APPEAL NO. 950428

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 30, 1995, a contested case hearing (CCH) was held. The issues were:

1. Did the Claimant report an injury to the Employer on or before the 30th day after the injury, and if not, does good cause exist for failing to report the injury timely?

2. Did the Claimant sustain a compensable injury on _____?

The hearing officer determined that claimant sustained an injury to her ankle in the course and scope of employment on _____ (all dates are 1994 unless otherwise noted), and that while claimant did not timely report the injury to the employer, claimant had good cause for failing to do so. Appellant, carrier, contends that the hearing officer's decision is contrary to the preponderance of the evidence and incorrect as a matter of law. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from the respondent, claimant.

DECISION

We reverse and render a new decision.

Claimant was a licensed vocational nurse at employer's hospital. Claimant testified that at about 8:00 p.m. on _____, she twisted her ankle as she was walking down a hallway in employer's hospital. Claimant said that she felt severe pain and later reported it to her supervisor. Claimant testified she considered going to the emergency room but decided to make an appointment with her regular doctor instead. Claimant admitted to having problems with arthritis in her knees and ankles previously. On June 8th claimant saw her regular doctor, Dr. M, who told claimant that she had arthritis in her left foot and ankle. Claimant testified that she told Dr. M that her ankle was "very painful" but that he insisted it was only arthritis. Dr. M gave claimant a light duty slip and it is undisputed that claimant reported the injury and gave the light duty slip to her supervisor on June 9th. The hearing officer, however, found, as fact, that claimant "did not report her medical problem as job related. . . ." Dr. M referred claimant for a consultation with podiatry. Claimant was seen by the podiatrist, Dr. O, on June 30th. Dr. O, in a report dated June 30th, recorded a "history of left foot and medial ankle pain." Dr. O's assessment was that claimant had "[p]osterior tibial tendon dysfunction, left lower extremity." Dr. O recommended conservative treatment, use of a "CAM walker" and pain medication. Dr. O indicated that he discussed the "etiology and treatment" with claimant. Claimant was again seen in the podiatry clinic on July 12th and 26th with an assessment of "posterial tibial tendinitis" and recommendations of increased use of the walker. Claimant was apparently referred to Dr. L for a consult. In a clinic note dated July 27th, Dr. L reported seeing claimant for "left ankle discomfort," claimant's treatment by Dr. O, and that claimant "is making slow, but

measurable progress." Dr. L extended claimant's light duty, gave her parking privileges close to the building and said he wanted to see claimant again in one month.

Claimant apparently filed a written notice of injury for workers' compensation on July 27th. Carrier filed a Notice of Refused/Disputed Claim (TWCC-21) dated July 27th, disputing claimant's injury as being within the course and scope of employment and alleging lack of timely notice. The TWCC-21 recites that claimant was diagnosed as having "arthritic changes at her initial visit and was not related to a work injury." The TWCC-21, in section 14, recited that carrier's first written notice of injury was received on _____.

Claimant was seen again in the podiatry clinic on August 10th and 18th. Dr. O, in a note dated September 1st, recited he has seen claimant "since approximately June 30th of 1994. . . ." Dr. O stated that claimant "while at work, sustained an ankle sprain. . . ." Other reports dated September 16th, December 29th and January 3, 1995, have essentially the same information. An "orthopaedic surgery note" dated January 12, 1995, diagnoses:

1. LEFT leg muscle pull.

2. Clinical rupture or attenuation of the posterior tibial tendon.

The report specifically recommended against surgery.

The hearing officer, in his statement of the evidence, made the following points:

> Claimant contended she had kept Employer appraised of her injury since the incident of _____. Claimant further contended she did not attribute her injury to her work with Employer until she realized the seriousness of her injury and after speaking with the medical support staff of [Dr. L] on July 27, 1994.
>
> Claimant said she immediately reported her injury as job related to Employer on July 27, 1994.
>
> Carrier submitted a TWCC-21 as an exhibit at the hearing which indicated Carrier was first notified of Claimant's injury on _____.
>
> The disputed determinations were:

FINDINGS OF FACT

7. Claimant did not report her injury until July 27, 1994, to Employer because Claimant trivialized the nature and extent of her injury until her medical condition was diagnosed on June 30, 1994, by a podiatrist.

8. Claimant exercised that degree of diligence as an ordinary prudent person would have exercised under the same or similar circumstances when Claimant failed to report her injury to Employer until July 27, 1994.

CONCLUSIONS OF LAW

3. Claimant had good cause for failing to report the injury timely to Employer.

4. Claimant sustained an injury in the course and scope of employment with Employer on _____.

Carrier appeals those determinations on the basis that claimant's testimony was that she had severe pain when she turned her ankle and cites Texas Workers' Compensation Commission Appeal No. 93184, decided April 29, 1993, for the proposition "that if testimony of the claimant is given to show the pain was severe, then this contradicts the contention that the injury was considered trivial." We generally agree with that statement; however, in the instant case, claimant promptly consulted a doctor and, according to claimant, was told she had arthritis. Claimant further testified that she told Dr. M how painful the ankle was and that Dr. M "insisted it was only arthritis." A good faith belief by a claimant that the injury is not serious may constitute good cause so long as such belief would have been entertained by a reasonably prudent person in the same or similar circumstances. King v. Texas Employers' Insurance Association, 416 S.W.2d 533 (Tex. Civ. App.-Amarillo 1967, writ ref'd n.r.e.). Further, advice from a physician to the effect that an injury is not serious may constitute good cause provided that the claimant acts reasonably and with ordinary care in believing and relying upon such advice. Travelers Insurance Company v. Rowan, 499 S.W.2d 338 (Tex. Civ. App.-Tyler 1973, writ ref'd n.r.e.). The Appeals Panel has frequently held that reliance on a physician's opinion can be held to constitute good cause for delay in reporting. Liberty Mutual Insurance Company v. Wilson, 495 S.W.2d 579 (Tex. Civ. App.-Texarkana 1973, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 94875, decided August 19, 1994. In this case claimant relied on Dr. M's assurances that the cause of her pain was "only arthritis" and the hearing officer is supported in determining that constituted good cause.

Carrier next argues that the Appeals Panel has held "in numerous decisions

regarding good cause, good cause must be continuous" and that if "good cause is found to have existed at the beginning . . . it certainly should have ended with the exam of June 30, 1994, by the podiatrist." The Appeals Panel and case law have held that good cause must continue to the date that the injured worker actually gives notice. Lee v. Houston Fire & Casualty Company, 530 S.W.2d 294, 296 (Tex. 1975). Farmland Mutual ins. Co. v. Alvarez, 803 S.W.2d 841, 943 (Tex. Civ. App.-Corpus Christi 1991, no writ). An injured worker owes a duty of continuing diligence in the prosecution of his claim, and that claimant must prove that the good cause exception continued to the date of notice. Texas Casualty Insurance Company v. Beasley, 391 S.W.2d 33, 34 (Tex. 1965). Even if a claimant at one point had good cause, the claimant must act with diligence to give the required notice or notify the employer of a claim or to file a claim. The totality of a claimant's conduct must be primarily considered in determining ordinary prudence. Lee v. Houston Fire & Casualty Insurance Co., 530 S.W.2d 297; Moronko v. Consolidated Mutual Insurance Company, 435 S.W.2d 846 (Tex. 1968). The Appeals Panel has refused to establish a standard that a claimant must "immediately" give notice to perfect a finding of good cause for delay in giving timely notice. Texas Workers' Compensation Commission Appeal No. 93494, decided July 22, 1993. The Texas Supreme Court in Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370, 373 (1948) stated:

> 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.

Section 410.165(a) provides that the hearing officer, as the finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness including the claimant. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We give great deference to the hearing officer in making factual determinations. An appeals body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier 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).

As noted above, we agree with the hearing officer's determination that claimant initially had good cause for trivializing the nature and extent of her injury based on Dr. M's statements. The hearing officer then makes a factual determination that claimant's trivialization ended when "her medical condition was diagnosed on June 30, 1994, by a podiatrist." We note that determination is supported by Dr. O's report and the fact that Dr.

O prescribed a walker for claimant. The hearing officer further makes the factual determination that claimant did not report her injury until July 27th. (Although another fact finder may have found that claimant reported her work-related injury on _____, which could be supported by carrier's TWCC-21, but that alone is not a sufficient basis on which to overturn the hearing officer's determination.)

As noted above, good cause for failing to give timely notice must continue until notice is given (i.e., until July 27th). Claimant ceased having good cause when the hearing officer determined claimant's medical condition was diagnosed on June 30th. In accordance with the Supreme Court's direction in Hawkins, *supra*, the Appeals Panel has refused to establish a standard that a claimant must "immediately" give notice to prefect a finding of good cause for delay in giving timely notice, Texas Workers' Compensation Commission Appeal No. 93494, decided July 22, 1993; however, notice must be within a "reasonable time." (*See* Hawkins, *supra*.) Although minds may differ as to what constitutes a "reasonable time" to give notice after the good cause has ceased to exist (in this case, according to the hearing officer on June 30th), 27 days (i.e., until July 27th) is untimely as a matter of law. Other cases have held that as long as 10 days was timely, Texas Workers' Compensation Commission Appeal No. 941656, decided January 26, 1995; and Texas Workers' Compensation Commission Appeal No. 93649, decided September 8, 1993; while 45 days was not timely, Texas Workers' Compensation Commission Appeal No. 94975, decided September 2, 1994, and 30 days was not timely. Texas Workers' Compensation Commission Appeal No. 93711, decided September 10, 1993. Consequently, we reverse the hearing officer's determination that claimant exercised due diligence in failing to report her work-related injury for 27 days after the hearing officer had determined that good cause had ceased to exist.

Accordingly, we reverse the hearing officer's decision and, based on the hearing officer's factual determinations, conclude that as a matter of law, claimant filed to give timely notice of her work-related injury and that good cause failed to extend to the time that claimant did give notice. Carrier is relieved of liability based on claimant's failure to give notice and lack of good cause for failing to do so. Section 409.002.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge