APPEAL NO. 931004

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). A contested case hearing was held on October 4, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the hearing was whether the Respondent (claimant) also sustained injury to his right arm, right shoulder and back in addition to the injury to his right hand on (date of injury).[1] The hearing officer found that the claimant did in fact also sustain injuries to his right arm, shoulder and back from the same incident that injured his right hand. Carrier appeals this decision asserting that the hearing officer improperly excluded evidence intended to impeach the credibility of the claimant; that certain of the claimant's documentary evidence was improperly admitted because it was not timely exchanged; and that the hearing officer misstated jurisdictional matters when she made a finding of fact about the identity of the employer in this case contrary to the stipulation of the parties.

DECISION

For the reasons set forth below, we reform in part, and reverse and remand in part, the decision of the hearing officer.

There is no dispute that the claimant injured his right hand in the course and scope of his employment on (date of injury),[2] while attempting to move a large piece of machinery with the help of another employee. The claimant testified that he immediately told his supervisor about his "mashed" right hand and fingers. The supervisor offered to get medical help, but the claimant declined and kept working his shift. He was off the next day, a Friday. Over the weekend he admitted doing some manual labor at the home of the company vice-president trimming trees, but insisted this work did not injure him or aggravate any existing injuries. The claimant did not recall whether he mentioned any other injuries besides his hand injuries to the vice-president.

The claimant next stated that he went to work the following Monday (May 10th) and reported to his supervisor that he had also hurt his back in the same incident when he hurt his hand. The supervisor urged him to see a company doctor. The claimant stated that rather than immediately go to the company doctor, he asked for and was given up to three weeks off (whether with or without pay is not clear) to see if his injuries would resolve themselves. If not, he would then go to the doctor. He stated that he was told that if he went to the company doctor a drug screen test would be performed.[3] He said

---

[1]The issue as framed by the hearing officer in her Decision and Order incorrectly refers to August 6, 1993, as the date of the injury. However, the evidence, the Findings of Fact and the Conclusions of Law all properly refer to (date of injury), as the date of the injury.

[2]Claimant admitted at the hearing that this hand injury is now healed.

[3]The claimant's attorney successfully objected to the carrier's attempts to

that he also filled out a formal accident report. He worked the entire day (May 10th) and, at the end of the day, his supervisor told him not to report back to work again without a hard hat. The supervisor set up a meeting with the claimant for May 14, 1993, which the claimant admitted he did not attend. There was some dispute about the purpose of the meeting with the carrier suggesting that the claimant did not attend because he knew he would be terminated at the meeting. The claimant asserted that he had no idea that at the meeting he would be fired. As discussed below, the hearing officer denied the carrier permission to pursue on cross examination what the claimant knew about the meeting and what effect that may have had on the claimant's credibility.

The claimant stated that while still off work his pain got worse. Sometime about May 20, 1993, he said he called the company to report worsening pain in his back, shoulder and neck and was told by a person whom he was unable to identify that he had been fired. At this point the claimant decided he needed medical care and made an appointment for May 28, 1993, with (Dr. WI) of the Texas Orthopedic and Trauma Associates. Dr. WI's first report of medical treatment states that the claimant complained of injuries to his back, right shoulder, right arm and right leg. Dr. WI began a course of conservative treatment including physical therapy. An MRI of the lumbar spine on June 30, 1993, showed "broad-based subligamentous disc herniation" at L4-5 and mild disc degeneration at L1-L2, L2-3 and L5-S1. An MRI of the cervical spine on July 31, 1993, revealed no disc bulge or herniation. An MRI of the right shoulder on August 28, 1993, disclosed muscular hypertrophy with impingement on the supraspinatus muscle near the musculotendinous junction, but no evidence of rotator cuff tear or tendinitis. The last medical report in evidence, prepared by (Dr. WE), also a Texas Orthopedic and Trauma Associate, confirms herniation of the lumbar spine and diagnoses cervicothoracic pain, sciatica, and radiculopathy radiating into the right shoulder and hand.

The claimant further testified that he still has a lot of pain and insists that because of his injuries he is unable to work. As of the date of the hearing, Dr. WE had not approved his return to work. The claimant insisted that he told co-employees about his injuries, but he refused (and the carrier did not press the point) to identify them for fear they would be retaliated against.

(Mr. E),[4] the company president, confirmed that the claimant reported the hand injury to his supervisor, but asserted that to his knowledge claimant never reported any back, shoulder or arm injury. He asked the claimant on May 10, 1993, to fill out a formal report of the injury and see the company doctor. To Mr. E's knowledge, the claimant did neither. No written report of injury was in evidence. The hearing officer did not permit

---

elicit further information about the likelihood of a drug test on the claimant's refusal to see the company doctor and how this affected his credibility even though a discussion of the drug test was contained in carrier's exhibit 2, admitted over objection by the claimant.

[4]Mr. E has the same last name, but is no relation to the claimant.

questions about any performance problems with the claimant that might otherwise be a basis for challenging the claimant's credibility. By notice of June 11, 1993, the employer disputed the claim of a back injury arising out of the (date of injury), incident, and indicated it first received notice of the claim on May 20, 1993, "after employees (sic) termination."

The relevant determinations of the hearing officer are:

FINDINGS OF FACT

2.On (date of injury), the Claimant was employed by (employer), rather than (company)., as indicted in the Notice of Hearing and Benefit Review Conference Report.

3.(company), Inc. handled the payroll for (employer).

4.On (date of injury), the Employer, carried a policy of workers' compensation insurance coverage with (carrier).

5.On (date of injury), the Claimant fell while working for (employer) and attempting to prevent a crate containing deli equipment from falling. The crate fell on the Claimant's right hand and also injured his right arm and shoulder and his back.

CONCLUSIONS OF LAW

2.The Claimant sustained a compensable injury to his right hand, arm, shoulder and his back on (date of injury), while in the course and scope of his employment with (employer).

The carrier asserts on appeal that the hearing officer misstated the name of the employer and mistakenly found that this employer was covered by workers' compensation insurance issued by the carrier. The carrier contends that the claimant was in fact employed by (company), "a leased employee company," and that (company), not (employer), was covered by workers' compensation insurance. Without citation to authority or further explication of reasons, the carrier urges that this finding of workers' compensation coverage that does not exist is a "jurisdictional matter" that "mandates reversal."

Contrary to the assertion by claimant's counsel in her response to the carrier's appeal, the record clearly shows that the parties stipulated that (company) was the employer and that (company) was the insured under the carrier's workers' compensation insurance coverage. Mr. E, in unrefuted testimony, stated that (employer) leased its staff from (company) and that it paid an extra fee to (company) expressly for workers' compensation coverage. The agreement between (employer) and (company) was not in

evidence.

Unlike other cases where a carrier or employer seeks to avoid liability under a borrowed servant or "leased employee" theory, *see* e.g., Texas Workers' Compensation Commission Appeal No. 93733, decided September 20, 1993, or where an employer may seek to misrepresent coverage, *see* e.g., Texas Workers' Compensation Commission Appeal No. 931000, decided December 8, 1993, the parties in this case proceeded under the theory that there was no dispute about the existence of coverage, the identity of the carrier or who, for purposes of workers' compensation, would be considered the employer if a compensable injury were found to exist. (company) was the covered employer and the carrier was prepared to pay (company) claims once a compensable injury was established. There was no disputed issue concerning the identity of the employer nor was such an issue added to the statement of disputes pursuant to the mechanisms in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODES 142.7 (Rule 142.7). Under these circumstances, we find the stipulation of the parties as to the identity of the employer "final and binding." *See* Texas Workers' Compensation Commission Appeal No. 92109, decided May 4, 1992, and Section 410.166. Thus, Findings of Fact No. 2 and No. 4 are not supported by the evidence. We reform them as follows:

FINDINGS OF FACT

2.On (date of injury), the Claimant was employed by (company), Inc.

4.On (date of injury), the employer, (company), Inc., carried a policy of workers' compensation insurance coverage with Planet Insurance Company.

Since the employer in this case was not a party to the proceedings, *see* Texas Workers' Compensation Commission Appeal No. 93133, decided (date of injury), we find no merit in the contention of the carrier that the mistaken Finding of Fact No. 2 is somehow jurisdictional and requires, without an assertion of harm to a party, reversal. *See*, Texas Workers' Compensation Commission Appeal No. 93435, decided July 16, 1993.

The carrier also appeals certain evidentiary rulings of the hearing officer, the "most egregious" of which was her refusal to allow the carrier to develop, through cross-examination of the claimant and direct examination of Mr. E, evidence of possible motivation for the claimant to exaggerate the extent of his injuries. Because the case turned largely on the credibility of the claimant, the carrier sought to establish that the claimant sustained only a minor injury to his hand, which was now resolved, and greatly exaggerated the extent of his injuries only after he found out he was about to be fired at a scheduled meeting with his supervisor on May 14, 1993, a meeting which the claimant did not attend. However, the hearing officer refused to allow any evidence about the claimant's job performance, attendance and safety practices as irrelevant to the issue under consideration.

As an interested party, the credibility of the claimant is always an issue at a

contested case hearing. *See* Texas Workers' Compensation Commission Appeal No. 92703, decided February 18, 1993, and Gomez v. Franco, 677 S.W.2d 231 (Tex. App. - Corpus Christi 1984, no writ). This is particularly true when the claimant's testimony is "not so clear, direct and positive and so lacking in circumstances tending to discredit it or impeach it as to render it binding upon the [finder of fact]." Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App. -Texarkana 1977, no writ). With only the claimant and Mr. E testifying, credibility became a critical matter. In this case, the hearing officer articulated no clear reason why she would not allow evidence on the issue of the claimant's credibility. The proffered evidence appears to be relevant to the issue of credibility. Claimant's testimony itself was replete with surmises and lack of specificity with regard to key dates. We thus conclude that the hearing officer erred in refusing to allow the carrier to develop evidence going to the claimant's credibility.

To obtain a reversal of a decision based upon the erroneous exclusion of evidence, the hearing officer's error must be shown to be reasonably calculated to have caused and to have probably caused the rendition of an improper decision. Here, the excluded evidence was not cumulative and may well have been controlling on the ever present issue of claimant's credibility. Considering the record as a whole, we believe the hearing officer's error was reasonably calculated to cause and probably did cause the rendition of an improper decision. *See* Harbison v. Service Lloyds Insurance Company, 808 S.W.2d 690, 693 (Tex. App. -Corpus Christi 1991, no writ); Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989); and Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. We remand the case for further development of evidence on the underlying issue of the credibility of the witnesses.

Finally, carrier appeals certain rulings of the hearing officer which admitted into evidence portions of Claimant's Exhibit 1 (medical records of the claimant) and Claimant's Exhibit 2, a statement of (Mr. V) over the carrier's objection that they had not been timely exchanged.

Section 410.161 provides that a party who fails to disclose information known to that party or documents which are in the possession, custody and control of that party at the time disclosure is required, may not introduce such evidence at a contested case hearing "unless good cause is shown" for failure to timely disclose. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)), such exchange shall take place no later than 15 days after the Benefits Review Conference (BRC) (with an exception in the case of expedited hearings). Additional documentary evidence is to be exchanged as it becomes available. Rule 142.13(c) also requires a hearing officer to find good cause as a precondition to the admission of documentary evidence not previously exchanged.

The carrier objected to those portions of Claimant's Exhibit 1 which reflect medical care provided after June 11, 1993. The significance of June 11, 1993, is not obvious, but presumably it is the date through which the carrier had medical records in its possession.

In any event, the latest element of Claimant's Exhibit 1 was dated September 24, 1993, some two weeks before the hearing. In response to carrier's objection, the claimant's attorney represented that she only received Claimant's Exhibit 1 on the day of the hearing. Similarly, Claimant's Exhibit 2 was dated September 9, 1993, and claimant's attorney represented that she only obtained a copy the morning of the hearing. The hearing officer determined that neither were previously available and admitted them into evidence. We assume, for purposes of this appeal, that the hearing officer's determination that these documents were not previously available was tantamount to a finding of good cause for the otherwise untimely exchange. See Texas Workers' Compensation Appeal No. 91064, decided December 2, 1991, for a discussion of mandatory good cause determinations and Texas Workers' Compensation Commission Appeal No. 92225, decided July 15, 1992, for a discussion of implied findings of good cause.

We hold that the admission of those portions of Claimant's Exhibit 1, which contain entries after June 11, 1993, and Claimant's Exhibit 2, constituted error and that the hearing officer improperly considered them not available for exchange until the documents were received by the claimant's attorney. Section 410.161 and Rule 142.13(c) speak in terms of obligations of the parties, not the attorneys, to exchange documents. Considerations of good cause, or lack thereof, for untimely exchange must be calculated as of the date that the party, not the attorney representing the party, has possession of the documents. *See* Texas Workers' Compensation Commission Appeal No. 93870, decided November 10, 1993.

We do not find reversible error in the admission of Claimant's Exhibit 1. This document contained essentially medical confirmation of the physiological bases for claimant's complaints of injury to his back, shoulder and arm. Since the claimant had previously testified generally to these injuries and his testimony alone, if credited by the trier of fact, would have been sufficient to establish a compensable injury, *see* Texas Workers' Compensation Commission Appeal No. 93872, decided December 8, 1993, we consider the erroneously admitted portions of Claimant's Exhibit 1, to be cumulative and not reasonably calculated to cause and probably did not cause the rendition of an improper decision.

However, with regard to the admission of Claimant's Exhibit 2, we do find reversible error. This document dealt directly with the credibility of Mr. E in that it asserted bias and a motive on the part of Mr. E to lie about his dealings with the claimant. It was, ironically, precisely the kind of evidence that the carrier was not allowed to introduce regarding the claimant's credibility. It was signed and presumably in the possession of the claimant for whom it was expressly written almost four weeks before the hearing. Had it been exchanged shortly after receipt, the carrier would have had the opportunity to inquire into the motives of the person making the statement and to attempt to independently confirm or deny his veracity. This the carrier was precluded from doing. Given the absence of an express articulation of a rationale of good cause by the hearing officer, a misinterpretation of Rule 142 as to when a document is available, and the critical

issue of credibility that this evidence was meant to address, we cannot conclude that it did not cause the rendition of an improper decision. We remand on this issue for the hearing officer to either articulate good cause for the admission of Claimant's Exhibit 2, or alternatively, to reevaluate the case without consideration of this evidence.

Because we find it necessary to remand this case to the hearing officer, we also note a lack of consistency in other evidentiary rulings. In particular, in certain instances hearsay testimony was admitted while in other instances it was not. *See* Texas Workers' Compensation Commission Appeal No. 92144, decided May 28, 1992, for a discussion of hearsay evidence in contested case hearings. Also, Carrier's proffered Exhibit 4 was not admitted upon objection by the claimant because, as a transcription of a telephone conversation, it was not signed by either party to the conversation, but only by the transcriber. On the other hand, Carrier's Exhibit 2 was admitted over objection by the claimant even though it was a transcription of a telephone conversation which, exactly like proffered Exhibit 4, was signed only by the transcriber. While some of this disparate treatment of the evidence in this case may ultimately be explained by the desire of a party not to raise an objection and the nature of the evidence itself, the rulings at least superficially raise questions about the conduct of the hearing "which, cumulatively, could tend to undermine confidence in the decision." Texas Workers' Compensation Commission Appeal No. 93815, decided October 22, 1993.

Having reformed Finding of Fact Nos. 2 and 4, the decision of the hearing officer is reversed and the case is remanded for the expedited development of additional evidence, as appropriate, and for such additional findings and consideration as are appropriate and not inconsistent with this opinion.

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 Commission's division of hearings pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Joe Sebesta
Appeals Judge