APPEAL NO. 94248

On January 28, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the hearing were: (1) whether the respondent (claimant) sustained an injury in the course and scope of his employment on (date of injury); and (2) whether the claimant has disability. The hearing officer determined both issues in favor of the claimant and ordered the appellant (employer/carrier) to pay workers' compensation benefits to the claimant in accordance with her decision and the provisions of the 1989 Act. The employer/carrier contends that the hearing officer erred in not admitting certain exhibits into evidence and erred in finding in favor of the claimant on the issues of compensable injury and disability.

DECISION

The hearing officer's decision and order are affirmed.

The claimant is a custodian for the employer/carrier, School District, a self-insured political subdivision of the State of Texas. He testified that on (date of injury), he was cleaning a locker room when he slipped on a cleaning solution and fell on his head, back, and legs. He said he injured his head, back, neck, and left leg. There were no witnesses to the accident. The claimant immediately reported the accident and injury to one of his supervisors and was taken to a hospital. The claimant said that the emergency room doctor gave him pain pills and advised him to see (Dr. S), whom the claimant saw the next day. The claimant stated that Dr. S told him that he had to be off work for "treatment" and for diagnostic tests, which tests the claimant said the carrier refused to authorize. The claimant said he last saw Dr. S on November 16, 1993.

The claimant stated that he next went to (Dr. A) on December 20, 1993, and that he has been treating with Dr. A since that date. The claimant testified that Dr. A prescribed pain medication and physical therapy three times a week. The claimant said he has been attending a physical therapy program. The claimant also testified that Dr. A told him he could not work because of his injuries. The claimant further testified that since his accident of (date of injury), he has had blurred vision, neck and back pain, problems with bending, and tingling and numbness in his left leg.

The claimant said he has not worked since his injury of (date of injury), because he is in "no shape" to do any work. The only medical documents offered into evidence by either party were the records of Dr. A which the claimant offered, and which were excluded from evidence because of the claimant's failure to show good cause for his failure to timely exchange the records. No complaint is made of that evidentiary ruling.

Other evidence showed that the claimant had a poor work record in regard to his work performance and attendance, and that a few days before his injury and on the day of the injury the claimant had been counseled by his supervisors and was given oral and written

warnings in regard to work policies. In a written statement dated (date of injury), one of the claimant's supervisors stated that the claimant reported to her that he had slipped and fallen flat on his back on (date of injury); however, she also stated that the locker room floor was not slippery.

The issues at the hearing were whether the claimant sustained an injury in the course and scope of his employment on (date of injury), and whether he has had disability, which is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage. After making pertinent findings of fact and conclusions of law, the hearing officer decided that the claimant sustained compensable injuries in the course and scope of his employment on (date of injury), and that the claimant has had disability since (date of injury).

The claimant has the burden to prove that he was injured in the course and scope of his employment and that he has disability. It has been held that in workers' compensation cases the general rule is that the issues of injury and disability may be established by the testimony of the claimant alone. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). The facts of this case do not present an exception to the general rule. *See* Fidelity & Guaranty Insurance Underwriters, Inc. v. Rochelle, 587 S.W.2d 493 (Tex. Civ. App.-Dallas 1979, writ dism'd); Pegues, *supra*. The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). Having reviewed the record, we conclude that the evidence sufficiently supports the hearing officer's findings, conclusions, and decision, and we further conclude that the findings, conclusions, and decision are not against the great weight and preponderance of the evidence.

We find no merit in the carrier's contention that the hearing officer erred in excluding from evidence transcriptions of five recorded statements of supervisors and coworkers that were recorded by the third party administrator for the employer/carrier on November 9, 1993, but which, according to the claimant's attorney, were not exchanged with the claimant until the week of the hearing. The carrier's attorney represented that the statements were mailed to the claimant's attorney by certified mail on January 12, 1994, but a return receipt from the claimant's attorney had yet to be received by the carrier's attorney as of the date of the hearing on January 28, 1994.

Section 410.160 provides, in part, that within the time period prescribed by Commission rule, the parties shall exchange, among other things, any witness statements. Section 410.161 provides that a party who fails to disclose information known to the party or documents that are in the party's possession, custody, or control at the time disclosure is required by Sections 410.158-410.160 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 under those sections. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1) (Rule 142.13(c)(1)) provides, in part, that

no later than 15 days after the benefit review conference (BRC), parties shall exchange, among other things, any witness statements. Rule 142.13(c)(2) provides that, thereafter, parties shall exchange additional documentary evidence as it becomes available.

As previously noted, the recorded statements were taken on November 9, 1993. The BRC was held on December 3, 1993. According to the carrier's attorney, the statements were not transmitted to the claimant until January 12, 1993, which was more than 15 days after the BRC. And, according to the claimant's attorney, the statements were not received by him until the week of the hearing. Since the witness statements were not disclosed within the time period provided by Rule 142.13(c)(1), and an objection was made for this reason, the carrier had to show good cause for not having disclosed the witness statements in the time period required under that rule in order to have the statements admitted.

As grounds for good cause, the carrier's attorney represented that he had not been assigned the case until January 11, 1994; that there was an expedited BRC on December 3, 1993, which did not permit opportunity for investigation; and that due to the Christmas and New Year's Day holidays it was not until January 7, 1994 (in one case January 11, 1994) that the witnesses who gave the recorded statements could sign and swear to the statements previously given on November 9, 1993. Each transcribed statement is preceded by an affidavit which states that the attached transcribed statement is a true and correct copy of the recorded testimony of the affiant. The hearing officer determined that the carrier had failed to establish good cause for not having exchanged the witness statements within the time period required by Rule 142.13(c)(1) and excluded the witness statements from evidence.

We have previously stated that the determination of good cause is a decision best left to the discretion of the hearing officer, and that the hearing officer's determination will only be set aside if that discretion has been abused. Texas Workers' Compensation Commission Appeal No. 92426, decided October 1, 1992. Also in Appeal No. 92426, *supra*, we stated that "[w]e have previously held that the appropriate test for the existence of good cause is that of ordinary prudence; that is, that degree of diligence as an ordinarily prudent person would have exercised under the same or similar circumstances." Having reviewed the record, and bearing in mind that the witness statements were taken on November 9, 1993, we cannot conclude that the hearing officer abused her discretion in finding that the carrier did not establish good cause for failing to timely exchange the statements. *See* Texas Workers' Compensation Commission Appeal No. 91076, decided December 31, 1991.

Affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge