by Dr. D in April 1994. He acknowledged that he applied for disability benefits and that an insurance carrier other than the workers' compensation insurance carrier has paid for everything so far. He said that in April 1994 the doctor asked him about his work and he told the doctor about the incident with the cabinet. He said that the doctor told him that his problem was hereditary but that he did something to make his back slip. The claimant denied injuring his back in any manner other than the cabinet incident.

The carrier called Mr. M who testified that he and another worker helped the claimant set the cabinet upright and that at that time the claimant said nothing about injuring his back. Mr. C, the claimant's supervisor, testified that he makes entries of incidents and that he did not record an incident involving the claimant in May or June 1993. Mr. C said that on April 19, 1994, the claimant called him and told him that he was suffering with back pain. He said that the claimant told him that it was hereditary. Mr. C said that he asked questions to determine if the injury was work related and that the claimant did not tell him that it was job related. He said that April 28, 1994, was the first time that the claimant told him that his back injury was job related. Mr. C also said that he spoke with Mr. G and that Mr. G did not recall the incident.

The hearing officer determined that the claimant had good cause for not timely notifying his employer of his back injury. Good cause for delay is an issue that may arise both as to notice of the injury and for filing a claim. In Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948), the Supreme Court of Texas 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 fact. 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.

We have reviewed the record in the case before us and have concluded that the hearing officer's determination that the claimant had good cause for failure to timely notify his employer of his injury is supported by sufficient evidence.

The carrier also urges that the claimant did not sustain a compensable injury and therefore did not sustain disability. While some evidence on whether the claimant sustained a compensable injury was brought out at the CCH, the specific issue of compensability of the injury was not included as a disputed issue agreed to at the start of the CCH and was not fully litigated at the CCH. In Texas Workers' Compensation Commission Appeal No. 941698, decided February 2, 1995, Judge Kelley wrote:

There was no issue joined by the carrier on whether claimant had sustained a compensable injury. Although it was part of the carrier's position at the BRC that disability did not exist because the claimant had not proven he had a compensable injury, we believe that the issue of whether a compensable injury occurred is such a threshold and distinct issue it must be raised as a discreet issue, with ample notice given to the claimant to raise, if applicable, the sufficiency and timeliness of the carrier's contest. That is not done where the issue appears to come in through the "back door" on an issue of disability.

Even though the inability to obtain and retain employment at wages equivalent to the preinjury wage must be because of a compensable injury before disability exists, in the case before us the hearing officer was not required to decide the specific issue of compensability of the injury and we will not address it on appeal. The evidence is sufficient to support the determination of the hearing officer that the claimant had disability from April 27, 1994, through July 11, 1994, and from September 14, 1994, through the date of the CCH.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst

Appeals Judge