APPEAL NO. 950187

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). Following a contested case hearing held in (city), Texas, on January 5, 1995, the hearing officer, (hearing officer), issued a decision resolving the three disputed issues by reaching certain findings of fact and concluding that appellant (claimant) injured his back within the course and scope of his employment on (date of injury); that he failed to timely file his claim; that he did not have good cause for the untimely claim; that his employer was not required to file a first report of injury before the expiration of one year after November 19, 1994; and thus that claimant has not had disability. Claimant's appeal generally challenges for insufficiency of the evidence the untimely claim and no disability determinations. The respondent (carrier) asserts the sufficiency of the evidence to support the decision.

DECISION

Affirmed.

Claimant testified that on (date of injury), while working as a painter and sandblaster, he jumped across a ditch, the bank on the other side gave way, and he fell in hurting his back. He said he reported the incident that day to several supervisors and filled out an accident report, that he declined an offer to be taken to a doctor because he felt he had just pulled a back muscle, and that he kept on working. The carrier offered to stipulate that claimant spoke of the incident on that date to (Mr. M), one of the supervisors, and told him he had sustained an injury. Mr. M testified that claimant told him on (date of injury), that he had injured his back on the job and that when he asked if claimant was all right and whether he needed to go to a doctor, claimant declined saying he had just pulled a muscle. According to Mr. M, claimant never at a later date told him his back was hurt or that he wanted to go to a doctor nor did he ever state reasons for his absences from work. Mr. M stated that he did not notify the carrier when claimant told him about his injury on the day it happened and conceded that he had a chance to investigate the matter at that time. However, he pointed out that another employee not present at the hearing took care of employer's workers' compensation matters.

Claimant indicated that at some later time he began to have back pain, that he first sought medical treatment in February 1993 from (Dr. B), and that he paid for the chiropractic treatments himself and did not want either the employer or the carrier to pay his medical expenses for fear of losing his job. He indicated that he never mentioned his job loss fears to any supervisor and conceded he did not actually know of an employee whose employment was terminated because of an injury. Dr. B's report of April 12, 1994, states that claimant was seen on February 6, 1993, with complaint of low back pain and stiffness and mild pain radiating into his lower extremities. The report went on to state: "He gave a history of injury at work but was not filing a workman's compensation claim." Claimant acknowledged that according to Dr. B's records, all of his treatments in 1993 were on Saturdays except for two Tuesday treatments after he had worked his shifts. He

said he could not remember any dates that he missed a full day of work because of his injury. He further stated that the eight days in 1993 that employer's records showed he was off were on account of his injury but that he never used sick leave and either used vacation time, if he had it, or else just did not come to work. He testified that he never advised the employer that any absence from work was due to his injury because, based on comments made at safety meetings, he feared the loss of his job. He further indicated he was never aware that the employer knew he missed any work because of his injury.

Claimant indicated that around the end of March 1993 he and other employees were advised that layoffs were coming at the job site his employer had him working, that voluntary layoffs were then solicited, and that he then volunteered to be laid off at that time because of his back. He stated that he later worked briefly driving a truck but was unable to continue due to his pain, that he has not since worked because of his back, and that he is not sure he can work until he gets his back straightened out.

Mr. M testified that he first became aware that claimant was making a claim approximately one week after he was laid off. According to the benefit review conference report, the employer's First Report of Injury or Illness (TWCC-1), dated March 30, 1994, was filed on "4-11-94" and claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) was filed on "5-9-94." The carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), dated "04-08-94," which disputed the claim based on no injury in the course and scope of employment and no timely filed claim, stated that the carrier's first written notice of the injury was received on "04-05-94."

The hearing officer made the following pertinent findings and conclusions.

FINDINGS OF FACT

4.On (date of injury), Claimant injured his back while he was engaged in the exercise of his regular job duties with Employer.

5.Since March 30, 1994, Claimant's back injury of (date of injury) has prevented Claimant from obtaining and retaining employment at wages equivalent to the wage Claimant earned prior to (date of injury); however, such inability is not due to an injury for which workers' compensation benefits are payable.

6.Claimant failed to file a Notice of injury and Claim for Compensation within one year of (date of injury).

7.Claimant did not act as a reasonably prudent person in failing to file his Notice of Injury and Claim for Compensation within one year of (date of injury).

8.Prior to March 30, 1994, Employer had no Notice that any lost time incurred by Claimant might have been due to Claimant's back injury of (date of injury).

9.Employer filed its first notice of injury on April 11, 1994.

CONCLUSIONS OF LAW

3.Claimant injured his back within the course and scope of his employment with Employer on (date of injury).

4.Claimant failed to timely file his Notice of Injury and Claim for Compensation.

5.Claimant did not have good cause for failing to timely file his Notice of Injury and Claim for Compensation.

6.Employer was not statutorily required to file its First Report of Injury prior to the expiration of one year after (date of injury).

7.Claimant has sustained no disability.

Claimant contended that while his claim was concededly not filed within the statutory one year period after his injury date as required by Section 409.003, his time to file was extended by the failure of the employer to timely file its first written report of the injury as required by Section 409.008, and that he had good cause for the untimely filing. Section 409.008 provides that if an employer or the employer's carrier has been given notice or has knowledge of an injury to an employee and fails to file the first written report of injury required by Section 409.005, then the period for filing a claim does not begin to run against the claim of the employee until the date the report has been furnished. Section 409.005 provides in pertinent part that an employer shall file a written report with the Texas Workers' Compensation Commission (Commission) and the employer's insurance carrier if "an injury results in the absence of an employee of that employer from work for more than one day." The implementing rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 120.2, provides that the employer shall file a written report for each injury that results in more than one day's absence from work for the injured employee and requires the report to be mailed or delivered to the Commission not later than the eighth day after the employee's absence from work for more than one day due to an injury.

The hearing officer found Texas Workers' Compensation Commission Appeal No. 94628, decided June 29, 1994, to be dispositive of claimant's contention that his one year period to file the claim was tolled. In that case the evidence showed that the employee, who injured his back at work on (date), and filed his claim on November 11, 1993, did not

miss any time from work as a result of his back injury. The opinion, citing several Texas court cases, stated:

> Therefore, the requirement for the employer to file any report of injury did not arise, at least until long after the claimant's one year limitation for filing a claim had passed. That the employer had notice or knowledge of the (date) injury does not itself establish a required report although lack of notice or knowledge will prevent any tolling.

The hearing officer's finding that prior to March 30, 1994, the employer had no notice that claimant had any lost time due to his back injury is sufficiently supported by the evidence. The findings sufficiently support the conclusion that employer was not required to file its first report of injury before the expiration of one year after the injury date.

Section 409.004(1) provides that failure to file a claim as required under Section 409.003 relieves the employer and carrier of liability unless good cause exists for failure to file a claim in a timely manner. Claimant had the burden to prove good cause for not timely filing his claim and the issue presented the hearing officer with a question of fact to resolve. The test for permissible delay in filing a workers' compensation claim is whether the claimant acted as a reasonably prudent person would have acted under the circumstances. Texas Casualty Ins. Co. v. Beasley, 391 S.W.2d 33, (Tex. 1965) *cert. denied*, 382 U.S. 994. Though other notions of good cause were addressed by the hearing officer, on appeal claimant asserts that good cause should be found in the employer's failure to timely file a TWCC-1 and in claimant's fear of losing his job. As has already been discussed, the evidence did not show the employer to have knowledge of claimant's having missed more than one day of work because of his injury prior to filing the TWCC-1. As for the job loss fear, the hearing officer reasoned that even if such could constitute good cause, claimant was required to show that such good cause continued to the date he filed his claim, and that the fear of job loss would have ceased on the date of his voluntary layoff in late March 1994 and not have continued to the May 9th filing of his claim. We agree with the hearing officer's analysis which is supported by our prior decisions and find no abuse of discretion in the good cause determination. *See e.g.* Texas Workers' Compensation Commission Appeal No. 94975, decided September 2, 1994; Beasley, *supra*.

We are satisfied there has been no abuse of discretion by the hearing officer and that the dispositive findings are sufficiently supported by the evidence and not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 632, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

CONCUR IN THE RESULT:

Gary L. Kilgore
Appeals Judge