APPEAL NO. 93611

On June 18, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The sole issue determined at the contested case hearing was whether claimant had good cause for failing to timely file a claim for an injury he sustained on (date of injury), while in the course and scope of his employment as the Chief of Police for the City of Alto, Texas, a self-insured governmental entity. The hearing officer determined that the claimant filed a claim for workers' compensation on February 8, 1993, and did not have good cause for not timely filing his claim during the twelve month period following the injury, as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.01(b) (Vernon Supp. 1993) (1989 Act).

The claimant has appealed, arguing that he was not allowed enough latitude to cross-examine one of the carrier's witnesses, (Ms. R), about litigation initiated against her. He disputes the hearing officer's finding that he did not miss regularly scheduled work days because of his injury, arguing that he did miss time from the injury but was able to adjust his work schedule to accommodate his injury. The claimant also argues that he felt his injury was not serious, and that his employer should have furnished instructions to him about filing a claim which would have informed him of the one year deadline for filing a claim. The carrier responds that the decision of the hearing officer is supported. The carrier further asks that the Appeals Panel "comment" on the propriety of allowing both the ombudsman and the claimant to question witnesses.

DECISION

We affirm the hearing officer's decision.

The facts in this case are unfortunate from the perspective that no one disputed that the claimant injured his back on (date of injury), while holding a part of a wrecked car off the throat of a woman who was pinned inside the car. The "Jaws of Life" equipment was not correctly functioning. His witness (Mr. B), who was the town's mayor at the time, was on the scene and testified that he heard claimant's back pop. Numerous witness statements verify the incident and subsequent back pain experienced by the claimant. Also undisputed was the fact that claimant did not file a claim for compensation with the Texas Workers' Compensation Commission (Commission) until February 8, 1993, and he stated that he did so when he was informed by an attorney that there was a one-year limitation on filing a claim. The claimant stated that he did not seek a doctor's medical treatment for his back until February 8, 1993. Between the date of injury and the date of seeing a doctor, claimant testified that he self-medicated his back with ice packs, heat packs, and Ibuprofen. This was corroborated by claimant's wife and several witness statements from persons who saw the claimant at times after his injury with ice packs on his back, and who also observed him in pain.

The claimant stated that he went to the employer's city administrator, Ms. R, to ask if the city would buy him a back brace for his pain. He stated that he asked if she could

recommend a doctor and she said she could not. The claimant stated that he asked her if further paperwork would be necessary and Ms. R responded that there was none that she knew of. The claimant stated that the city also bought claimant some over-the-counter pain medication from petty cash. The claimant indicated that he was terminated around April 1992, by the city council, apparently after an FBI investigation conducted for reasons that were not put into the record. The claimant stated that after he left the city, he made no further contact with them until his claim was filed because he wanted no further contact.

When questioned about a 16 month delay in seeing a doctor, both claimant and his wife testified that he was not a person with a tendency to run to doctors. The claimant stated that the pain had initially been around a "7" out of a "10" scale at the time of the accident and in the months until his termination. The claimant said that as his lifestyle at home was more "sedate", his back did not hurt as much but still probably was at least a consistent "4" out of a "10" scale of pain, getting more painful with increased activity. He said that after he lost his job, he expected that his back would clear up on its own when he was not doing physical labor, and when it did not, he sought medical treatment. The claimant stated that until he talked to the lawyer, he assumed he would have two years to file a claim.

Mr. B testified that he was in the same office when claimant spoke to Ms. R about his back brace. Mr. B recalled that claimant asked if there was any paperwork that had to be done, and Ms. R responded that she didn't think so or didn't know. Mr. B stated that Ms. R would communicate with Texas Municipal League about problems involving the city. Mr. B stated he had been terminated by the city council as mayor, which he regarded as illegal and unfair. Mr. B's testimony indicated unfamiliarity with the process for filing claims for city employees who were not fire department employees. He did not recall Ms. R offering to take action on behalf of claimant with respect to filing forms. Mr. B stated that claimant worked most of the time at night, and that he became aware that claimant had been working a little less in the evening after his accident.

Ms. R testified and agreed that the city purchased a back brace for the claimant, and that she provided the city's tax exemption to him so that he could do this. This occurred October 17, 1991. She did not believe or did not recall that pain medication was purchased from petty cash. Ms. R stated that she told claimant that he should see a doctor and he replied, "I don't believe in doctors." She recalled no conversation about paperwork; however, she stated that if paperwork were discussed, she would not have interpreted it in the context of workers' compensation (as opposed to the purchase of the brace) because she was not responsible for filing the workers' compensation claims. (The employer's report of injury that was filed for claimant's injury, received by the Commission on February 25, 1993, was signed by Ms. R but the information was completed by clerk LaVonne McCommas). Ms. R testified that it was her understanding that a report of injury had to be filed if an injured worker missed a day of work, and claimant had not missed a day of work.

The claimant stated that he was home every day for 2-4 hours with ice packs on his back, but that he was able to schedule his work hours around this. Although he argued that the combined number of hours would add up to at least a missed day if he worked a nine-to-five job, claimant and Mayor B both indicated that claimant did not miss an entire day of work. The claimant indicated that he had reticence about filing a claim because he was concerned that it would affect his employability in law enforcement.

A log from the fire department vehicle that responded to the accident on (date of injury), states, "T hurt back lifting on roof along with G." Claimant's medical records indicate nerve problems with his back and radiculopathy, with a suspected disc herniation in the lumbar area which a CT scan is recommended to diagnose. Claimant stated that he has not received medical or income benefits from the city due to the claim, aside from the back brace and pain medication.

A claim for compensation must be filed with the commission not later than one year after the occurrence of an injury. 1989 Act, Art. 8308-5.01(b). The failure to file this claim relieves the employer and carrier of liability, according to Art. 8308-5.03, unless:

1)good cause exists for failure to file a claim in a timely manner; or

2)the employer or insurance carrier does not contest the claim.

Although actual knowledge of injury on the part of employer or carrier is, under Article 8308-5.02(1), an exception to the 30-day notice to the employer of injury, there is no similar excuse among the exceptions listed in Article 8308-5.03 for failure to file a claim with the Commission. Under prior law, it was held that notice to an employer of injury did not excuse a claimant from also filing a claim with the workers' compensation agency. Camarrillo v. Highland Underwriters' Insurance Co., 625 S.W.2d 11 (Tex. App.- Beaumont 1981, no writ).

In this case, although the city administrator stated that she did not dispute that the claimant was injured, the claim itself is being contested. Because the employer is a self-insured governmental entity, it is both carrier and employer. At the time the city agreed to buy a back brace, there was no "claim." The city/carrier disputed the claim immediately after it was filed. Therefore, the exception in Article 8308-5.03(2) does not apply.

The hearing officer analyzed this case in terms of "good cause." Good cause is acting the way an ordinarily prudent person would under the same or similar circumstances in diligently processing a claim. Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948). Many cases decided under the similar claim and notice provisions in the previous law have fairly consistently held that ignorance of the law itself is not good cause for failing to file a claim. Lee v. Houston Fire & Casualty Insurance Co., 530 S.W.2d 294 (Tex. 1975).

(It follows from this that the failure of an employer to inform employees about the requirements of the law does not constitute good cause).

By contrast, the failure to appreciate that an injury is serious (if that belief would be held by a prudent person) may constitute good cause for failure to file a claim. Reliance on representations by the employer that it has filed a claim, along with furnishing of medical and income benefits, may be considered as good cause. Employers' Insurance of Wausau v. Schaefer, 662 S.W.2d 414 (Tex. App. - Corpus Christi 1983, no writ).

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Article 8308-6.34(e). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

Because the claimant did not miss a day of work due to the injury prior to his termination, the employer was not required under Art. 8308-5.05 to file an Employer's Report of Injury; consequently, the "tolling" provisions for the claim deadline do not apply. *See* Lowe v. Pacific Employers' Indemnity Co., 559 S.W.2d 370 (Tex. Civ. App.- Dallas 1977, writ ref'd n.r.e.).

Although there were conflicting portions of the evidence, these were for the trier of fact to weigh. The claimant testified that he knew he was injured on the date of injury; although his pain was relieved when he became more sedentary after he left work, he testified and his medical records indicated that it would flare up again upon resumption of physical activity. The hearing officer determined from this that his pain did not "substantially" improve during the 16 months following his injury, and witness statements submitted by the claimant indicate that claimant's ability to function was negatively affected by the pain he experienced. Claimant did not seek medical treatment such that the hearing officer could find a medical basis for claimant's statement that he felt his injury was not serious. The employer did not offer to file paperwork. We cannot say that the hearing officer's conclusion that claimant did not demonstrate good cause is against the great weight and preponderance of the evidence. Unfortunately, whenever a deadline is put into the law by the legislature, such as the filing requirement here, its operation will result in denial of coverage for work related injuries. *See* Texas Employers' Insurance Ass'n v. Coronado, 519 S.W.2d 517 (Tex. Civ. App.- San Antonio 1975, writ ref'd n.r.e).

We have reviewed the record and do not agree that the hearing officer prematurely cut off the claimant from questioning Ms. R about matters pertinent to the claim or to the witness' credibility. Ms. R admitted that she and the claimant were not the best of friends. When claimant attempted to question Ms. R about a counselling session that Ms. R had regarding her dealings with the police department, carrier objected, and claimant responded by saying that he felt he had made his point. At another point, the hearing officer sustained an objection that claimant had become argumentative in his questioning of the witness. The record does not indicate, however, that this resulted in omission of information about either the witness' bias or the issue of good cause. We overrule claimant's point of error regarding the scope of cross-examination.

Because the carrier's reply point about the ombudsman was not asserted as error, Article. 8308-6.41 and 6.42, we decline to comment, as requested by the carrier, on the role of the ombudsman and the claimant in questioning witnesses.

The hearing officer's decision is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge