APPEAL NO. 950396

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 10, 1995, a contested case hearing (CCH) was held in (city), Texas, before (hearing officer). The issues were whether the claimant timely reported his injury (or, if not, did good cause exist); was the carrier's second notice of the Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) based on newly discovered evidence that could not reasonably have been discovered at an earlier date, or is its defense limited to the issue of timely reporting; did the claimant sustain a compensable injury on (date of injury); is the injury of (date of injury) a producing cause of the claimant's current shoulder problems or is a subsequent incident the sole cause; has the claimant experienced disability and, if so, for what periods; and did the claimant make a binding election of remedies by choosing to have his medical bills paid by his group health insurance carrier, thereby precluding recovery under the 1989 Act.

The carrier appeals the hearing officer's determinations: (1) that although the claimant timely reported his injury to a non-supervisory person, a reasonable person in claimant's circumstances could have reasonably believed that that individual was a person in a supervisory or management position; (2) that claimant had good cause for reporting the injury to a supervisor on September 18 or 19, 1994; (3) that the evidence upon which the carrier's second TWCC-21 was based could reasonably have been discovered before November 7, 1994, and that therefore the carrier's defense is limited to the reporting defense stated on the first TWCC-21; (4) that claimant sustained a compensable injury on (date of injury), which was a producing cause of his current shoulder problems; and, (5) that the claimant sustained disability from March 17, 1994, through the date of the contested case hearing. The claimant basically responds that the hearing officer's decision is correct and should be affirmed.

DECISION

The hearing officer's decision on the issue of timely notice is reversed and a new decision rendered.

The claimant was employed as a driver for (employer). He contended that he suffered a shoulder injury on (date of injury) (all dates are (year) unless otherwise indicated) after using a shovel to dislodge concrete which was hardening in the chute of his truck; he stated that the injury did not occur suddenly but that the pain came on over the course of the shoveling. At the end of that working day, he informed (Mr. RM), one of employer's dispatchers who was on duty at the time, that he had strained his shoulder at the worksite and needed to check out. He went to a hospital emergency room on March 17th and was referred to (Dr. P), an orthopedist. Patient notes from Dr. P's office indicate he was first seen on March 21st, complaining of shoulder pain of two weeks' duration but not recalling any specific trauma. The claimant continued to see Dr. P and underwent physical therapy, but ultimately had surgery to repair a rotator cuff tear on April 25th. The claimant subsequently

experienced pain in the same shoulder when he grabbed for a falling object at his home and detached his deltoid muscle; this was surgically repaired on May 31st.

Dr. P took the claimant off work on March 17th and several times thereafter. The claimant delivered the off-work slips to his employer and said he expected to receive something in the mail concerning his workers' compensation claim. In the meantime he applied for, and received, disability and health insurance benefits from the employer's group health carrier. (Ms. H), employer's secretary, testified that she handled the off-work slips claimant brought in and signed the insurance forms, but that she was not aware that this was a workers' compensation claim. (Mr. M), employer's director of industrial relations and safety, testified that the group insurance plan excludes coverage for work-related injuries.

Mr. RM, the dispatcher, testified that all drivers must check in and out with him and that he gives them their daily assignments; they also are required to call him when they arrive at, and are about to depart from, a worksite. In addition, he said that drivers are to report to him in the morning if they are calling in sick; however, he said he is not a supervisor and does not take reports of on-the-job injuries. He did not recall claimant's having told him he injured his shoulder, although he said if an employee had informed him of an injury he would have called 911 or tried to contact a supervisor.

Several witnesses testified that the employer has four supervisors, two of whom--(Mr. C) and (Mr. J)--testified at the hearing. The testimony of these two individuals, along with other witnesses, was that the employer rotated supervisors on weekends (claimant was injured on a Saturday); that dispatchers are not supervisors, are not salaried, and have no authority to hire or fire, train, or discipline employees; and that the employer has no written job descriptions or organizational chart. Mr. C testified that he is claimant's usual supervisor, but that Mr. J was the supervisor on the day of injury; neither man was told by the claimant that he had suffered a work-related injury. Mr. C said that in April the claimant asked for and received a leave of absence; he said leaves of absence were not granted for workers' compensation claims.

Sometime in February, prior to the injury which is the subject of this claim, the claimant injured his shin at work. He said he went by the office and showed the injury to the dispatcher who was on duty at the time; at that point Mr. C came in, looked at claimant's leg, and sent him to the doctor. The claimant said in September he received some paperwork in the mail concerning a workers' compensation claim, and thought it was going to be about his shoulder; however, it related to his shin injury. At that point, he inquired and found out no claim for his shoulder had ever been reported. On September 23rd Dr. P wrote a letter "To whom it may concern," stating that he had been treating the claimant for several months and that "His original injury to small rotator cuff tear is consistent with an overhead type of repetitive activity which he has described to me recently as possibly causing his injury." On October 11th the claimant completed a written Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) which was date

stamped as received by the carrier on November 3rd. Mr. C, Mr. J, and Ms. H testified that they became aware that claimant was claiming a workers' compensation injury in November.

(Mr. C), carrier's adjuster, verified that the carrier received the notice of claimant's injury on November 3rd, and that he was assigned the case on November 4th. He said that based upon his conversations with claimant and with Mr. RM he believed the only basis for dispute was claimant's allegedly untimely notice of injury, and he filed a TWCC-21 on November 7th giving this reason. (Benefits were never initiated by the carrier.) Mr. C said he had also tried to get Dr. P's records but was told they would not be available until the following week. Sometime prior to November 16th, and based upon a conversation with Dr. P's office, the carrier filed an amended TWCC-21 raising as an additional grounds for disputing the compensability of the injury; Dr. P's medical reports were not received until after the second TWCC-21 was filed.

At the outset we address the carrier's appeal of the hearing officer's determination that the evidence upon which the carrier's second TWCC-21 was based could have been reasonably discovered on or before November 7, 1994, and his conclusion of law that thus the carrier's defense is limited to the timely reporting defense included on its first TWCC-21. Section 409.021 provides that not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the carrier shall either initiate payment of benefits, or notify the Commission and the employee in writing of its refusal to pay; Section 409.022 states that the notice of refusal to pay benefits must specify the grounds for refusal which grounds constitute the only basis for the carrier's defense on the issue of compensability "unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date."

In its appeal the carrier contends there is no evidence to support the hearing officer's determination that the carrier could reasonably have discovered the compensability defense prior to the date the first TWCC-21 was filed. We note, however, that claimant's TWCC-41 gives the name of the hospital and doctor he first visited, along with Dr. P's name. Since Mr. C testified that the amended TWCC-21 was filed on the strength of a conversation with Dr. P's office, and not the medical records themselves, we believe there is sufficient evidence to support the hearing officer's determination that the crucial information could reasonably have been adduced prior to November 7th.

The carrier also complains of the Appeals Panel's interpretation of the pertinent statutory provisions and asks that we reconsider our decision in Texas Workers' Compensation Commission Appeal No. 931131, decided January 26, 1994. That decision cites the statute and the applicable rule, Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE 124.6 (Rule 124.6)--which distinguishes between a carrier which refuses to begin paying benefits and one which disputes compensability after payment of benefits has begun--and concluded that the act and rules contemplate a "pay or dispute" situation such that if a carrier files a TWCC-21 within seven days it is bound by the grounds set forth therein unless any additional defense is based on newly discovered evidence. We see no reason to depart

from the reasoning nor the holding in that case. As to whether the evidence in the instant case was "more compelling" than other cases cited by the carrier, we note that Texas Workers' Compensation Commission Appeal No. 92060, decided April 1, 1992, differs from this case in that it involved a carrier which initiated income benefits but later terminated them (and filed a TWCC-21) based upon new medical evidence which arose after the 60th day. Texas Workers' Compensation Commission Appeal No. 92038, decided March 20, 1992, like the instant case, affirmed a hearing officer's determination that the carrier could have, with reasonable diligence, discovered certain information earlier; that decision also notes that the treating doctor's name was contained in the first written notice of injury. And, in Texas Workers' Compensation Commission Appeal No. 93774, decided October 15, 1993, the panel stated that a determination whether evidence could have been reasonably discovered earlier "is committed to the sound discretion of the hearing officer" which will be overturned only upon a finding of abuse of discretion. That panel further rejected the carrier's argument that it could not determine whether to dispute compensability until its own doctor examined the claimant. Based upon the foregoing, we find no error in the hearing officer's determination of this issue.

We next turn to carrier's contention that the hearing officer erred in making the following findings:

**FINDINGS OF FACT**

6.Claimant reported his (date of injury) injury as a work-related injury to [Mr. RM], who is not a person in a supervisory or management position with Employer, on (date of injury).

8.A reasonable person in Claimant's circumstances could have reasonably believed that [Mr. RM] was a person in a supervisory or management position with Employer.

12.Claimant acted as a reasonable person in reporting his (date of injury) injury.

13.Claimant had good cause for not reporting his (date of injury) injury to a person in a supervisor position with employer prior to September 18, 1994 or September 19, 1994.

The 1989 Act provides that an employee or a person acting on the employee's behalf shall notify the employer of an injury no later than the 30th day after the date on which the injury occurs; such notice must be given to "the employer" or "an employee of the employer who holds a supervisory or management position." Section 409.001(a) and (b). Failure to file such notice relieves the employer and its insurance carrier of liability unless, among other things, the Commission determines that good cause exists. The test of good cause is whether the employee acted as a reasonably prudent person would have acted under the same or similar circumstances. Farmland Mutual Insurance Company v. Alvarez, 803

S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ). Texas Workers' Compensation Commission Appeal No. 94050, decided February 25, 1994, summarized reasons cited in Texas case law as good cause to include the claimant's belief that an injury is trivial, mistake as to cause of the injury, reliance upon the representations of employers or carriers, minority, and physical or mental incapacity; none of these circumstances exist in the instant case. In addition, case law has held that an employee's reliance upon the statements of his employer may constitute good cause. *See, e.g.*, Texas Employers Insurance Association v. Thompson, 517 S.W.2d 832 (Tex. Civ. App.-San Antonio 1974, writ ref'd n.r.e.). However, there is no evidence in the instant case that claimant was relying upon anything other than his own perception when he reported his injury to Mr. RM due to his belief that it was appropriate to report everything to the dispatcher; as his own testimony acknowledged, action on his prior injury had come from his supervisor, Mr. C. To the extent that he may have misapprehended the requirements of the 1989 Act, courts have held that ignorance of the law does not constitute good cause. Allstate Insurance Co. v. King, 444 S.W.2d 602 (Tex. 1969).

In short, we do not believe that the facts or the law support the hearing officer's determination that the claimant had good cause for not timely reporting his injury, based upon his reasonable belief that Mr. RM was a supervisor. Even if we were to accept that premise, courts have held that good cause must continue up to the date of filing. *See* Texas Workers' Compensation Commission Appeal No. 91066, decided December 4, 1991, and cases cited therein. Under the facts of this case, claimant's misapprehension about the efficacy of his notice to Mr. RM continued through repeated treatment with Dr. P, including two surgeries, during which time he had to seek health insurance benefits as well as disability benefits for the time in which he was off work. According to the claimant, he continued to be in communication with the employer during this time and there was no showing that he could not have inquired earlier as to why workers' compensation benefits had not been paid. However, the evidence shows that he did not so inquire until some six months later, after he received paperwork about his leg injury. Under the facts of this case, we hold that a finding that claimant had good cause which continued to the date of notification is against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We therefore reverse the hearing officer's finding on this issue and render a decision that the claimant did not timely notify his employer of an injury, did not have good cause for such failure, and that the carrier is hereby relieved of liability on this claim.

While our review of the remaining issues will have no effect on the disposition of this claim, we note that the evidence, though conflicting, can support a finding that claimant suffered an injury in the course and scope of his employment, and that he had disability as a result. While the medical evidence could have supported a different conclusion, the hearing officer was entitled to credit the claimant's own testimony as to the cause of his injury, along with Dr. P's September 1994 letter indicating that the injury could have occurred as claimant related. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

Based upon the foregoing, the hearing officer's decision and order are reversed and a new decision and order rendered that the carrier is relieved of liability for this claim.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge