APPEAL NO. 931184

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.) (1989 Act). A contested case hearing was held in (city), Texas on November 3, 1993, following two continuances, before (hearing officer), hearing officer. The issues were whether the respondent, hereinafter claimant, suffered an injury to his eye on or about (date of injury), during the course and scope of his employment; whether the appellant, hereinafter carrier, is excused from liability from such injury because the claimant failed to timely report such injury; and whether the claimant's alleged injury caused him to be unable to obtain and retain employment at preinjury wages from January 11 through March 7, 1993. The hearing officer determined these issues in claimant's favor (although he held that claimant's disability began on January 12, 1993). The carrier contends on appeal that the claimant failed to meet his burden of proof on each of the three issues, pointing to evidence in the record that supports carrier's position. It also contends the hearing officer erred in admitting three sworn statements from claimant's coworkers which were not timely exchanged pursuant to the appropriate rule of the Texas Workers' Compensation Commission (Commission). The claimant did not file a response.

DECISION

Finding no reversible error, we affirm the hearing officer's decision and order.

Claimant testified through an interpreter that he had been employed by (parent company:) (employer) since February of 1992. He was a laborer in the fireproofing division, with job duties that included spraying liquids and pulling cables. At the hearing the claimant testified that on a date which he gave as (date), he was spraying oil with a hose when the hose exploded and the liquid hit him in the left eye, causing his eye to turn red and purple for about ten days. (Under cross-examination the claimant acknowledged that he had previously given his date of injury as (date of injury)--including in his first report of injury and at the benefit review conference--but stated that he had made a mistake. One of carrier's witnesses testified that (date of injury) was a Sunday and employer's plant was not open that day.)

The claimant said he immediately notified his supervisor, (Mr. L), about the incident, but that he did not see a doctor until December 16th, when he went to the Clinic; according to evidence in the record, he was referred to (Dr. W) on December 18th. Dr. W diagnosed a dense cataract in claimant's left eye and recommended surgery. The claimant said he told Mr. F about the cataract and the need for surgery after he saw the doctor. In an April 26, 1993, letter Dr. W wrote claimant had given a history of diesel fuel or oil accidentally spraying in his eye under a lot of force on (date of injury) (patient notes from December 16th also give this history). Dr. W determined that claimant had a cataract, and she stated her opinion that it was probably caused by the force of the spray. On January 12, 1993, the claimant underwent surgery for the cataract. He was off work following the injury, but stated he got a job with a different employer on March 8, 1993.

(Ms. S), who works as employer's personnel director, testified that in the summer of 1992 she had a conversation with claimant in which he asked how to use his health insurance to see an eye doctor because of blurred vision and headaches. (She said another employee, (Mr. G), translated the conversation.) She said she later spoke with someone at the Clinic and was told claimant had seen a doctor there; however, no medical records from this visit were put into evidence and claimant denied he had sought medical treatment prior to December of 1992. Ms. S said she was not aware that claimant was claiming a workers' compensation injury until after he had surgery; she said in January 1993 he told her he was going to have surgery for a cataract and gave her a doctor's note, but that it did not indicate the problem was work related. She also said she spoke with claimant's supervisor who said claimant did not tell him he was hurt on the job within 30 days (Mr. L did not testify at the hearing).

Mr. G testified that the claimant did not indicate to him or to anyone else he was aware of that he had been injured on the job, within 30 days. He remembered translating the conversation between claimant and Ms. S in the summer of 1992, and stated that claimant was asking to see a doctor, but he said he could not remember the exact nature of his complaints.

(Mr. M) testified that he was not claimant's supervisor in (month, year), but that he worked around claimant on a daily basis. He did not see claimant sustain an injury, nor did claimant tell him he injured his eye.

The claimant introduced into evidence, over objection, virtually identical affidavits from three coworkers ((Mr. J), (Mr. DV), and (Mr. B)), all of whom stated that on (date of injury), they saw the accident happen and that claimant told the supervisor what had happened. Mr. M stated that he thought Mr. J and Mr. B worked in fireproofing in (month, year), but that Mr. DV worked in pre-stress which he said was too far away from fireproofing to be able to observe what was going on there. Ms. S said that Mr. J was a considerable distance from fireproofing, and that Mr. DV worked on a water truck that went throughout the plant but was primarily in pre-stress. Claimant acknowledged that Mr. DV is his nephew.

Carrier's attorney objected to the admission of the three witness affidavits on the basis that they had not been timely exchanged and that indeed he had not seen them at all prior to the hearing. The 1989 Act provides in Section 410.160 that, within the time prescribed by the Commission the parties shall exchange documentary evidence including witness statements. Tex. W.C. Comm'n, TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)), requires this exchange to be made no later than 15 days after the benefit review conference (which in this case was held on June 16, 1993). The affidavits were dated July 2, 1993. Admitted into evidence as hearing officer exhibits were a June 28, 1993, letter to carrier from claimant's attorney in which he indicates that Mr. B, Mr. DV, and Mr. J may be called as witnesses for claimant, and an October 26, 1993 letter to carrier from claimant's attorney which states in pertinent part that claimant planned to introduce at the hearing witness testimony from the three above-named individuals (claimant's attorney stated that

the affidavits accompanied this letter). A certified mail receipt was attached to the October letter, but claimant's attorney stated he did not have the accompanying "green card."

Rule 142.13(c) further provides that, after the 15-day time period, "[t]hereafter, parties shall exchange additional documentary evidence as it becomes available." It also states that the hearing officer shall make a determination whether good cause exists for a party not having previously exchanged such information or documents to introduce such evidence at the hearing. Section 410.161 provides that a party who fails to disclose information known to the party or documents that are in a party's possession, custody, or control at the time disclosure is required by the statute may not introduce the evidence at any subsequent proceeding before the commission or in court on the claim unless good cause is shown for not having disclosed the information or documents.

In this case, the hearing officer determined that the documents had been exchanged and thus admitted them. Pursuant to the statute and Rule 142.13, there was not even a colloquy as to whether good cause existed for the claimant's not having timely exchanged these documents to introduce such evidence at the hearing.[1] However, to obtain reversal based upon error of the trier of fact in admission of evidence at the hearing, the complaining party must show first the existence of error, and second that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989), was a workers' compensation case in which the trial court had allowed the claimant to present undisclosed fact and expert witnesses. The Supreme Court noted that the goals of the Rules of Civil Procedure regarding discovery were "to encourage full discovery of the issues and facts prior to trial so that parties could make realistic assessments of their respective positions [and] . . . prevent trials by ambush," Id. at 396. The court, however, stressed the trial court's discretion in admitting such evidence upon a finding of good cause. However, the court said, when a trial court errs by allowing the testimony of an undisclosed witness into evidence without a showing of good cause, the appellate court must determine whether that action constituted reversible error, and "[t]his court will ordinarily not find reversible error for erroneous rulings on admissibility of evidence where the evidence in question is cumulative and not controlling on a material issue dispositive of the case." Id. With regard to the testimony of the fact witness, who corroborated claimant's complaints of pain, the court noted that the claimant himself had testified as to back pain and such complaints were contained in the history he gave his doctor. The court concluded that "[i]n a workers' compensation case the issue of disability may be based on the sole testimony of the injured employee. Thus, the improper admission of [the witness'] testimony was not harmful because [claimant's] own testimony would have been sufficient to establish disability.

[1]To the extent the hearing officer may have found the affidavits timely exchanged on the basis of the June 28, 1993, letter naming these individuals as witnesses, we have previously held that exchanging witnesses' names is not good cause for not exchanging the same witnesses' statements. Texas Workers' Compensation Commission Appeal No. 92108, decided, May 8, 1992.

Furthermore, improper admission of evidence does not as a rule constitute reversible error when there is other competent evidence of the fact in question in the record," Id. at 397 (citations omitted).

Likewise, in this case the statements contained in the three affidavits are essentially cumulative of claimant's testimony which, if believed, by itself can establish the occurrence of an injury. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. App.-Texarkana 1974, writ ref'd n.r.e.). While we do not approve of the hearing officer's failure to make a determination as to good cause, we nevertheless find that admission of these three documents in this case did not constitute reversible error. Texas Workers' Compensation Commission Appeal No. 92225, decided July 15, 1992.

Turning to the merits of the case, carrier points to testimony of its witnesses which it says tends to discredit claimant's testimony. It is true that the evidence in this case is conflicting and contradictory. However, we cannot say as a matter of law that it is insufficient to support the hearing officer's determination. The claimant testified to events at the work place which he contends caused his eye injury; his medical records indicate that he gave the same history to Dr. W who opined that a forceful spray into the eye could cause trauma resulting in a cataract. He also testified that he immediately informed his supervisor about the incident, and denied that he had had pre-existing eye problems. The hearing officer, as sole judge of the relevance and materiality of the evidence, and of its weight and credibility, Section 410.165(a), was privileged to believe the testimony of claimant and the opinion of his doctor rather than that of carrier's witnesses, who stated that claimant's eye problem had manifested earlier and that he did not report a job related injury. As the trier of fact, the hearing officer weighs the evidence, decides the credence to be given the whole, or any part, of the testimony of witnesses, and resolves conflicts and inconsistencies in the testimony. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). While different inferences might reasonably be drawn from the evidence presented, this fact alone is not a sufficient basis to reverse the decision of the fact finder. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992.

Finding that the hearing officer's decision is not so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust, Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986), we affirm the hearing officer's decision and order.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

CONCUR IN RESULT:

The claimant's testimony and the opinion of the claimant's doctor provided sufficient evidence to support the hearing officer's decision in favor of the claimant. I would not necessarily classify the statement of a disinterested eyewitness as cumulative evidence.

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Robert W. Potts
Appeals Judge