APPEAL NO. 950885

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 25, 1995, in _____, Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were as follows: "1. Was [Employer A] or [Employer B] the employer; 2. Was Employer A a subscriber to workers' compensation insurance; and 3. Did the appellant and cross-respondent [claimant] timely file her Notice of Injury and Claim for Compensation [TWCC-41] with the Texas Workers' Compensation Commission [Commission] and, if not, did good cause exist for her failure to do so." Based on a number of factual findings the hearing officer concluded that claimant was employed by Employer B at the time of her injury and that claimant, without good cause, failed to file a claim with the Commission within one year. The parties stipulated that Employer A was not a subscriber to workers' compensation insurance on the date of claimant's injury.

In her appeal claimant first contends that a record of her follow-up visit with Dr. P on July 13, 1993 (Dr. P's report), which reflected that a copy was sent to the Commission, and which she asserts was "concealed" by the respondent and cross-appellant (carrier) and/or her employer and not discovered by her until after the CCH when she was preparing for a Social Security Administration hearing, served to provide the Commission with "timely notice of claim" for her injury of _____, citing to Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE §§ ?? 122.2 and 124.1 (Rules 122.2 and 124.1). She further asserts that the carrier was required to provide her with Dr. P's report prior to the benefit review conference (BRC) and the CCH, citing Rules 141.4 and 142.13. Claimant attached to her appeal Dr. P's report along with several post-CCH affidavits, carrier's pre-CCH witness and exhibits disclosure correspondence and carrier's pre-CCH responses to claimant's interrogatories. Claimant's second position was that she had good cause (Section 409.004) for failing to file her claim with the Commission within one year of the injury date (Section 409.003) because she relied on her employer's false representation that it did not have workers' compensation insurance. The carrier responds that the Appeals Panel should not consider claimant's evidence submitted for the first time on appeal, that there was no evidence that the carrier had possession of Dr. P's report or that the carrier and/or employer concealed the report, and that claimant could have discovered the existence of the report prior to the CCH. The carrier further contends that Dr. P's report did not suffice to constitute a "claim" per Rule 122.2 and that claimant's reliance on Rule 124.1 concerning written notice of an injury to the employer is misplaced. The carrier also contends that the evidence is sufficient to support the hearing officer's determination that claimant did not have good cause for not timely filing her claim. The carrier points to evidence that claimant, who it asserts was paid income and medical benefits by Employer A from shortly after the date of her injury (_____) to the time she filed her claim (July 2, 1994), had the impression for approximately two years after her injury that she was covered by workers' compensation insurance yet did not file a claim, that she took no action during that period to clarify whether she was covered, and that she did not contact the Commission to verify coverage until June 30, 1994, notwithstanding that she knew an attorney had contacted the Commission in April 1994 and learned of her coverage.

In its cross-appeal the carrier challenges on evidentiary sufficiency grounds the conclusion that claimant was employed by Employer B and five factual findings leading to that conclusion. In her response the claimant, who contends that the evidence is sufficient to affirm the challenged findings and conclusion, asserts that not only was she hired and employed by Employer B but also that Employer B exercised control over her work.

DECISION

Affirmed.

There was no dispute that claimant, a licensed vocational nurse (LVN), injured her neck and back on _____, when she turned to catch a medically dependent child under her care who had slipped walking up steps into the house where claimant was caring for her. Claimant said she grabbed for the child to prevent the child's head from hitting the cement porch and in so doing twisted her back. The parties stipulated that associates is a joint venture and was doing business as Employer B, and that at the time of claimant's injury Employer A (a corporation) was doing business as MPP of city and has done or is doing business as IH of city. Claimant testified that on March 9, 1992, she was hired by an entity which she understood to be simply MPP; that on that date she was provided with one employee's handbook by the person who attended to her hiring; that on its front cover that handbook stated the name of the entity as Employer B and further stated that Employer B would be referred to in the handbook as MPP; and that she understood she worked for MPP and thought Employer B was a division of MPP. She indicated she was never advised of nor did she learn of the existence of Employer A and the relationship between Employer A, Employer B and MPP.

The Good Cause for Untimely Claim Issue

Claimant testified that on the day she was hired the interviewer reviewed the Employer B employee's handbook with her and that it contained a provision stating that Employer B had workers' compensation coverage with the carrier. She denied having been given an employee's handbook for Employer A or otherwise having knowledge, through posted notices, that Employer A did not have workers' compensation insurance coverage. She acknowledged signing, when she was hired, a notification of rules and regulations which included the following statement: "I have read and understand [Employer B's] Notice of Workers' Compensation." Claimant further testified that on July 30, 1992, she went to her employer's office to pick up her check. The evidence showed that although Employers A and B had different addresses at the building where they were located they shared a common office having several doors. According to claimant, Ms. M, the administrator for health agency (described by Ms. M as "a portion" of Employer A), to whom she apparently reported her injury, told her she would have to complete an incident report and see a doctor before she could return to work. Claimant said that when she told

Ms. M she could not afford to miss any work Ms. M said "they would take care of it with a percentage of my income until I could return to work because they didn't have workers' comp." Claimant said she was "upset" and "devastated" upon hearing that workers' compensation was not available, that this was her first knowledge that she did not have coverage, but that she did not "confront" anyone about it. She stated that she was subsequently provided with medical benefits and on or about June 30, 1992, began to receive weekly income benefits of approximately $191.90 which continued into November 1994 when she was told they were discontinued because she had reached maximum medical improvement. Claimant indicated she was surprised when the payments stopped since Ms. M had told her they would continue until she was able to return to work.

Claimant further testified that in April 1994 she became "curious" about workers' compensation coverage, located and reread the handbook she had been given, contacted an attorney and had the attorney contact the Commission. In a July 2, 1994, letter claimant wrote to the Commission forwarding her claim she indicated that in the spring of 1993, an employee of health advisory services, from whom she apparently received her medical and income benefits, called to advise that Mr. R at MPP had a check for $10,000.00 made out to her "so they can get you off their payroll" and indicated she declined to accept. In that letter claimant also stated she had spoken to an attorney a week earlier and that a telephone call to the Commission informed them that a workers' compensation insurance policy was in effect on the date of her injury. However, claimant was specifically asked if it was in April 1994 that she reread the handbook and contacted an attorney and she replied in the affirmative. She further testified that sometime in June 1994 she herself called the Commission and was told there was coverage; that she contacted the Commission again on June 30th and was told she would be sent a form; and that on July 2, 1994, she filed her claim. The Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) in evidence shows that claimant signed it on July 2nd and that it was received by the Commission's City 1 field office on July 5, 1994.

The hearing officer found that claimant did not file her claim with the Commission within one year of the date of her injury and that she did not have good cause for her failure to do so. As stated, claimant's appeal first asserts that Dr. P's report should be considered and that it constitutes a "timely notice to the Commission" of the claim. We find no merit in these assertions. The record does not support the assertion that "the employer" and the carrier "concealed" Dr. P's report and, on the state of this record, we do not view Rules 141.4 and 142.13 as having imposed a duty on the carrier to have discovered and exchanged that report with the carrier. Claimant was able to discover the report, without apparent difficulty, when preparing for a Social Security benefits hearing after the CCH. Further, we decline to reverse and remand the case for consideration of Dr. P's report and the other documents attached to claimant's appeal. Section 410.203(a) provides that the Appeals Panel shall consider the record developed at the CCH. Dr. P's report and the carrier's exchange letter and answer to interrogatories were dated well before the CCH. The documents attached to claimant's appeal do not meet the criteria for newly discovered

evidence and will not be considered. *See* Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. Even if Dr. P's report could be considered as evidence, it is apparent that it does not contain the information required by Rule 122.2. Claimant's reliance on Rule 124.1 is misplaced in that that rule pertains to written notice of injury to the employer.

Other than stating in his discussion that claimant had no "legal justification" for her late filing, the hearing officer did not state his rationale for finding that claimant did not have good cause. The Appeals Panel has said that the judgment of the fact finder should be affirmed it if can be sustained on any reasonable theory supported by the evidence. Texas Workers' Compensation Commission Appeal No. 93502, decided August 4, 1993. We are satisfied from the evidence of record that the hearing officer did not abuse his discretion in determining that claimant did not have good cause for not timely filing her claim. Texas Workers' Compensation Commission Appeal No. 93870, decided November 10, 1993; Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986). Claimant had the burden to prove she had good cause and the test is whether she 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); Providence Lloyds Ins. Co. v. Smith, 828 S.W. 2d 328 (Tex. App.-Austin 1992, writ denied.) The totality of a claimant's conduct must be considered in determining ordinary prudence. Lee v. Houston Fire & Casualty Insurance Co., 530 S.W.2d 294, 297 (Tex. 1975). The Beasley court further held that the duty to prosecute one's claim with that degree of diligence which a reasonably prudent person would have exercised under the same or similar circumstances continues up to the date the claim is filed. Beasley, *supra,* at 34-35. *And see* Lee v. Houston Fire & Casualty Company, *supra*, at 296; Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841,943 (Tex. Civ.App.-Corpus Christi 1991, no writ).

It was not disputed that Ms. M told claimant on June 30, 1992, that her injury was not covered by workers' compensation insurance and that she would otherwise be provided with medical and income benefits. Nor was it disputed that claimant thereafter was provided with such benefits. While claimant acknowledged not having "confronted" anyone about Ms. M's representation despite having been advised when she was hired that the employer had coverage, she said that in April 1994 she became "curious," reread her employee's handbook and contacted an attorney. She had the attorney contact the Commission and said she followed the attorney's advice (which was not well developed in the evidence), and also said that she herself contacted the Commission twice in June 1994 before filing her claim in July 1994. We do not find under these circumstances that the hearing officer abused his discretion in determining that claimant did not have good cause for the untimely filing of her claim. Even if claimant's reliance on Ms. M's representation and her subsequent receipt of medical and income benefits constituted good cause for not filing a claim until sometime in April 1994, such good cause did not continue up to the date she filed the claim. The evidence quite clearly established that at sometime in April 1994 claimant no longer relied on or had a reasonable basis to continue to rely on Ms. M's

representation and the receipt of benefits.

The Employer Issue

"Employer" is defined, in pertinent part, as "a person who makes a contract of hire, employs one or more employees, and has workers' compensation insurance coverage." Section 401.011(18). "Employee" is defined, in pertinent part, to mean "each person in the service of another under a contract of hire, whether express or implied, oral or written." Section 401.012(a). No written contract of employment was adduced and neither party took the position at the CCH that claimant was a "borrowed servant" of either Employer A or Employer B at the time of her accident. It was the carrier's position that claimant was the employee of Employer A when she was injured while claimant contended to the contrary.

Ms. M testified that the contracts for the assignment of employees to perform home health care did not require workers' compensation insurance and that employees performing home health care duties, who did not have to be supervised by registered nurses (RN), worked for Employer A whereas the contracts under which employees were assigned to hospitals and nursing homes did require such coverage and employees working in those locations, who had to be supervised by registered nurses, worked for Employer B. The documentary evidence showed that Employer B had coverage by the carrier on the date of the injury and that the provisions of the 1989 Act had been "rejected" by MPP effective November 1, 1990. Ms. M testified that notice of the noncoverage was posted in the common room when claimant was hired; claimant denied seeing such notice. In any event, the notice referred to the rejection by MPP, not Employer A. Ms. M further testified that in addition to the Employee B handbook claimant "would have been given" an Employer A handbook when she was hired. A copy of that document was excluded from evidence on objection by the claimant. Claimant introduced a copy of a document entitled "Employee Acknowledgement Forms." This exhibit reflected the name of the entity as Employer A, to be thereafter referred to as MPP. It did not contain claimant's signature. None of the forms accompanying that document, which bore the signatures of claimant and Ms. B and the date March 9, 1992, made reference to Employer A. Ms. M also stated that both entities had their own "coordinators," that the coordinators scheduled the employees but did not supervise them, that the coordinators shared a common room, and that upon entering the room one probably could not discern which coordinators worked for which entity. She conceded that on occasion coordinators for one entity become involved in coordinating the work of employees of the other entity.

Claimant's handbook from Employer B and other documents she was given when hired on March 9, 1992, bore the stamped signature of Ms. B over the title of "supervisor." Claimant testified that after she was hired she first worked at a hospital before commencing home health care duties, that the same coordinators scheduled her for both hospital and home health care work, and that her day-to-day contact was with coordinators. She said

that Ms. S once contacted her, told her she was her supervisor, and wrote her evaluation. Claimant said this was her only contact with Ms. S. Ms. M stated that both Ms. S and her successor were claimant's supervisors and were RNs. Claimant introduced the job description she was given on March 9, 1992, pay stubs for periods she worked at a hospital and at a home, a copy of her name tag, a progress notes form and a medication record form. All bore the name MPP.

The hearing officer found that claimant was employed by Employer B at the time of her injury; that she was not aware of any employment relationship with Employer A; that she was hired by employees of Employer B; that those employees worked in the building occupied by Employer B; that her work was coordinated by employees of Employer B; that her chief nurse was the chief nurse for Employer B; and that both Employer A and Employer B were referred to as the MPP. The hearing officer further found that claimant did not receive a handbook from Employer A and was not aware that Employer A did not subscribe to workers' compensation insurance. The hearing officer concluded that claimant was employed by Employer B. In Pederson v. Apple Corrugated Packaging, Inc., 874 S.W.2d 135 (Tex. App.-Eastland 1994, n.w.h.), the court referenced the 1989 Act and stated that "[f]or workers' compensation purposes, the party with the `right to control' the employee at the time of the injury is the `employer.' [citation omitted]." We are satisfied that the great weight of the evidence does not establish that Employer A had the right to control claimant at the time of her injury.

The issue of which entity was claimant's employer on the date of her injury presented the hearing officer with a question of fact which he resolved in claimant's favor. The hearing officer is the sole judge of the materiality, relevance, weight and credibility of the evidence (Section 410.165(a)). It is for the hearing officer as the trier of fact to resolve conflicts and inconsistencies in the evidence such as exist in this case. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We will not disturb the findings of the trier of fact unless we find them so against the great weight of the evidence as to be manifestly unjust and we do not so find in this case. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Absent evidence of an adequate written employment contract, the hearing officer could determine from all the evidence that on March 9, 1992, claimant entered into an oral contract of employment with Employer B.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Elaine M. Chaney
Appeals Judge