APPEAL NO. 950036
FILED FEBRUARY 17, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 8, 1994, a contested case hearing (CCH) was held. The unresolved issues from the benefit review conference (BRC) were:

1. Did the Claimant report the injury to his Employer no later than thirty (30) days after _____, or in the alternative, did the Claimant establish "good cause" for not reporting the injury within thirty days:

2. Did the Claimant timely file a claim for compensation within one year of _____, or in the alternative did the Claimant establish "good cause" that would excuse his failure to timely file a claim?

In addition, the parties agreed to add the issue of: "3. Did the Claimant have disability?" The parties agreed and stipulated, before the commencement of the CCH, what the claimant's average weekly wage (AWW) was.

The hearing officer determined that the claimant had failed to establish that he gave timely notice of the injury or had timely filed his claim for compensation and that he did not have good cause for failure to timely file the notice of injury and claim for compensation. The hearing officer further found claimant did not have disability after _____.

Appellant, (claimant) contends that the employer had actual notice of the injury or, in the alternative, claimant had good cause for failure to timely give notice or file his claim. Claimant contends his testimony established that he had disability and requests that we reverse the hearing officer's decision. Respondent, (carrier) responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Although not at issue, there was testimony regarding who the claimant's employer was. Claimant testified that on _____ he was employed by (Employer) pouring concrete at a location close to (referred to as the employer). Apparently, very early in the morning (around 7:00 a.m.) on _____, (Mr. B), employer's owner, received permission to have claimant (and others in Employer's crew) help unload some furniture. In the course of unloading the furniture, claimant testified "I felt my back just give and I hollered and I said `I hurt my back.'" Claimant contends Mr. B was about eight feet away and that he "heard that therefore he knew [claimant was] injured. . . ." Claimant then

testified "I didn't think it was an injury." Claimant said that after unloading the furniture, he returned to pouring concrete (at about 7:30 or 8:00 a.m.), but that he "was hurting" and by "eleven o'clock I couldn't take it no more." Claimant testified that he went to a hospital emergency room (ER) that day. Testimony regarding dates and extent of other medical treatment of the injury is sketchy. At some point in time, after May 1991 and before January 1993, claimant saw (Dr. R) and then on January 25, 1993, he was seen by (Healthcare Provider).

Claimant also testified that some time in 1991 he made an inquiry of the Texas Workers' Compensation Commission (Commission) whether Employer had workers' compensation coverage and was told they had none. (Commission records do not support such a call but the hearing officer observes that during the first year or so of operation, the records might well have been incomplete.) Claimant said that he did not contact or speak with Mr. B or the employer. Claimant's attorney testified that he was retained by claimant "in either December of `92 or January of `93" (later determined to be January 21, 1993) and that he inquired "between January and March 1993." with the Commission whether the employer had workers' compensation coverage and was told there was no coverage. (There are no Commission records regarding this inquiry.) Claimant filed a civil action against the employer in March 1993. Mr. B testified that when he was served with the lawsuit was the first knowledge that he had that claimant was claiming an injury in May 1991. Claimant's attorney testified that he never contacted Mr. B or the employer about workers' compensation coverage and instead relied on the Commission representation. During discovery proceedings (a deposition) in October 1993, for the civil lawsuit, claimant and claimant's attorney learned that Mr. B and the employer did, in fact, have workers' compensation coverage. Claimant filed a written notice of injury and claim for compensation with the Commission on January 13, 1994.

Hospital medical records of _____, indicate complaints of back pain "onset approx. 7 days ago." Claimant testified that should have read seven hours previous. X-rays of the lumbar spine were normal. Records of (Healthcare Provider) dated January 25, 1993, recite the work-related incident of unloading furniture but give no diagnosis and indicate no insurance. Claimant was prescribed pain medication. A handwritten report from Dr. R dated November 15, 1994, indicates a back condition and requests a myelogram. An undated report by Dr. R has a diagnosis of "Chronic Back Pain Syndrome/Left Sciatic Neuritis." Hospital notes signed by Dr. R dated September 2 and 15, 1994 indicate that claimant is being examined "only at the request of TRC . . ." and has a diagnosis of "Chronic Back Pain Syndrome."

On the issue of disability, claimant testified that he did not return to work for Employer after _____, except for "a couple of days," that he worked intermittently, including some part-time concrete jobs, that he worked some for his brother collecting rent on some rental houses, and some odd jobs. On that issue, carrier states: ". . . I frankly

don't know enough about what was done in those jobs to even suggest an issue of intervening cause or anything like that."

Claimant's positions are: first, that his outcry on _____, that he hurt his back was heard by Mr. B and that constituted actual notice of a work-related injury. In the alternative, claimant argues he had good cause for not giving notice of injury because "his actual boss" (Employer) told him that he didn't have insurance and this was confirmed by the Commission (apparently in 1991). Claimant argues he did not file his claim for compensation within one year because he had good cause, being that he had been "told that no compensation coverage existed." Claimant further alleges this was confirmed by his attorney when claimant's attorney called the Commission "between January and March of 1993" and was informed that there was no workers' compensation coverage. Although claimant and his attorney concede that they became aware that Mr. B and the employer had workers' compensation coverage on October 12, 1993 (during Mr. B's deposition), no effort was made to address the fact that the notice and a claim were not filed until January 13, 1994 (three months later), simply stating ". . . good cause existed [being they were told that there was no workers' compensation coverage] preventing claimant from filing notice with the workers' compensation board within one year."

The hearing officer, in determining that claimant had failed to establish that he acted "like a reasonably prudent person" and, therefore, did not have good cause for failing to timely file notice or his claim for compensation stated, in the statement of evidence:

> A review of the record indicates that the Claimant did not act like a reasonably prudent person in the same or similar circumstances and that his delay in giving notice of injury is not justified.
>
> * * * *
>
> The Claimant and his attorney acknowledge that no claim was filed with the Commission until January 13, 1994. (See Carrier's Ex. A). The Claimant's attorney testified that he called the Commission between January and March of 1993 and was informed that the Employer did not have workers' compensation insurance coverage. If on appellate review it is determined that some erroneous information provided by a Commission employee delayed the filing of this claim and that the erroneous information constitutes "good cause", then it should be noted that the good cause . . . did not continue through the date of filing, January 13, 1994.

On the question of actual notice, the hearing officer is the sole judge of the weight and credibility to be given the evidence (Section 410.165(a)) and he could believe all, part or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer could have believed claimant did

not call out as he stated, or could have believed that Mr. B did not hear claimant's exclamation or could have believed the exclamation, if any, did not impart on Mr. B notice that claimant was claiming an injury. In fact, claimant testified "I didn't think it was an injury at the time" and the hearing officer questioned if claimant didn't think it was an injury how was Mr. B to know it was an injury. We find sufficient evidence to support the hearing officer's determination that the employer did not have actual knowledge of the injury.

The hearing officer questioned both claimant and claimant's attorney why they had not contacted Mr. B or the employer and asked about workers' compensation coverage, and instead filed suit against the employer. The response was that claimant's attorney ". . . did not feel comfortable in contacting just a potential defendant. . . ." The hearing officer determined that claimant did not have good cause for failing to file the notice of injury. 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 ordinary prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948); Texas Workers' Compensation Commission Appeal No. 94975, decided September 2, 1994. The hearing officer determined that good cause did not exist. The appellate standard of review of a hearing officer's determination regarding good cause is abuse of discretion. Texas Workers' Compensation Commission Appeal No. 93870, decided November 10, 1993. In determining whether there is an abuse of discretion, we look to see if the hearing officer acted without reference to any guiding rules or principles. Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986).

The situation in this case is quite similar to Texas Workers' Compensation Commission Appeal No. 93342, decided June 9, 1993, where a preliminary inquiry by an attorney's support person seemed to indicate a lack of workers' compensation coverage. Subsequently, it appeared there was coverage and the claim was filed more than one year after the date of injury. The hearing officer, in that case as in the instant case, determined that no good cause existed for claimant's failure to timely file a claim. It was unrefuted in that case that the Commission indicated no insurance coverage. In that case, as at the CCH in this case, carrier relied on Dillard v. Aetna Insurance Company, 518 S.W.2d 255 (Tex. Civ. App.-Austin, 1975, writ ref'd n.r.e.), for authority that ". . . receipt of bad advice from a clerk at the Commission does not as a matter of law constitute good cause for failing to timely file a claim for compensation." The bad advice in Dillard dealt with the legal issue of ignorance of the six month filing requirement (under the old law), while the information in the instant case is a factual question of whether or not an employer had insurance coverage. The Appeals Panel in Appeal No. 93342 held that misstating a fact, such as whether the employer does or does not have coverage, "may well constitute good cause." We noted that whether a claimant has used such due diligence as to constitute good cause is a question to be determined by the hearing officer. In both Appeal No. 93342 and this case, we are uncertain on what information the hearing officer relied in stating that no good cause existed for claimant's failure to timely file a claim. However, in light of the fact that we are upholding the hearing officer's decision on other grounds, noted

below, we do not find it necessary to determine whether the facts in this circumstance, as a matter of law, constitute good cause.

Even if the claimant initially did have good cause, based on allegedly erroneous advice by the Commission to claimant's attorney in early 1993, that good cause ceased to exist once claimant and his attorney determined on October 12, 1993, that Mr. B and the employer did, in fact, have coverage. The Appeals Panel and case law have held that good cause must continue to the date when the injured worker actually files the claim. Lee v. Houston Fire & Casualty Insurance Company, 530 S.W.2d 294, 296 (Tex. 1975); Farmland Mutual Ins. Co. v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ). An injured worker owes a duty of continuing diligence in the prosecution of his claim, and that claimant must prove that the good cause exception continued up to the date of filing. Texas Casualty Insurance Company v. Beasley, 391 S.W.2d 33, 34 (Tex. 1965). Even if a claimant at one point had good cause, the claimant must act with diligence to notify the employer of a claim or to file a claim. The totality of a claimant's conduct must be primarily considered in determining ordinary prudence. Lee v. Houston Fire & Casualty Insurance Co., 530 S.W.2d at 297; Moronko v. Consolidated Mutual Insurance Company, 435 S.W.2d 846 (Tex. 1968). The Appeals Panel has refused to establish a standard that a claimant must "immediately" give notice to perfect a finding of good cause for delay in giving timely notice. Texas Workers' Compensation Commission Appeal No. 93494, decided July 22, 1993. The Texas Supreme Court in Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370, 272 (1948) stated:

> In all cases a reasonable time should be allowed for the investigation, preparation and filing of a claim after the seriousness of the injuries is suspected or determined. No set rule could be established for measuring diligence in this respect. Each case must rest upon its own facts.

Consequently, even if claimant had good cause initially, claimant knew of the employer's workers' compensation coverage on October 12, 1993, and still waited three months before filing the notice of injury and claim for compensation. Although minds may differ what constitutes a "reasonable time" to file the claim after the good cause has ceased to exist, 90 days is untimely. Other cases have held that ten days was timely, Texas Workers' Compensation Commission Appeal No. 941656, decided January 26, 1995; and Texas Workers' Compensation Commission Appeal No. 93649, decided September 8, 1993; while forty-five days was not timely, Appeal No. 94975, *supra*; and thirty days was not timely, Texas Workers' Compensation Commission Appeal No. 93711, decided September 10, 1993. We affirm the hearing officer's determination that good cause did not continue from October 12, 1993, through January 13, 1994.

The evidence regarding claimant's ability or inability to obtain and retain employment is very sketchy. There are no firm dates when claimant worked (although by his own testimony there were some periods when he worked) or specific periods for which

there is medical evidence of the claimant's inability to work. In any event, the burden of proof is on the claimant to prove by a preponderance of the evidence that he sustained disability, as defined in the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. The hearing officer determined that the claimant has failed to do so, and we find that determination to be supported by the evidence.

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). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge