APPEAL NO. 94274

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 19, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues presented for resolution were:

Did CLAIMANT timely file a claim for compensation with the Commission within one year of the injury as required by the Texas Workers' Compensation Act, Texas Labor Code Sections 409.001-.003, and if not, does good cause exist for failing to timely file a claim?

Did CLAIMANT have disability resulting from the injury of (date of injury), and is so, for what periods?

The hearing officer determined that the claimant had timely filed his claim because the employer had failed to file its first notice of injury with the Texas Workers' Compensation Commission (Commission), that claimant had good cause for filing his claim late and that claimant had disability beginning on June 9, 1993, because of his injury of (date of injury).

Appellant, carrier herein, contends that whatever disability claimant may have was not related to the original injury of (date of injury), and that claimant had "not timely filed a Notice of Claim for the injury of (date of injury)." Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, filed a minimal response.

DECISION

The decision and order of the hearing officer are affirmed.

Claimant testified that he was employed as a general laborer and oil field "roustabout" by (employer), employer herein, and that on (date of injury), while performing heavy labor lifting and bending, he felt a pull in his back, a "snap" and that he "couldn't hardly straighten up." Claimant stated he reported the injury to his supervisor, the "pusher" and requested to see a doctor. At some point in time, claimant met with the employer's "safety man," (Mr. P). Claimant testified that he assisted Mr. P in completing an accident report and that he then asked Mr. P if there was anything else that he, claimant, needed to do. Claimant testified that Mr. P told him "[n]o, we'll take care of the rest of it" and "that was all that was needed to be done."

Claimant was sent to (Dr. CP) on May 17, 1991, by the employer. Claimant complained of low back pain, was diagnosed as having a "low back strain." Claimant was given a prescription for pain medication and instructed to return in one week, which claimant failed to do. Claimant testified that Dr. CP sent him to physical therapy (PT) and that he was in PT "for about a month." Medical records of (city) Physical Therapy (OPT) dated

August 16, 1991, show "worsening" back pain, bending, sitting, rising, and walking with a notation "acute lumbar strain."

Claimant testified he was placed on light duty and that the employer gave him light duty in the mechanics shop for awhile and then work as a night watchman for about three months. During that time, after his injury, and while he was taking PT, claimant testified that he missed no time from work, that he was paid for the time he had medical appointments and continued to be paid his preinjury wage while he was on light duty. After working as a night watchman for employer, claimant said he returned to heavy labor as a roustabout for employer until February 1993, when the employer went out of business. During this time, claimant testified that he continued to have back pain but took an over-the-counter analgesic for his pain and continued working because he needed the work.

Claimant testified that after the employer went out of business in February 1993, he applied for and received unemployment benefits for about six weeks. Claimant subsequently worked for another employer for about two months doing roustabout work and then worked for another firm doing home improvements (assisting in roofing) for two days until he quit because of worsening pain in his back and hip. Claimant denies any other injuries while working for either of the other employers.

After working two days for the home improvement company, claimant went to (Dr. L), a chiropractor, on June 9, 1993. Claimant received a number of treatments and in a report dated August 9, 1993, was diagnosed as having:

724.8Nerve root compression in lumbar
720.0Ankylosing spondylitis
846.0Lumbosacral sprain or strain
739.4Sacroiliac segmental dysfunction

Claimant was subsequently referred to (Dr. D) and saw several other doctors. Dr. D conducted an examination on September 21, 1993, ordered an MRI and in a follow-up progress note dated September 28, 1993, recorded:

IMPRESSION:1.Evidence of degenerative joint disease involving L4-L5 disc space.
2.Contained disc herniation of the central and posterolateral aspect of the right-sided L4-L5 and L5-S1.
3.Congenitally small central spinal canal area at L3-L4 and L4-L5, otherwise normal.
and recommended a lumbar epidural steroid injection. The injection was performed, without success, and in a follow-up progress note dated November 23, 1993, Dr. D noted:

In light of lack of response to lumbar epidural steroid injection, I would like to have surgical consultation on [claimant].

Claimant testified back surgery was scheduled, but then cancelled when carrier contested the case. Claimant testified that he has not returned to work since June 9, 1993. Claimant

testified, on cross-examination, that he was not aware of the requirement to file a claim for compensation with the Commission within one year and that he filed the claim for compensation only when he received information from the Commission after contacting the local field office on June 9, 1993. Claimant testified he had sought assistance from the local field office after his injury flared up and then discovered no claim had been established. Claimant's Notice of Injury (TWCC-41) was filed on June 9, 1993.

Carrier offered into evidence an Initial Medical Report (TWCC-61) dated May 17, 1991, from Dr. CP prescribing hot packs and "light duty for one week" and a report, dated January 12, 1994, from (Dr. DE). Dr. DE only reviewed claimant's medical records and opined:

> I would deny that whatever difficulty that [claimant] did have when seen by [Dr. D] and [Dr. L] had nothing [sic-probably means anything] to do with his injury of (date of injury), when he was seen by [Dr. CP]. A serious orthopedic problem such as a nerve root compression does not lie dormant for two years and then suddenly pop back up.

The hearing officer in his discussion of the case commented:

> There is also evidence to support a finding that CLAIMANT timely filed his claim for compensation based on a tolling of the filing period due to EMPLOYER's failure to file its first report of injury. EMPLOYER was aware of the injury and CLAIMANT did miss time within the first eight days following the injury. He saw [Dr. CS] on May 17, 1991, two days after the injury. CLAIMANT took therapy for at least a couple of weeks during August 1991 and then worked light duty for three months following the therapy. It is apparent an employer's first report of injury should have been filed and I find the period for filing was tolled by EMPLOYER's failure to file its first report of injury.

The hearing officer found, as fact, that "claimant has not suffered an intervening injury to cause his current back problems" and that claimant has had disability since June 9, 1993. The hearing officer further determined that in addition to the one year time limitation for filing a claim being tolled because of the employer's failure to file its first "notice on injury," claimant also had good cause for filing his claim late "since he was informed by EMPLOYER's representative that he had done everything required to report his injury."

Carrier's first contention of error is that whatever disability claimant may have is not related to the original injury of (date of injury). As evidence to support this contention, carrier points to Dr. CP's report prescribing light duty for only one week, and the fact that claimant worked at light duty and then returned to regular roustabout duties with the employer and two other companies for almost two years with no lost time or apparent complaints about his back. Carrier points out that Dr. CP released claimant with no disability expected in June 1991. Carrier also points to the report from Dr. DE which states that whatever nerve root problem claimant had was not the result of the (date of injury),

injury, and emphasizes that there was no causal connection between the (date of injury), injury and claimant's June 1993 disability. We note that whether the claimant's (date of injury), injury is the cause of claimant's present back condition and whether such a condition can "lay dormant" for two years are factual determinations within the province of the hearing officer to resolve. The hearing officer, as the finder of fact, is the sole judge of the relevance and materiality of the evidence and of its weight and credibility and the inferences to be drawn therefrom. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Campos, *supra*; Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level 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). The claimant testified, and the hearing officer obviously believed, that claimant continued to have back pain and took analgesics for it but continued to work because he needed the work. Further, we would note that in a workers' compensation case the issue of disability may be based on the sole testimony of the injured employee. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). The hearing officer found, and there is no evidence to the contrary, that claimant had not suffered an intervening injury to cause his current back problems. The hearing officer was free to weigh and accept, or not, Dr. DE's opinion about how long the condition could lie dormant. In short, the hearing officer determined claimant's disability after June 9, 1993, was due to his injury of (date of injury), and we find there is sufficient evidence in the form of claimant's testimony and medical evidence to support that decision.

Carrier further contends that the hearing officer's determination that claimant's filing period was tolled by the employer's failure to file its first notice of injury (TWCC-1) is in error because, pursuant to Section 409.005, the employer was not required to file an TWCC-1 because claimant, by his own admission, had not missed a day of work due to the (date of injury) injury. The pertinent portion of Section 409.005 provides:

(a)An employer shall file a written report with the commission and the employer's insurance carrier if:

(1)an injury results in the absence of an employee of that employer from work for more than one day; or . . . .

Although, at one point, claimant did testify that he had not missed a day of work, the hearing officer found, as fact, that claimant did "miss time from work." Section 409.008 provides that if an employer or the employer's insurance carrier has been given notice or has knowledge of an injury to or the death of an employee and the employer or insurance carrier

fails, neglects, or refuses to file the report under Section 409.005, the period for filing a claim for compensation under Section 409.003 and 409.007 does not begin to run against the claim of an injured employee or a legal beneficiary until the day on which the report required under Section 409.005 has been furnished. Generally, the case law under the prior workers' compensation law has interpreted similar provisions as requiring the claimant to be absent from work or to have lost time from work and the lack thereof would not toll the period for filing a workers' compensation claim (Lowe v. Pacific Employers Indemnity Co., 559 S.W.2d 370 (Tex. Civ. App.-Dallas 1977, writ ref'd n.r.e.). The court held that the intent of the statute was to require filing of a report only when injury was sufficiently serious so that a claim may be anticipated. Masuccio v. Standard Fire Ins. Co., 770 S.W.2d 854 (Tex. App.-San Antonio 1989, no writ). Whether claimant had such a serious injury and whether he missed a day of work is unclear from the hearing officer's determinations. The case law does suggest that an alternative theory involving "good cause" may be available even if a claim is otherwise untimely filed. We need not decide this point in that we are affirming the hearing officer's determination that there was good cause for claimant not filing his claim within one year.

Carrier also contends that Mr. P's completion of an accident report with claimant's assistance and Mr. P's comment to claimant "that was all that was needed to be done [by claimant]" was not a report required by the Commission and "does not constitute evidence to support a conclusion by the hearing officer that the employee was misled by the employer's representative to think he did not have to file any Notice of Claim with the [Commission] regarding his workers' compensation benefits." We would only note that whether Mr. P's comments to claimant that claimant need not do anything further, constituted a misleading statement upon which claimant relied, to his detriment, is largely a question of fact appropriately resolved by the hearing officer. The hearing officer's determination on this point is supported by the testimony of claimant which is largely uncontroverted.

Along the same lines as the argument in the preceding paragraph, carrier argues that claimant "admitted in his testimony that he was ignorant of any obligation to file a claim" and therefore Mr. P's representation could not have influenced him. On this point, we would note that the hearing officer, in addition to finding that claimant's filing period had been tolled, also determined that claimant had good cause for filing his claim late because the employer's representative, Mr. P, had assured claimant that claimant had done everything necessary to report his injury. Good cause for late filing of a claim is measured by the standard of ordinary prudence, that is, whether the claimant prosecuted the claim with that degree of diligence that an ordinary prudent person would have exercised under the same or similar circumstances, which is ordinarily a question of fact to be determined by the trier of facts. Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (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 based on Mr. P's representations. Lee v. Houston Fire & Casualty Insurance Co., 530 S.W.2d 294 (Tex. 1975). By contrast, 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). *See also* Texas Workers' Compensation Commission Appeal No. 93611, decided August 25, 1993. We find that the hearing officer did not abuse his discretion in finding that claimant had good cause in the late filing of his claim. In Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986), the Supreme Court of Texas stated that "to determine if there is an abuse of discretion, we must look to see if the court acted without reference to any guiding rules and principles." The hearing officer obviously believed that Mr. P, employer's safety representative, misled claimant by stating that "we'll take care of the rest of it" and that nothing else needed to be done. As such, the hearing officer has not abused his discretion.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not so find and consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge