APPEAL NO. 94298

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held in (city), Texas, on February 9, 1994, with (hearing officer) presiding as hearing officer. She determined that the appellant (claimant) did sustain a compensable injury on (date of injury). However, she further determined that claimant did not have disability, for purposes of the 1989 Act, from August 9, 1993, through the date of the hearing. The claimant disagrees with the hearing officer's determination that he does not have disability. The respondent (carrier) responds that the decision is supported by the evidence.

DECISION

Finding no error in the hearing officer's conclusions of law and sufficient evidence to support her factual findings, the decision and order are affirmed.

Two issues were submitted to the hearing officer for resolution at the CCH, namely, did the claimant sustain a compensable injury on or about (date of injury), and if so, did the claimant have disability from August 9, 1993, to the date of the hearing resulting from that injury. The hearing officer concluded that claimant suffered a compensable injury on (date of injury), and the carrier has not appealed that conclusion. Nonetheless, because we believe that claimant's testimony relating to the accident and injury is instructive on the issue of disability, a brief recitation of the testimony at the CCH will be included in this opinion. Claimant alleges injury resulting from a slip and fall at a job site on (date of injury). At the time of the injury, claimant worked as a concrete truck driver for (employer) and had worked for the employer for approximately 13 years. On (date of injury), claimant testified that he had poured his last load of concrete for the day and he had driven his truck to the designated "wash out" area, where he was going to clean the chutes, which dispense the concrete from the truck. Claimant stated that the "wash out" area was muddy and wet and as he was attempting to clean the chute, he slipped and fell backwards to the ground, injuring his back, neck and left shoulder. Following the accident, claimant returned the truck to employer's lot where he says he had a conversation with a coworker (Mr. R), who is also claimant's brother-in-law. Claimant testified that he told Mr. R about the injury. At the CCH, Mr. R recalled having a conversation with claimant on (date of injury), however, he did not recall claimant telling him about the accident. Instead, Mr. R recalled claimant saying that his back pain was attributable to a previous back injury.

Claimant also testified at the CCH that he was scheduled to work in the week following the accident, but he did not report to work. Claimant said that on the Monday following his accident, he called in to tell his employer that he would be late to work because he had personal business to which he had to attend. He said that he spoke to the dispatcher; however, he did not tell the dispatcher about his injury, despite the fact that the dispatchers were designated by the employer, along with the plant supervisor, as the proper persons to whom an employee should report an on-the-job injury. Claimant testified that from Tuesday to Friday in the week following his accident, he attempted to contact, (Mr. FP),

employer's safety and personnel director, to report the injury; however, his efforts were unsuccessful because Mr. FP was on vacation. Claimant further stated that he went to work on Wednesday, August 11, 1993, to pick up his check from the plant supervisor, (Mr. HP), but he did not tell Mr. HP about the accident and did not tell him that the reason he had not and would not be coming to work that week was the injury. Finally, claimant testified that he was also scheduled to work on Saturday, August 14, 1993, but again, he did not go into work and he did not call in to say he was not coming to work.

On August 16, 1993, claimant states that he first went to a chiropractor, (Dr. C), in relation to his injury. He said that he had not sought treatment earlier, despite missing six days of work, because of his inability to contact Mr. FP. According to claimant, on August 16th, Dr. C took x-rays and ran other tests, but his actual treatment began on August 17, 1993, and continued on a nearly daily basis for several months.

On August 16, 1993, an attorney acting on behalf of the claimant contacted Mr. FP and asked whether the employer was covered by workers' compensation insurance. On August 17th, at the employer's request, claimant had a meeting with Mr. FP and JC, employer's general manager. At that meeting, the accident and resultant injury were discussed as was claimant's unacceptable attendance record, which had been the subject of previous discussions. Claimant was terminated at the meeting, for excessive absence and tardiness.

The evidence relating to disability at the CCH consisted of claimant's testimony and an Initial Medical Report and an accompanying narrative statement from Dr. C, dated September 9, 1993. Claimant stated that he had not been able to work since the date of his injury because of pain and weakness resulting therefrom, with the exception of brief employment with "Man Services of the Baptist Ministry," which entailed filling out applications for people. [It is not clear from the record how long the claimant was so employed or what he was paid, if anything, in the position.] Dr. C diagnosed a cervical sprain/strain and a left shoulder sprain/strain, and stated "totally disabling from 3/1/93 to unknown." Claimant attempted to introduce into evidence other medical records of Dr. C at the CCH, but they were not admitted for failure to exchange those documents with the carrier before the CCH, in accordance with Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1)(A) (Rule 142.13(c)(1)(A)).

Initially, we will address the alleged error in the hearing officer's exclusion of medical records. In Texas Workers' Compensation Commission Appeal No. 92382, decided September 16, 1992, the Appeals Panel addressed the issue of failure to exchange medical reports and records noting that a party who fails to exchange such documents may not introduce such evidence, unless good cause is shown for not having done so. The Appeals Panel further noted that the burden of establishing good cause is on the party offering the evidence. *Id.*, citing Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). In this instance, claimant offered no explanation for his failure to exchange the excluded medical records prior to the date of the hearing, other than to indicate that the records reflected

continuing treatment from August 17 to November 9, 1993. While the hearing officer did not specifically state that she found an absence of good cause, we are persuaded that such was the basis for her ruling. *See* Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992. We observe that in Gee, the Texas Supreme Court held that "[t]o obtain a reversal of a judgment based upon error of the trial court in admission or exclusion of evidence, the following must be shown: (1) that the trial court did in fact commit error; and (2) that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment." 765 S.W.2d at 396. Even were we to assume that the claimant could establish good cause for his failure to timely exchange the records, we cannot conclude after review of the documents, that exclusion of the documents was reasonably calculated to cause and probably did cause an improper decision.[1]

Under the 1989 Act, the hearing officer is the trier of fact at the contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact can believe all or part or none of any witness's testimony, including that of the claimant, and judges the credibility of the witnesses and the weight to assign their testimony, and resolves the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. As the fact finder, the hearing officer must resolve conflicts and inconsistencies in the evidence, weigh the credibility of the witnesses, and make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993. An appellate body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied.) Where sufficient evidence supports the findings and they are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In concluding that the claimant did not have disability as a result of his compensable injury, the hearing officer apparently did not believe the claimant's testimony that he was unable to work from August 9, 1993, until the date of the hearing as a result of his injury. The only other evidence relating to disability in this case is Dr. C's parenthetical statement in his narrative report that the injury was totally disabling from March 1993, (five months prior to the date of the injury) to a date unknown. The hearing officer was free to consider Dr. C's statement and was also free to reject it, if she believed that claimant did not suffer disability within the meaning of the 1989 Act as a result of his compensable injury. The

[1]We note that all of the medical records and reports bear dates prior to the benefit review conference of December 15, 1993; therefore, it appears that the claimant would face a high hurdle to demonstrate good cause for the failure to exchange the documents in accordance with Rule 142.13(c), before the CCH held nearly two months later.

hearing officer was not bound to accept Dr. C's statement that the claimant had disability. Rather, she was permitted to consider all of the evidence relating to the issue of disability, to assess its credibility, to assign weight thereto, and to reach her decision in accordance with those credibility and weight determinations. That is exactly what the hearing officer did in this instance and we are satisfied that her findings and conclusions are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, her findings and conclusions will not be disturbed.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge