

## APPEAL NO. 93152

A contested case hearing was held in (city), Texas, on January 29, 1993, (hearing officer) presiding as hearing officer. He determined the appellant (claimant) did not timely report an injury to his employer and that no good cause existed for the failure to do so. Accordingly, benefits were denied under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). Claimant asks us to review the hearing officer's denial of a request for continuance, to review his decision denying him benefits and to grant another hearing so that he can be represented by legal counsel and allowed to present good cause for failure to timely notify his employer of his injury. Respondent (carrier) urges that we affirm the hearing officer's denial of the requested continuance and his decision that good cause for failure to timely notify the employer of the claimed injury was not established.

### DECISION

Finding the decision of the hearing officer to be sufficiently supported by the evidence, we affirm.

The single issue before the hearing officer was whether the claimant timely reported an injury to the employer within 30 days from the date of the injury as required by Article 8308-5.01 and if not, whether there was good cause for such failure. The hearing got off to a rocky start largely because two previously scheduled hearing dates were rescheduled because the carrier's counsel was unable to get to (city) because of inclement weather. Because of claimant's objection to the delays, the hearing officer began the contested case hearing by conducting a hearing to see if there was good cause for the delays. After hearing testimony and taking evidence on the matter, he found good cause for the delays and further permitted the carrier's counsel to appear at the January 29, 1993 hearing via telephonic hookup because of a court appearance conflict. An adjuster for the carrier was present at the hearing. Although we do not find error requiring corrective action in the procedure permitted by the hearing officer, it is not encouraged and should be avoided. Difficulties became apparent when previously unexchanged (yet potentially admissible) items of evidence were offered into evidence and review of them by opposing counsel necessitated a description of them or reading of the entire document over the phone.

The claimant was a "Z" employee of the state which, we gather from his explanation at the hearing, was a temporary position and involved individuals hired for a particular project. In any event, it was determined and agreed, according to the claimant, that the employment would end on (date of injury). In the afternoon on that date, a Friday, the claimant and his immediate supervisor were moving a desk when the claimant felt a pain in his back. He rested over the weekend and went to his doctor on Monday. Medical records of the examination indicate "tender low back and Rt rib, Rib subluxed tender, Dx Paravertebral muscle spasm, subluxed rib, Rib reduced." The claimant did not notify the employer about his injury until sometime in late August or early September (the evidence is not definitive as to an exact date). Regarding the issue of timely notice, the claimant's

single position was that he did not report the injury to his employer within the required 30 days, because after (date) he did not have an employer. In the claimant's view, his employment was ended after (date) and he therefore did not have an employer for the purpose of reporting the injury of (date). The hearing officer specifically, and in some detail, questioned the claimant about the basis for a showing of good cause, and the claimant specifically disclaimed that it was because of thinking the injury was trivial (a position indicated in the benefit review officer's report) or that he did not think he was covered by workers' compensation (also indicated in the benefit review officer's report). Regarding this matter the following occurred at the hearing:

H.O.:You're taking the position that you had good cause for late reporting because you were no longer an employee?

Claimant:Absolutely , unequivocally.

H.O.:Is that the only reason?

Claimant:Absolutely.

The claimant went on specifically to disclaim what the benefit review officer set forth as the positions of the parties in his report. The claimant acknowledged that even after (date), he knew the individuals who occupied the various levels of supervision for the employer and knew the phone number of the regional supervisor. The hearing officer explained to the claimant that he did not believe there was any basis for good cause for not timely reporting an injury on the basis that claimant's employment ended on (date). Because of the rejection of some of claimant's documents on the grounds of failure to exchange, and because of the position taken by the claimant, the hearing officer advised the claimant "do you want to ask for a continuance and exchange them and I will take this case up another time and give you a chance to brief the law---I'm willing to do that." The claimant asked for and was given a recess after which he elected to continue with the case. After he presented the rest of his case, the claimant became somewhat agitated and stated he wanted a continuance so he could obtain legal representation. The carrier objected to any continuance at that point, and stated that it had no other evidence to present and was resting. Carrier urged that the claimant's only reason for wanting a continuance at that late point was because the case wasn't going the way he wanted it to and further, that he had had adequate time to obtain counsel if he so desired.

Under the circumstances, we do not find any abuse of discretion on the part of the hearing officer in denying the request for continuance at the end of his case. He had specifically asked the claimant earlier in the proceedings if he desired a continuance and indicated that he would grant one if he so desired. The claimant rejected the offer and elected to continue with the presentation of his case. A request for continuance is a matter within the sound discretion of the hearing officer. See Texas Workers' Compensation

Commission Appeal No. 91041, decided December 17, 1991. Unless there is some abuse of that discretion, and we find none, the ruling should not be disturbed. Gibraltar Savings Association v. Franklin Savings Association, 617 S.W.2d 322 (Tex. Civ. App.-Austin 1981 writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 92265, decided August 5, 1992.

We also find that the hearing officer's decision "that no good cause exists for the [claimant's] failure to timely notify [the employer] that he claimed an injury to his back occurred on (date of injury)," is sufficiently supported by the evidence and is legally correct. We have set forth in some detail the various bases for showing good cause for untimely notice under Texas case precedent. Texas Workers' Compensation Appeal No. 92657, decided January 15, 1993. Among other things, ignorance of the law, mistake as to the correct employer or following poor or erroneous advice has been held not to be good cause. We find no basis to disturb the hearing officer's decision that good cause was not established in this case.

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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Lynda H. Nesenholtz  
Appeals Judge