APPEAL NO.93801

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.). On August 2, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) was not injured in the course and scope of employment on (date of injury), and that claimant did not give timely notice to the employer of his alleged injury. Claimant appealed asserting that he did sustain and injury and notified his foreman the day of the injury. Respondent (carrier) replies that the evidence is sufficient to uphold the decision of the hearing officer.

DECISION

We affirm.

At the hearing, the parties agreed that the issues were whether claimant injured his shoulder on (date of injury), while working for (employer) and whether claimant gave notice to the employer of an injury within 30 days.

Section 410.204(a) states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

On appeal, claimant asserts that he told both his foreman, (Mr. T) and the lead man, (Mr. L) of the injury the day it happened, that the hearing officer should have admitted two statements that were not exchanged until less than one week before the hearing, that the hearing officer should have allowed claimant's wife to testify even though she was not identified until less than one week before the hearing, that the hearing officer should not have allowed (Mr. B) to testify after he was allowed to stay in the hearing prior to his testimony, that his translator did not translate correctly, that the original hearing officer improperly denied certain subpoenas, and that the hearing officer did not refer to his tendinitis and other medical data in his decision.

The Appeals Panel determines:

That the evidence sufficiently supported the hearing officer's findings of fact that claimant did not give timely notice to a supervisor or manager within 30 days and did not sustain a shoulder injury while working for employer on (date of injury);

That the hearing officer did not abuse his discretion in failing to find good cause for claimant's failure to timely exchange documents and to timely identify persons with knowledge of the facts of the case;

That the hearing officer did not err in refusing to admit two statements not exchanged until July 28, 1993 and in refusing to allow a witness to testify who was not identified until July 28, 1993;

That the hearing officer did not err in allowing Mr. B to testify;

That the hearing officer did not abuse his discretion in denying requests for subpoenas of five employees of the employer;

That the hearing officer did not err in using the translator who was sworn to perform those duties at this hearing; and

That the hearing officer is not required to discuss all evidence in writing his decision.

Claimant worked for employer as a laborer. Employer was in the business of placing telephone cable and related equipment in the ground. On the day in question, (date of injury), claimant was in a ditch that had been dug by a backhoe, shoveling. There had been rain and the ground was wet. Claimant stated that his shovel stuck in the mud, one hand slipped on the shovel, and his other shoulder was pulled as that hand maintained its grip on the shovel. He said that he grabbed his shoulder and said that he had hurt himself to Mr. T who was sitting on the backhoe right above him. He said Mr. T could see him grab his shoulder but appeared to disregard his statement that he was hurt. He added that another worker, (Mr. R) had to help him out of the hole. He said that he told Mr. L, who was a lead man, of the injury because Mr. T did not seem to be concerned about the injury. He kept on working because he had to work. He said that the pain would come and go. He also said he was afraid he might lose his job because of the injury. On January 24, 1992, he was laid off. He was brought back to work on February 19, 1992, and worked until March 26, 1992 when he told the foreman, who he then worked for, that he had hurt his shoulder on (date of injury). That foreman told the superintendent, (Mr. B) who then took claimant to the hospital for tests.

The only medical document claimant offered at the hearing was a statement of (Dr. C) dated June 22, 1992, which referred to an evaluation of that date. He diagnosed rotator cuff tendinitis and impingement syndrome. He stated that claimant's condition was "not incompatible with injury" in January 1992. He released claimant to light duty.

Claimant introduced statements in English and Spanish from Mr. R which said that he recalled claimant hurting his shoulder. He added that he helped claimant out of the hole and claimant told him what happened. He said that Mr. L said it might be a pulled muscle and that claimant told Mr. T, but he "kept going on. . . ."

Mr. T stated that he was on the backhoe on that day and saw no injury and was told of no injury. He acknowledged that Mr. R extended his hand to assist claimant out of the hole, but stated that this is a common practice for crew members to do one for another. He said the hole was about three and one-half feet deep and that claimant, weighing approximately 250 pounds could not have exited the hole just by the assistance of Mr. R, who weighed about 150 pounds without helping himself with his other hand; in exiting the hole, Mr. T did not see claimant favoring his arm or shoulder. The first time Mr. T heard of

an injury was when Mr. B came to inquire of him on March 26, 1992, after Mr. B had heard of the assertion. Mr. T said that Mr. L was not a lead man.

Mr. B testified that Mr. R had been injured a short time before (date of injury), and had been taken to the hospital and suffered no loss of job because of the injury; claimant knew of this because he went along to translate for Mr. R. Mr. B said that Mr. L was not a lead man and even if he were, he would only be in a supervisory position when the foreman was not present. Mr. B saw claimant at work from time to time between (date of injury) and March 26th and did not see him impaired in his working.

A statement of (Mr. C), a brother-in-law of claimant, stated that claimant told him of the injury about a week before March 26, 1992. (Mr. C was also employed by employer).

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He could believe Mr. T when he said that he was working with claimant on the day in question and was observing him in the hole, but saw no injury and was told of no injury. There was no prompt medical attention given other than what claimant described as over-the-counter pain medicine and his wife's massaging; claimant first saw a doctor about the condition of his shoulder on March 26, 1992. Claimant missed no work because of any injury between (date of injury) and March 26th and was not observed to be impaired in his performance. Mr. T testified that he had taken another worker, Mr. R to the hospital not long before (date of injury), when he, Mr. T, observed a possible injury even though Mr. R did not tell him he was injured. The evidence was sufficient to support the hearing officer's determination that Mr. L was not a supervisor, that claimant did not notify employer within 30 days, and that claimant did not show he was injured on the job.

In this case, contested case hearing dates of October 29, 1992, January 12, 1993, and May 20, 1993, had been set prior to the hearing dated August 2, 1993. None of the continuances provided are indicated in the record as being as a result of a request by the carrier.

Claimant's exhibits 13 and 14 were both excluded as not timely exchanged. Both statements were dated in May 1993, but were not exchanged until July 28, 1993, and the hearing was held on August 2, 1993. Texas Workers' Compensation Commission Appeal No. 92263, decided August 3, 1992, upheld a hearing officer's failure to find good cause for exchange five days before the hearing when a part of the delay was based on sickness with the flu. In this case, the claimant did have difficulty communicating with the ombudsman because of lack of a telephone and a car; however, the hearing officer did not abuse his discretion in failing to find good cause to admit these two documents.

Claimant's wife was not allowed to testify when her name was not provided to the carrier until July 28, 1993. Texas Workers' Compensation Commission Appeal No. 91131, decided February 12, 1992, upheld a hearing officer's decision to not allow testimony of a witness who had not been identified as a person with knowledge of the facts of the case.

That case also cited Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1)(D) (Rule 142.13(c)(1)(D)) which requires parties to timely exchange the names of persons with knowledge of the facts. The hearing officer did not abuse his discretion in not allowing claimant's wife to testify. (We note that Texas Workers' Compensation Commission Appeal No. 92539, decided November 25, 1992, provides that a claimant does not have to identify himself to testify, but that decision did not extend to his wife.)

At the hearing no objection was made to Mr. B testifying after being present in the hearing. He had identified himself as the employer's representative. Section 409.011 provides that the employer may be present at administrative proceedings. An employer's representative may testify after being present at the hearing. See Texas Workers' Compensation Commission Appeal No. 92378, decided September 14, 1992.

Claimant's exhibit 9 includes an order of a prior hearing officer denying subpoenas. That order recites that claimant in requesting the subpoenas only stated that each person "had first hand knowledge of my accident on (date of injury)." That order was entered on November 3, 1992. The benefit review conference, which had been held on September 4, 1992, only listed one issue at that time and that issue dealt with whether the injury was timely reported. The order pointed out that claimant made no showing that statements, affidavits, or depositions could not be obtained and there was no representation that any witness was a representative of the employer who had actual knowledge or reported it to a supervisor. The order concluded that good cause was not shown for the subpoenas. Rule 142.12(c)(1)(B) provides that a subpoena must explain the relevance of the evidence when the party requesting the subpoena is represented. An unrepresented party is not required by the rule to make that showing. However, Rule 142.12(b)(2) also states that a subpoena will be issued on a showing of good cause by the party, without distinction as to whether represented. In this case, with no showing of knowledge of facts relative to the only issue in being at the time and with no indication that testimony could not be obtained through written means (Rule 142.12(d)), the hearing officer did not abuse his discretion in denying subpoenas. We note that the only one of the five persons named in the request who was either a supervisor or even alleged to be a supervisor was Mr. T, and he testified at the hearing. Statements from the other four people were offered at the hearing. If there was error in denying the subpoenas, it was not reversible error because it probably did not cause an improper decision. *See* Hernandez v Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ).

A question arose as to the translation by the translator when the hearing officer asked her to read a statement, (claimant's exhibit 12 of Mr. R) offered in Spanish, into English. The same statement was also offered in English as claimant's exhibit 11. The ombudsman pointed out that there was some error in the translation but did not point out what that error was. In view of the fact that the statement was already translated into English and such translation is also in evidence, any error in not delving more deeply into the assertion of error in translation was not reversible error. *See* Hernandez, *supra*.

The hearing officer is only required to make findings of fact, conclusions of law, determine whether benefits are due, and award benefits by the 1989 Act. There is no requirement that a statement of the evidence be provided in the decision. If evidence is discussed by the hearing officer, the Appeals Panel has only required that it reasonably represent the record of proceedings. The hearing officer referred to the medical records offered and did not err in not mentioning the diagnosis of the doctor.

Finding that the decision and order are sufficiently supported by the evidence and that no reversible error occurred, the decision and order are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge