APPEAL NO. 92407

On July 10, 1992, a contested case hearing was held at (city), Texas, before (hearing officer). The hearing was held pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts.8308-1.01 *et seq*. (Vernon Supp 1992) (1989 Act). The issue was whether or not appellant (claimant below) was injured in the course and scope of his employment on (date of injury). The hearing officer held that appellant was involved in an automobile accident on (date of injury), but that he did not receive damage or harm to the physical structure of his body in that accident. He thus held that appellant did not suffer an injury in the course and scope of his employment on the date indicated.

Appellant contends in his request for review that his testimony and the medical records introduced into evidence demonstrate by a preponderance of the evidence that he did in fact suffer an injury. Appellant says he was unable to obtain a particular doctor's records prior to the hearing, but that he relied upon respondent's answer to interrogatories that it intended to offer the records. Appellant attaches to his pleading the pertinent portion of the interrogatories, respondent's attorney's letter designating persons with knowledge of relevant facts, and an initial medical report signed by (Dr. L). Respondent replies that the decision and order are supported by the record evidence.

DECISION

We affirm the decision and order of the hearing officer.

At the hearing the parties stipulated that appellant was an employee of (employer), an employee leasing company that was insured for workers' compensation purposes by WGI of Texas. The parties also stipulated that at the time of appellant's alleged injury he was performing work for (employer)., under a lease arrangement between (employer). The hearing officer's decision says that following the hearing, respondent's attorney advised that the correct carrier was (carrier). No issues regarding identity of the employer or the insurance carrier were raised at the hearing or on appeal. Solely for purposes of clarity in this decision, we will refer to (employer), as "employer."

Appellant testified that on (date of injury), he and another coworker were returning to the employer's shop after wiring a house when the pickup truck in which he was riding, which was owned by employer, hit the back of the car directly in front of them. He said the impact caused his body to go forward. He and the coworker went back to the shop that day, and he came to work the next day. He did not report to work on the following day (date) because he was in pain, but he said he did not call his employer because he did not have access to a telephone. He said on (date) his neighbors returned from out of town and he was able to use their telephone to call in to work. He first spoke with (PF) to ask for information about the employer's insurance carrier, but was told he had been terminated and that he needed to talk to (DH). He said he contacted DH and told him he had been injured and needed insurance information so he could see a doctor. He said DH told him he was terminated and there was nothing the insurance company could do.

Appellant said he was seen by (Dr. S) on December 17th, upon an attorney's recommendation. He saw Dr. S only once and thereafter began treatment with (Dr. L). He said he had neck and lower back pain from the accident.

DH, who is employer's (city) office manager, testified that appellant was hired as a helper on November 20, 1991. He said neither appellant nor the driver of the truck reported any injury from the accident on (date). Appellant did not report for work nor call in on the 11th or 12th; he said appellant was terminated because he had missed a total of five days work since he was hired. On the afternoon of December 12th a woman called PF on appellant's behalf and was told appellant had to speak directly to DH. A few minutes later DH said appellant called him to say he was not feeling well and to see about coming back to work; at that time DH told him he was terminated. Less than one hour later, DH said appellant called him back to say he had been injured on the job and needed to see a doctor. He said appellant said he had seen his own personal doctor the evening of (date). Appellant denied that he had called DH twice nor that he said he had seen a doctor. He testified that he told DH he had been injured in the accident before DH told him he was fired.

Health insurance claim forms and an initial medical report filed by Dr. L show that appellant was treated by Dr. L for cervical and lumbar sprain/strain from January 7 through February 13, 1992. The initial medical report noted, and appellant acknowledged on cross-examination, that he had suffered a previous back injury in 1990 for which he was paid workers' compensation benefits. Appellant first denied, then later acknowledged, that he had been in another automobile accident in 1989.

The claimant in a workers' compensation case has the burden of establishing by a preponderance of the evidence that an injury occurred in the course and scope of his employment. Parker v. Employers Mutual Liability Insurance Co. of Wisconsin, 440 S.W.2d 43 (Tex. 1969). The evidence brought forward by appellant in this case was his own testimony, which was controverted, and documents showing medical treatment by Dr. L for lumbar and cervical sprain or strain. We note that even the uncontradicted testimony of an interested witness does nothing more than raise an issue of fact unless that testimony is clear, direct and positive, and there are no circumstances in evidence tending to discredit or impeach such testimony. Anchor Casualty Co. v. Bowers, 393 S.W.2d 168 (Tex. 1965). Where, as here, there is conflicting testimony, the hearing officer as trier of fact may believe one witness and disbelieve others. Ford v. Panhandle & Santa Fe Ry. Co., 252 S.W.2d 561 (Tex. 1952). The hearing officer as sole judge of the relevance and materiality of the record evidence and of its weight and credibility, Article 8308-6.34(e), was likewise entitled to weigh the medical evidence in this case, which we note consisted of seven claim forms filed by Dr. L with the health insurer, and an initial medical report completed by Dr. L. Based on the foregoing, we do not find that the hearing officer's decision was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In Re King's Estate, 244 S.W.2d 660 (Tex. 1951).

On appeal, appellant also appears to complain that respondent, after having indicated it would introduce medical reports from Dr. S, failed to do so. Appellant also

claims that respondent failed to exchange these records prior to the hearing, as required by Art. 8308-6.33 and Tex. W.C.Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). Appellant says he was unable to secure these documents prior to the hearing.

Rule 142.13(c) provides that, except for expedited hearings or a hearing without a prior benefit review conference, no later than 15 days after the benefit review conference the parties shall exchange, among other things, all medical records; thereafter, the parties shall exchange additional documentary evidence as it becomes available. A party who fails to disclose documents in his possession when disclosure is required may not introduce such evidence at any subsequent proceeding before the Commission unless good cause is shown for not having disclosed such documents. Article 8308-6.33(e); Rule 142.13(c). Prior opinions of this panel have previously addressed situations where parties attempted to introduce unexchanged information into the record at the hearing. In the instant case, respondent, who in answers to interrogatories claimed to possess Dr. S's records, apparently did not exchange them nor attempt to introduce them. As we have stated earlier, the claimant bears the burden of proof and is responsible for bringing forward such evidence as will assist him in meeting this burden. We note that the record does not show that appellant asked that the hearing be continued so that he could subpoena or otherwise obtain Dr. S's records. We find nothing in appellant's contention that would require our reversal.

The decision and order of the hearing officer are affirmed.

_____
Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge