APPEAL NO. 950407

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (city), Texas, on February 14, 1995, (hearing officer) presiding. While the hearing officer held that the claimant suffered an injury in the course and scope of his employment and had disability therefrom, the carrier appeals only the hearing officer's determination that the claimant had good cause for failing to timely report his injury to his employer. The appeals file contains no response by the claimant.

DECISION

The hearing officer's decision is reversed and a new decision rendered.

The claimant had been employed for 23 years by (employer). On (date of injury), he experienced low back pain after lifting a 50- or 60-pound metal plate; he characterized the pain, on a scale of one to ten, as a five or six. At the time, he was working with (Mr. R), and mentioned to him that he had hurt his back from lifting the plate; while the evidence showed that Mr. R sometimes filled in for the lead man, there was no showing that he was doing so at the time nor that he held any other supervisory or management position.

The claimant worked the rest of his shift that day, a Thursday, and also worked the following day. He said that by Saturday morning he could not get out of bed due to back pain and that he remained in bed through the following Monday. On December 14th he went to an emergency room where he saw (Dr. K). Patient notes from that visit reflect that claimant had been "hurting since last Thursday," but that he had "no known injury," although claimant maintained he told Dr. K about the incident at work. Claimant said that Dr. K performed no diagnostic tests, but prescribed medication. He returned to Dr. K and later sought treatment with a chiropractor, and then saw (Dr. D), who recommended an MRI which was performed January 14, 1994, and which showed a herniated disk at L4-5. Claimant subsequently had surgery to repair the disk.

The claimant had not returned to work since (date), using vacation time for the period he was home. During this time he informed his employer that he was having back problems. He said that (Ms. G), employer's area supervisor, called him while he was at home and asked whether he had been injured on the job; claimant said he replied that he did not know; Ms. G's testimony was essentially the same.

On January 4, 1994, claimant telephoned (Ms. B), employer's insurance coordinator, and as a result of that conversation he applied for and received group accident and sickness benefits. Ms. B agreed that the claimant called her on that date to say he had been out on vacation because of back problems and needed to go on sick leave; she said he did not say his injury was work related. While the group insurance forms were not in evidence, Ms. B said they would have had to be signed by the claimant and by his doctor and that the group insurance carrier would not pay these benefits for on-the-job injuries. (Mr. K), employer's

personnel manager, said that on a date he recalled as January 14, 1994, claimant called him to say he believed his back problems were caused by his work. Claimant testified that as soon as he got the results of the MRI he went to employer's personnel office to report the injury.

The hearing officer made the following findings and conclusion which are appealed by the carrier:

FINDINGS OF FACT

6.The full extent and seriousness of the Claimant's injury was not diagnosed at the emergency room or after the chiropractic examination on December 30, 1993. The claimant was left with the false impression that his injury was less serious.

8.It is difficult, if not impossible, for a layman to determine the seriousness of an injury without competent medical advice.

9.A reasonable person in the same or similar circumstances as the Claimant would not have realized that they had a serious injury prior to January 14, 1994.

10.The Claimant's belief that his injury was not serious was reasonable.

11.The Claimant's reasonable belief arose during the notice period and continued until January 14, 1994, when he gave notice of injury to his Employer.

CONCLUSION OF LAW

4.The Claimant did not give timely notice of injury to his Employer. The Claimant established a legally sufficient reason (good cause) excusing his failure to give timely notice of injury. The good cause arose within the notice period and continued through January 14, 1994, when the Claimant gave notice of injury to the Employer.

The 1989 Act provides that failure to notify the employer by the 30th day after the date on which the injury occurs relieves the employer and its insurance carrier of liability unless, among other things, the Commission determines that good cause exists. Section 409.002(2). 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). Further, it is well settled that a claimant's good faith belief that his injury is trivial, with no medical evidence to the contrary, constitutes good cause. Farmland, *supra*. Reliance upon a physician's diagnosis has also been held to constitute good cause. *See, e.g.*, Texas

Workers' Compensation Commission Appeal No. 92084, decided April 15, 1992, and cases cited therein.

It was the claimant's testimony and position at the hearing that he did not realize the full seriousness of his injury until after he saw the results of the MRI; that until that time he had thought it was a "minor problem." However, he also testified that he suffered immediate pain at the time of the lifting incident, that he informed a coworker about the pain, and that he was in bed three days because of "so much pain . . . from my back . . . from lifting that pin plate." The medical notes from Dr. K contain the doctor's impression of lower back pain, and show that medication was prescribed. The limited medical records from a chiropractic visit on December 30, 1993, state that claimant's injury was "occupational" and the diagnoses included "Subluxation 4th & 6th cervical," "2nd lumbar," and "Sacroiliac Subluxation." While it is clear that the full extent of claimant's injury was not realized until the January 14, 1994, MRI, we cannot say from the evidence before us that the claimant was told by any doctor prior to that time that his condition was not serious. *Compare* Travelers Insurance Company v. Rowan, 499 S.W.2d 338 (Tex. Civ. App.-Tyler 1973, writ ref'd n.r.e.) which involved a delayed diagnosis of a work-related skin condition ("It is not realistic to assume from the record that she should have known something which her doctors did not ascertain for two years"); Allstate Insurance Company v. Maines, 468 S.W.2d 496 (Tex. Civ. App.-Houston [14th Dist.] 1971, no writ), wherein a doctor diagnosed a condition as being caused by something other than an industrial accident.

Moreover, the exact or specific nature of an injury or disease does not have to be known before an injured employee can be charged with taking the action of a reasonably prudent person. As we wrote in Texas Workers' Compensation Commission Appeal No. 93184, decided April 29, 1993:

> This does not mean . . . that a claimant can persist indefinitely with a severe and debilitating pain, which causes him to leave work and actively seek medical treatment, and still contend that he deemed such an injury to be "trivial." When an injury's effects cause severe and continuing pain, and an inability to do previous levels of work, following an incident at work, the fact that a claimant's doctor cannot state that a condition is related to work will not preclude the trier of fact from finding that the claimant should have appreciated both the seriousness and work-relatedness of an injury. [Citation omitted].

As we also stated in that decision, "we do not believe that the reasonably prudent personal standard requires concrete medical diagnosis," citing Texas Employers' Insurance Ass'n v. Allen, 519 S.W.2d 194 (Tex. Civ. App.-Corpus Christi 1975, writ ref'd n.r.e).

Our review of the record indicates that the great weight of the evidence outweighs the hearing officer's determination and that thus he abused his discretion in finding good cause for claimant's failure to timely give notice. Texas Workers' Compensation Commission Appeal No. 941363, decided November 23, 1994. We accordingly reverse

the hearing officer's decision and order and render a new decision that the claimant did not have good cause for his failure to timely notify his employer of a work-related injury, and that the carrier is thus relieved of liability on this claim.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge