APPEAL NO. 94125

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act) TEX. LAB. CODE ANN § 401.001 *et seq*. On December 15, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) injured his shoulder through his employment. Appellant (carrier) took issue on appeal with the admission of one statement, the denial of its request for continuance and subpoena, and the determination that claimant's injury was compensable. Claimant replied that the statement was admissible or did not constitute reversible error, that a continuance would have been detrimental to his interest, and that the evidence sufficiently supported the decision that injury occurred in the course and scope of employment.

DECISION

We affirm.

Claimant worked for (employer) as a "mixologist." On (date of injury), he developed a right shoulder problem while at work. He told several coworkers that his shoulder hurt; some statements of coworkers indicate the coworkers observed claimant had a shoulder problem. No one indicated that claimant had a right shoulder problem prior to that day, although there was some evidence that claimant previously had a left shoulder problem. Claimant testified that he felt pain in the right shoulder as he attempted to pull a case of beer from the top of cases stacked 10 high. The issues in this hearing involved compensable injury, disability, and average weekly wage; there was not a notice issue.

Claimant agrees that he referred to his problem as "tendinitis" when telling his supervisor he could not work after the injury. He had had something like tendinitis in the other shoulder previously and that caused him to think this might be a similar malady. Although he did refer to tendinitis, he still ascribed the initial indication of pain to the reaching up and pulling the case of beer from the top of the stack. Claimant introduced several signed statements into evidence. Among them were statements from (RE), (PS), and (PP). RE said that on (date of injury) she was working as a cocktail waitress when claimant "came from the back room and commented that he had hurt his right shoulder;" she said his pain was noticeable. PS worked as a bouncer and said that on (date of injury) he could see claimant was "favoring" his right arm and asked about it. According to PS, claimant replied, "I just hurt my shoulder." PS then helped claimant with the work and could tell the arm "was getting worse." PP (on September 3, 1993) said she worked on (date of injury) as a waitress. She added, "[d]uring that evening [claimant] had gone to the beer storage area in the bar and lifted some cases of beer to carry into the bar area and stock those coolers. He apparently injured his arm at this time." She said he complained to her at least twice that night about the problem.

At the hearing, (SL) testified that on (date of injury) he worked as a disc jockey at the same employer's location as claimant. SL was asked about what claimant told him on (date

of injury) after having indicated to SL that he was in pain:

Q:Did he tell you he hurt it at work that day?

A:He said he did. He said he was reaching for something, and that was that. He was reaching for something and he reached up and I guess he pulled something, or whatever it was.

* * * * *

Q:And when you observed him, he looked to you to be in pain?

A:Correct.

Supervisory personnel emphasized different points and did not contradict the witnesses' statements above. (SB) was the assistant general manager on (date of injury). He first found out that claimant connected the shoulder problem to work on July 30th. Prior to that time, claimant had described his problem to SB as tendinitis, and SB also questioned why claimant had used his health insurance if the problem was work related. (MB) is the general manager; she said that on July 23rd claimant told her his "tendinitis was acting up again." She first heard that claimant considered work the cause of the problem on July 30th and questioned why claimant would wait 13 days to make the connection. She acknowledged that she had no reason to doubt claimant thought for some period of time that it was tendinitis. (DB) is in charge of personnel for employer. Claimant told her his right shoulder problem was work related on July 30th. She said that he referred to his doctor indicating that connection. She commented that when surgery was determined to be necessary, that is when the injury became workers' compensation. She agreed, though, that claimant is "an honest person."

When claimant saw (Dr. G) on July 19, 1993, he did not indicate a history of reaching for a beer case, and tendinitis was recorded as a possibility. On his deposition, Dr. G states that in his opinion claimant's right shoulder injury occurred while he was moving "heavy boxes" at work. Claimant also saw (Dr. P), an orthopedic surgeon, who gave claimant an injection in the shoulder. (Dr. P and claimant ceased the doctor-patient relationship on August 7, 1993.) Dr. P, in his deposition, said, "[p]atient did not state to me that that problem was specifically related to a work injury nor did his patient information sheet, filled out by him, relate any injury." During claimant's hospitalization from August 7 to September 4, 1993, (Dr. R), internal medicine, treated claimant for "acute staphylococcal septic arthritis of the right shoulder, staphylococcal sepsis with disseminated intravascular coagulation, septic thrombophlebitis, acute tubular necrosis, acute hepatic failure, and positive hepatitis c." Dr. R in his deposition stated:

Patient tore the rotator cuff ligaments on the job. He received at least two injections in the shoulder for treatment of this and one of these injections led to a

staphylococcal infection and subsequent complications.

Carrier asserts on appeal that the hearing officer abused his discretion in admitting into evidence the sworn statement of PP dated December 15, 1993, which was exchanged the day of the hearing, December 15, 1993. This statement said, in part:

> During that evening, [claimant] complained to me that he had injured his right arm while getting, or attempting to get, cases of beer from the storage area and stock the beer cooler. I specifically remember at least two occasions where he complained of his discomfort directly to me, and that the problem arose when he was moving cases of beer.

We note that PP had given a signed statement (not sworn) on September 3, 1993, which was summarized, *supra*. The hearing officer heard argument at the time the sworn statement was offered which indicated that carrier had provided the name of the witness originally to claimant and that claimant provided a copy of the sworn statement at the time he received it. With this assertion, together with the fact that a similar statement had previously been obtained from the same witness, we can imply that the hearing officer in admitting the sworn statement found good cause for so doing. In view of the testimony of SL, the statements of RE, SP, and PP, addressing the same subject matter, the admittance of the sworn statement of PP, even if error, would not be reversible error. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Carrier also asserts that upon admittance of the sworn statement of PP, it should have been granted a continuance and a subpoena to compel PP to testify upon its request for these. The hearing officer did not grant a continuance after claimant asserted that he was not collecting benefits and a continuance would therefore prejudice his rights. The hearing officer did not abuse his discretion in not granting a continuance and subpoena in these circumstances. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.10(c)(3) (Rule 142.10(c)(3)) provides that a continuance requested at the hearing will be granted after a showing of both good cause and absence of prejudice to the other party.

The recitation of facts, provided earlier in this opinion, indicates some divergence of emphasis in regard to the events that occurred after the injury; there is very little conflict as to evidence on the day of the injury. The hearing officer is the sole judge of the evidence. *See* Section 410.165. He is to resolve any conflicts in the evidence. *See* Ashcraft v. United Supermarkets, Inc, 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). The evidence sufficiently supports his finding that the claimant was injured in the course and scope of employment. The appeals panel will not reverse on a factual determination unless the decision is against the great weight and preponderance of the

evidence. *See* In re King's Estate, 244 S.W.2d 660 (Tex. 1951). The decision and order are not against the great weight and preponderance of the evidence and are affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge