APPEAL NO. 92657

A contested case hearing was held on November 12, 1992, at (city), Texas, (hearing officer) presiding as hearing officer. She determined that the appellant (claimant) sustained a compensable injury but that she failed, without good cause, to timely report her injury. Benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art 8308-1.01 *et seq* (Vernon Supp. 1993) (1989 Act), were accordingly denied. Claimant, on appeal, argues that good cause was shown and urges that the decision be reversed and that benefits be awarded. Respondent (self-insured) asks that the decision be affirmed since there is sufficient evidence to support the hearing officer's finding that the claimant did not have good cause for failing to report her injury within 30 days.

DECISION

Determining there is sufficient evidence of record to support the decision of the hearing officer, we affirm.

The issue as to the compensability of the claimed injury was decided in favor of the claimant, has not been appealed, and will not be set out herein other than for background purposes. The claimant had a part-time position with the self-insured when on December 30 and 31, 1991, she sustained a back injury moving and lifting school furniture. The injury was not realized to be work related until (date of injury 1). After December 31, the claimant had not been called back to perform any part-time work with the self-insured. The claimant stated that although she felt no pain at the time, she started to feel leg pain a few days following December 31st, but attributed that to not being used to standing on concrete. The pain gradually became more severe and on (date of injury 1) she went to an emergency room, was subsequently diagnosed as having a ruptured disc, and underwent surgery on January 20th. When she went into the hospital she gave her husband's group health insurance policy as the insurance coverage. She testified that (date of injury 1), was the first time that she knew that she had sustained a severe injury which was caused by her employment. She stated that she could have reported the injury that date and that the only reason she did not report her injury to the self-insured until (date of injury 2), was because prior to that date she believed she was not covered under workers' compensation as a part-time worker. She said she held this belief because shortly before her injury, she was engaged in a general conversation with other coworkers and supervisory personnel wherein it was mentioned that one of the coworkers was about to have knee surgery. (The record does not indicate if the knee surgery was work related.) According to the claimant, the janitorial supervisor said that part-time workers did not have insurance coverage. Claimant indicated she erroneously understood this statement to include worker's compensation coverage.

(Mr. S), the assistant superintendent for the self-insured, testified that the first he was aware that the claimant asserted she had been injured on the job was on (date of injury 2), when she came to his office to discuss her injury. When she indicated that the injury was about December 31, Mr. S stated that he did not think her injury would be covered because

it was not reported within the statutory time. Mr. S testified that the self-insured is, and was on the date of the injury, in compliance with all the posting requirements to show employees are covered by workers' compensation and that notices are posted in several locations where claimant was working. A statement of the janitorial supervisor in the record indicated that the claimant never reported any injury to her and that she, the supervisor, "did not inform any substitute employee or full time worker that they were not covered by workers' compensation insurance."

The hearing officer concluded that the claimant failed to timely report her injury and that she did not have good cause for such failure. Concerning the requirement to report an injury, the 1989 Act provides, in pertinent part, in Article 8308-5.01 that:

> (a)An employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs.
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> * * * * *

and in Article 8308-5.02;

> An Employee's failure to notify the employer as required under Section 5.01(a) of this Act relieves the employer and the employer's insurance carrier of liability under this Act unless:
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> (1)the employer or person eligible to receive notification under Section 5.01(c) of this Act or the insurance carrier has actual knowledge of the injury;
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> (2)The commission determines that good cause exists for failure to give notice in a timely manner; or
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> (3)the employer or insurance carrier does not contest the claim.

Under the facts of this case, only the "good cause" provision was raised by the evidence.

The claimant has the burden of proving that good cause exists for his or her failure to give notice of injury within the time required by the workers' compensation law. *See* Adams v. Texas Compensation Insurance Co., 573 S.W.2d 612 (Tex.Civ.App.-Houston [1st Dist] 1978, no writ). Good cause is an issue that can arise in notification of injury situations as well as in failure to file a claim within the statutory requirements. *See* Articles 8308-5.01(b) & 5.03(1). Good cause for failing to timely comply with notice and filing requirements is that legal excuse which prevents a reasonably prudent person from complying with the requirements, and whether a claimant has shown good cause for failure to timely file under the ordinarily prudent person test is usually a question of fact to be

determined by the trier of fact. Farmland Mutual Insurance Co. v. Alvarez, 803 S.W.2d 841 (Tex.App.-Corpus Christi 1991, no writ). The test for good cause is that of ordinary prudence, that is, whether the claimant 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 Co., 207 S.W.2d 370 (Tex. 1948).

A bona fide belief that an injury is not serious or is trivial, only to discover later, and after statutory notice or filing requirement have passed, that it was serious, has been held to be sufficient to uphold a determination of good cause. *See* Texas Casualty Insurance Company v. Crawford, 340 S.W.2d 110 (Tex.Civ.App.-Amarillo 1960, no writ); Alvarez, *supra*. On the other hand, it has been held that bad advice from an attorney as to time for filing a claim for workers' compensation did not constitute good cause for failure to timely file a claim. St. Paul Fire and Marine Insurance Co. v. Lake Livingston Properties, Inc. 546 S.W.2d 404 (Tex.Civ.App.-Beaumont 1977, writ ref'd n.r.e.). And in Texas Workers' Compensation Commission Appeal No. 92037, decided March 19, 1992, we noted that the Supreme Court of Texas has stated that a belief that compensation is not payable for the particular injury does not constitute good cause for delay in filing. Allstate Insurance Co. v. King, 444 S.W.2d 602 (Tex. 1969). A mistaken belief concerning the correct employer was not good cause for failing to meet time requirements. Texas General Indemnity Co. v. McIlvain, 424 S.W.2d 56 (Tex. Civ. App.-Houston [14th Dist.] 1968, writ ref'd).

In commenting on the 30 day notice requirement in Applegate v. Home Indemnity Co., 705 S.W.2d 157, 159 (Tex. App.-Texarkana 1985, writ dismissed) the court of appeals stated that the purpose is to give the insurer opportunity to immediately investigate the facts surrounding the injury. The court went on to state:

> Yet, the test, well established by precedents, is not whether the insurer was harmed by the delay, but rather whether or not the injured worker was prudent in his beliefs that caused the delay. Such a test has the effect of punishing a worker for his poor judgement or ignorance, even though no harm resulted from his inaction.
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> Nevertheless, this court is bound to abide by the jury's finding by numerous precedents unless the jury's finding is against the great weight and preponderance of the evidence and reasonable minds could not differ as to the conclusion to be derived therefrom.

The court in Applegate also observed that Texas courts have consistently held that an employee's ignorance of provisions of the Workers' Compensation Act does not constitute good cause. 705 S.W.2d at 160: *See generally* Texas Workers' Compensation Desk Book Korioth and Southers, Workers' Compensation Publishing Co. Inc., Austin Texas, 1980, Chapter 15, pp. 155-164, for a discussion of excuses for late notice or late filing.

As we have repeatedly stated, the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence

(Article 8308-6.34(e)), and it is within the authority and responsibility of the hearing officer to resolve conflicts and inconsistencies in the evidence, assess the testimony of the witnesses and to make findings of fact. Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992; Article 8308-6.34(g). Where there is sufficient evidence to support the determinations of the hearing officer, as we find here, there is no sound basis to disturb the decision. We do not find that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Pool v. Ford Motor Co. 715 S.W.2d 629 (Tex. 1986)

The newly raised assertion on appeal that the claimant "was physically and mentally incapacitated between (date of injury 1) and (date of injury 2)," thus causing her to be unable to timely notify her employer of her injury, is simply not supported by the evidence, and more specifically, by the claimant's own testimony. We do not decide here whether an incapacity as postulated in the request for review would provide a good cause basis for failure to provide timely notice of injury.

The decision is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge