APPEAL NO. 000931

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 6, 2000. The hearing officer determined that the appellant (claimant) sustained an injury on _____, in the course and scope of employment; that the respondent (carrier) is relieved from liability because of claimant's failure without good cause to timely notify the employer of the claimed injury; that claimant is barred from pursuing workers' compensation benefits because of an election of remedies; and that claimant did not have disability. The claimant appeals the determinations of no good cause for lack of timely notice; no disability; and election of remedies, expressing her disagreement with them. The carrier replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The finding of a work-related injury has not been appealed and has become final. Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant worked as an administrative assistant to the human resources manager. She said she injured her knee and low back on _____, at approximately 5:00 p.m. when "bending over to lock a file cabinet and another employee said something funny and I raise[d] up laughing. When I raised up I twisted to the left and my feet did not move causing the knee to twist." She said she did not realize she was hurt until she got home that day and felt pain in her lower back and knee. On August 20, 1999, Dr. U, her family doctor, diagnosed left knee and hip pain and sciatica. She was later diagnosed with lumbar herniation for which she underwent surgery on October 8, 1999, by Dr. H. Dr. H concluded that the knee pain came from compression of the L4 nerve root caused by the herniation.

Section 409.001 requires generally that an employee notify the employer of an injury not later than 30 days after the injury occurs. Failure to do so absent good cause relieves the employer and carrier of liability for benefits. Section 409.002. The purpose of the notice provision is to give the carrier the opportunity to expeditiously investigate the circumstances of the claimed injury and determine whether to initiate benefits or not. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). The test of good cause to excuse an untimely reporting is that of ordinary prudence, that is, whether the employee has prosecuted the claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Company, 207 S.W.2d 370 (Tex. 1948). Commonly recognized good cause excuses include trivialization of the injury, mistakes about the cause of the injury, reliance on the representations of employers or carriers, young age of the claimant, reliance of medical advice, and physical or mental incapacity. Ignorance of the law, reliance of the advice of third parties, or lack of a precise diagnosis are generally not considered good cause. *See* Texas Workers' Compensation Commission Appeal No. 94050, decided

February 25, 1994. Although immediate reporting upon the termination of good cause is not necessarily required, the good cause relied on by a claimant for untimely reporting an injury must continue more or less up to the time the report is actually made. Texas Workers' Compensation Commission Appeal No. 93677, decided September 21, 1993. Whether good cause exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 990494, decided April 22, 1999.

The claimant testified that she did not give her employer or supervisor, Ms. G, notice of her injury until October 18, 1999, a month beyond the 30-day period for timely notice. When directly asked at the CCH why she waited this long, she said:

> I did not know that it was a job-related incident until after I had talked with my surgeon, [Dr. H], as far as the cause of the incident. And at that point, that's when he explained . . . was when the twisting of the knee and the pain it—the muscles and the nerves are centered at the back. And so, therefore, a person without medical knowledge would not know actually that it was the disk that was causing the problem.

Other evidence of the claimant knew about the cause of her injury and when she knew it included a transcription of her recorded statement with an adjuster. In this statement, the claimant said she told Dr. U at her first visit, after Dr. U asked her what she was doing at the time, that she was leaning over the file cabinet and straightening up. She also testified that medical tests were run, including an MRI on September 3, 1999, and blood work on or about September 28, 1999, to eliminate other possible causes of her back pain.[1] The claimant also said that before her surgery she talked with her surgeon and neurologist who "explained to me that the knee–the muscles in your nerves are all centered at the lower back. And when I twisted, it twisted and the knee twisted and so the nerve and the muscle twisted along to the back. And then that 's when the disk clamped down on the nerve and the muscle. So at that point that's when I realized that it was from the twisting. . . ." The claimant also said that on the day after surgery, she asked Dr. H if the incident at the file cabinet "caused it" and he said "yes."

The hearing officer commented in his decision and order that the claimant did not establish good cause for untimely reporting, because the evidence showed she had some knowledge that her actions at work on _____, played a causative role in her injury and she gave this history to her doctors, including her family doctor the day after the injury occurred. The hearing officer further commented that even if good cause existed by virtue of a mistake as the cause of her injuries, that good cause would have ended on the date of her surgery. In her appeal of this determination the claimant asserted that she did not know "how I was injured" until an MRI on October 1, 1999, and until Dr. H "explained" it in the discussion with him on October 9, 1999. She also takes issue with the comments of

[1]The claimant was admitted to the hospital on September 28, 1999; the operation was on October 8, 1999; and she was discharged from the hospital on October 12, 1999.

the hearing officer that she had several opportunities to timely report the injury to Ms. G, and contends that she did not have as many opportunities as the hearing officer believed.

We have held that whether a claimant has good cause for not timely reporting an injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, 1992. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. In this case, the evidence was in some conflict about whether the claimant attributed her pain to the incident at work almost immediately after it occurred or later. What is apparently undisputed is that the claimant waited some nine days after confirming the cause with Dr. H on October 9, 1999, until she finally reported it on October 18, 1999. She did not account for what she did during this time that may have further impeded notice or why she waited until October 18, 1999, to give notice. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination of the hearing officer that the claimant without good cause failed to give timely notice of her injury to her employer.

The hearing officer also found that the claimant was barred from pursuing workers' compensation benefits under the election of remedies doctrine because she chose to pursue group health medical benefits and the benefits of a short-term disability policy. *See* Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980). In support of this conclusion, the hearing officer found that the claimant "made an informed choice between two inconsistent remedies as to constitute manifest injustice." Finding of Fact No. 7. Whether there has been an election of remedies also presents a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 972051, decided November 13, 1997. Presumably, the manifest injustice found by the hearing officer is the receipt of group health and short-term disability, but it is unclear how this is an injustice to the carrier in this case. In Texas Workers' Compensation Commission Appeal No. 990022, decided February 19, 1999, we noted that the "mere filing of health care claims" is not enough to establish an injustice and that relief under an election of remedies theory should be "imposed sparingly." *See also* Texas Workers' Compensation Commission Appeal No. 990525, decided April 16, 1999, for a discussion of "informed choice." We conclude that the hearing officer's finding of fact and conclusion of law on this issue are against the great weight and preponderance of the evidence. For this reason, we reverse that determination and render a decision that the claimant did not make an election of remedies to the exclusion of workers' compensation benefits.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

For the foregoing reasons, we affirm the decision and order of the hearing officer that the claimant failed without good cause to give the employer timely notice of the injury. We reverse the determination that the claimant made an election of remedies and render a decision that the claimant did not make an election of remedies. The carrier is not liable for benefits.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

CONCUR IN PART; DISSENT IN PART:

I concur with the majority decision in all but the affirmance of the election of remedies issue. I dissent on that issue because I am not convinced that the hearing officer's determination of that issue is against the great weight of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 950636, decided June 7, 1995, and Texas Workers' Compensation Commission Appeal No. 962512, decided January 27, 1997.

Philip F. O'Neill
Appeals Judge