APPEAL NO. 94493

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held on February 3, 1994, and March 23, 1994, (hearing officer) presiding as hearing officer. He determined that the respondent (claimant) sustained a compensable back injury on (date of injury) , while in the employ of the employer insured by (Carrier 1), that the claimant experienced "intermittent periods" of disability after (date of injury), and that the claimant had good cause for not timely filing his claim for workers' compensation. (Carrier 2) filed an appeal conditioned on the filing of an appeal by either the claimant or Carrier 1. While agreeing with the hearing officer's decision regarding the correct employer and responsible carrier, Carrier 2's conditional appeal involves the issue of the erroneous admission of two items of evidence, the hearing officer's finding of a "generic" disability without identifying any specific periods or amounts and the finding of good cause for the untimely filing of his claim. Carrier 1 appeals on five points of error: that their insured was the employer at the time of injury; that the claimant proved disability while failing to specify times and amounts; that good cause existed for the untimely filing of the claim; and, the admission of the same two items of evidence cited by Carrier 2. The claimant asks that the decision be affirmed.

DECISION

Determining, under the circumstances of this case, that there are insufficient findings and conclusions regarding the matter of the specific time frame(s) and dollar amounts for any periods of disability sustained by the claimant, we reverse and remand.

One of the issues in this case involves the tangled web not uncommon in situations of "leased" employee enterprises. According to the testimony of the claimant, in 1987 he was hired by one of the owners of and always worked for (LOC) up to the time of his back injury on (date of injury). He stated he was only supervised by LOC employees, wore a LOC uniform, was provided tools and equipment to work with by LOC, was paid by LOC, and always considered himself an employee of LOC. He denied knowing anything about any arrangement between LOC and a MS or ever becoming an employee of a company owned by MS. There was evidence of an agreement entitled "Employee Services Contract" between LOC and MS, "doing business as (Company 1)" dated January 1, 1991, which purports to be an agreement for Company 1 to provided labor employees to LOC, vesting supervision and control in LOC but providing that Company 1 would pay "any and all taxes required by law due to the employment of said employees" and to provide workers' compensation coverage. MS apparently was involved with another company with his wife, "(Company 2)," and he stated in an transcript of an interview admitted into evidence that the claimant was an employee of Company 2, not Company 1. There was no evidence of any contact or agreement between LOC and a company called Company 2. The evidence was far from clear but it appeared that a workers' compensation insurance policy had been issued by Carrier 2 to which was in effect on (date of injury), but that a policy issued to Company 1 expired on September 15, 1990. With the evidence in this posture, the hearing officer found that LOC was the claimant's employer. The evidence to support his determination is not only sufficient, it is compelling

and we affirm his finding and conclusion on this issue.

The claimant injured his back on (date of injury), in a lifting incident and the fact of his sustaining a compensable injury was not in issue. He reported the matter to SS the secretary in the employer's office and since he did not want to go to a doctor at the time (claimant testified that he was not one to go to a doctor unless absolutely necessary), SS told him "no" when he asked if it was necessary "to write it down or anything." She said to let her know if he needed to see a doctor. He stated he did not know the seriousness of the injury at the time and that he had some good pain medicine at home. Sometime later, he went to the office and told the secretary that he needed to see a doctor because his back was really bothering him. She told him "okay" but that he would have to talk to CS about it as she was handling workers' compensation for them. He talked to CS who told him it was okay to go to a doctor. The claimant also testified that he asked CS if he needed to fill out any forms or anything and that she told him "no" that they "had taken care of everything for me." He saw a Dr. S who he had seen for previous injuries (apparently he had two prior workers' compensation claims under the pre-1989 Act). In any event, the claimant continued working for LOC from the date of his injury until sometime in March 1992 when he went into a business with a relative. He testified that he was in constant pain throughout the time and that he was not able to work as many hours overtime (over 40 hours per week) after the date of the injury. He acknowledged that at sometime during the period of time from the date of the injury until he stopped working for the employer, he got a 50 cent per hour raise.

The evidence indicates that the claimant only saw Dr. S several times during the period involved in this case and that until much later, Dr. S only prescribed pain medication and therapy stating there was not much that he could do for the claimant. The claimant indicated that after the business he went into closed, he sought other employment, drew unemployment insurance and worked for another company for some seven and a half weeks. This employment ended on October 13, 1993, when on that day he tried to get out of bed and experienced extreme pain in his back. He subsequently went to an emergency room and was later diagnosed with a ruptured disc. He testified that he was told he needed surgery.

The claimant testified that up until January 1993, his medical bills were being paid (he did not know who paid them) and it appeared to him that everything was being taken care of regarding his injury although he had not received any temporary income benefits. In January 1993 he called the insurance company because he needed to have a CAT scan and this was the first he knew there was any trouble with his workers' compensation claim (apparently he was relying on the assertions of CS that everything had been taken care of) for the injury of (date of injury). He stated he called the Texas Workers' Compensation Commission (Commission) immediately after talking to the insurance company (apparently Carrier 2) and was told he needed to fill out a form. The Commission sent him a form and he signed and returned it on January 25, 1993, and it was received by the Commission on February 3, 1993. This was the first written notice of injury or a claim for workers' compensation benefits. The claim was disputed.

The hearing officer determined that there was good cause for the late filing of the claim extending from the date of the injury to February 3, 1993, and that it was reasonable for the claimant to rely on representations of SS and CS that they had or would file all necessary paperwork regarding his injury claim. The claimant's testimony, if believed, as it obviously was by the hearing officer, forms a sufficient evidentiary basis to sustain the finding of good cause. *See generally* Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). A claimant's testimony only raises an issue of fact and can be believed over other evidence or testimony. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). A claimant's reliance upon the representations by an employer that it had filed a claim may constitute good cause. Employers' Insurance of Wausau v. Schaefer, 662 S.W.2d 414 (Tex. App.-Corpus Christi 1983, no writ); Texas Workers' Compensation Commission Appeal No. 94274, decided April 18, 1994. We cannot say that the hearing officer abused his discretion in determining good cause existed under the circumstance presented. Appeal No. 94274, *supra*.

Over objection based upon no exchange of documents, the hearing officer admitted two items of evidence into the record: (1) an October 29, 1993, letter of Dr. S which tied in the claimant's current back condition (disc herniation) with the (date of injury), injury as a natural progression of that injury, and (2) a handwritten narrative of the sequence of events from (date of injury), to the present by the claimant. There was no assertion or evidence that either of these documents had been exchanged or provided to Travelers by claimant in accordance with the requirements of Section 410.160 and Rule 142.13 (Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.13). Under the provisions of Section 410.161 items not properly exchanged may not be introduced into evidence at any subsequent proceeding unless good cause is shown for not having disclosed the information or document. There was no offer to show or showing of good cause and the hearing officer made no determination of good cause for the failure to exchange. Consequently, the documents were improperly admitted and the objection should have been sustained.

With regard to the narrative summary by the claimant, we do not find any prejudice from the erroneous admission since it basically did nothing more than parrot his extensive testimony at the hearing. Testing for prejudice under the standards enunciated in Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992; we find none. We are not able to concluded that the error was reasonably calculated to have caused and probably did cause the rendition of an improper decision. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ); Texas Workers' Compensation Commission Appeal No. 931004, decided December 14, 1993. However, regarding the issue of disability, we cannot conclude that the admission of Dr. S's October 29, 1993, letter was quite so benign. Since the issue of disability and the periods and amounts involved were in considerable dispute, Dr. S's letter might well have significantly influenced the determination of the hearing officer. And, from the finding of "intermittent" periods of disability following his injury of (date of injury), we cannot judge the degree of improper influence, if any, that it had. In his further consideration of the issue of disability

as required by this remand, the hearing officer should not consider this item of evidence.

While this is a sufficient basis for our remand on the disability issue, our principle reasoning concerns the inadequacy of the resolution of the issue under the circumstances of this case. While the issue was simply framed as "did the claimant have disability as a result of his compensable injury," the circumstances of the case made it clear that a mere "yes" or "no" answer would resolve little. While there may be no dispute as to the time periods or amount involved in a given case once the fact of disability is resolved, here it is patently clear that factual determinations are necessary to resolve what "intermittent" period are factually established and what amounts are appropriate. The order for Travelers to pay temporary income benefits is virtually unenforceable in this case where there is no determination of what "intermittent" periods or amounts are covered. And the rate of any temporary income benefits requires factual determinations given the circumstances that part of the time may have involved a difference in the overtime capable of being worked before and after (date of injury), the different periods and times of employment, including drawing pay from a business, and the varying limitations on working during the period of time involved. In an appropriate case, it might be possible and feasible to resolve the matter of the period and amount of disability involved at the disability determination officer or benefit review officer level; that was not and is not the case here. The claimant has the burden of establishing if and when he suffered disability from his injury. *See* Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. The carrier has the burden of establishing that some other condition or injury was the sole cause of the disability. *See* Texas Workers' Compensation Commission Appeal No. 931134, decided January 28, 1994.

For the foregoing reasons, the decision and order are reversed on the issue of disability and the case remanded for further consideration and development of evidence as deemed appropriate and for findings and conclusion on the specific periods and amounts concerning the disability issue. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge