APPEAL NO. 94302

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 11, 1994, a contested case hearing (CCH) was held (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer left the record open until January 21, 1994, in order to allow the claimant to submit additional medical evidence. The contested case hearing was reopened on February 7, 1994, to obtain additional and/or new evidence and to address claimant's allegations of improper conduct. The CCH was closed on February 7, 1994.

The issues to be resolved by the hearing officer were:

1.Whether the Claimant sustained a compensable injury on (date of injury), in the course and scope of employment; and

2.Whether the Claimant had disability resulting from the claimed injury of (date of injury)?

The hearing officer determined that claimant did not sustain an injury to his neck, or aggravate any physical condition, in the course and scope of his employment on (date of injury), and consequently, has not had disability based on the alleged injury of (date of injury).

Appellant, claimant herein, alleges that the hearing officer did not consider his evidence and the medical evidence, refused to subpoena certain requested witnesses, that carrier's attorney "gave false statements," that one of the treating doctors had been coerced into changing his opinion, and in general alleges misconduct and improprieties. Claimant, in essence, requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, (city) Independent School District, a self-insured governmental entity (employer or carrier as appropriate in the context), responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Claimant testified that he was employed as a substitute teacher and that on (date of injury), while employed at one of employer's schools, a student pushed his head forward, very hard. Claimant testified that he immediately reported the incident to his employer and within a day or two, when he began having headaches, saw (Dr. N), who advised him to take Advil.[1] There is no record of this visit because, claimant testified, he saw "the doctor" in the waiting room between patients because he did not have an appointment.

[1]Claimant refers to Dr. N as a doctor while carrier states the individual "is a nurse, not a doctor. In fact, the medical records indicated that the individual is a certified physician's assistant (PAC).

It should be noted that claimant has or had a number of medical problems such as diabetes, hepatitis, high blood pressure, glaucoma and hypertension, unrelated to the alleged incident. In the months that followed the (month year) incident, claimant developed a bump, or knot, or abscess on the back of his neck or behind his right ear. This was apparently operated on without further problems on June 15, 1992.

On November 10, 1992, the medical records reflect, and claimant testified, he fell in the parking lot of an apartment complex, injuring his right shoulder. This incident may be the subject of an unrelated civil suit. Claimant testified that from November 1992 through July 1993, he had no neck pain and that he thought his neck injury had been resolved. Claimant testified that in July 1993, while attending a family reunion, he stayed in a "cold" motel room and began having neck pain. According to claimant, his attorney referred claimant to (Dr. DN) (apparently in connection with the shoulder suit), who initially saw claimant on August 12, 1993. Claimant testified that Dr. DN had an MRI taken of his neck and shoulder, and that Dr. DN was concerned more about his neck than his shoulder and asked about an injury to the neck. Claimant testified that after some questions, he remembered the (month year) incident with the student and Dr. DN exclaimed that was the cause of all his problems. Claimant is quite adamant that he did not realize the seriousness of his neck injury, until Dr. DN explained how that incident had caused his current problems which included poor eyesight, blurred vision, high blood pressure, headaches and neck pain.

We should note that the tape recording of the proceedings covered some seven hours of testimony and the record contains voluminous hospital and medical records, most of them hand written. Claimant relied heavily on, and read into the record, portions of the following medical records which he believed prove that his current problems are causally related to the (month year) incident. An MRI dated September 3, 1993, apparently ordered by Dr. DN which found:

> IMPRESSION:Degenerative changes involving C4-5, C5-6, and C6-7 with associated osteophyte production and disc protrusion with foramina encroachment on the right a C6-7.

Claimant testified regarding the findings of "Dr. C" however, the medical records reflect (SC) to be a physical therapist. In a report dated September 24, 1993, SC stated:

> At the present time [claimant's] chief complaint centers around swelling in the posterior aspect of his neck. However, he does report that this swelling does not cause any pain. The patient does have some mild swelling of the posterior aspect of his neck but this does not appear to be causing any limitations of range of motion.

The record contains a report from Dr. DN dated November 22, 1993.[2] Dr. DN, in his November 22nd report comments at length about the shoulder injury and only mentions the neck in that it ". . . did not appear to get a coordinated amount of health care for his neck and shoulder injury." Dr. DN seems to attribute the injury to claimant's shoulder and neck to the November 1992 fall. Comments from Dr. DN's report are:

> At the time of his initial presentation to my office, the patient's main complaint was one of a chronic pain in the right shoulder with pains being presently [sic] constantly and not relieved with previous treatment, including limited physical therapy at the VA and/or medication. The patient had stiffness on moving his shoulder and was constantly uncomfortable. He also complained of a moderate amount of neck pain.
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> 2) In addition, the patient's shoulder pain was partly contributed to by trauma to his neck when he fell, which obviously aggravated a pre-existing cervical degenerative disk complex. The patient does not give significantly good history of any shoulder pain or right neck pain in the 6 month period prior to his injury. Therefore, I believe that the patient's degenerative disk disease, although present, was not symptomatic.
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> SUMMARY: In summary, this patient sustained an acute and subsequently chronic right shoulder sprain, which ultimately resolved with the appropriate and persistent physical therapy and medication management. He also has associated degenerative disk disease which when exacerbated by the fall, produced complicating pain to further accentuate and complicate this patient's pain process. The fall certainly contributed to the exacerbation of this degenerative disk disease in the cervical area and in that respect, the pain complex can be assumed to be 100% the result of the injury on the date in question. [Dr. DN is referring to the November 10, 1992, fall.]

Claimant relies heavily on (Dr. B) chiropractic reports and progress notes to support his position. We note that claimant lists the start of his complaints as "11-10-93 [sic, apparently meaning the parking lot fall of November 10, 1992]." Dr. B's progress notes of various treatments and adjustments are in long hand and, as far as we can determine, merely record claimant's progress and do not comment on causation.

Carrier's position is that nothing occurred on (date of injury), or if there was an incident it was such a light touch that it was not the cause of claimant's present problems,

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[2]Claimant makes frequent reference to a January 1994 report by Dr. DN, however it is not in the record. Claimant also testified at length that he was unable to obtain any further reports from Dr. DN in January 1994, in spite of going to Dr. DN's office several times demanding the doctor answer questions "within five days." Apparently it is for Dr. DN's January report that the record was left open. No such record was offered when the CCH was reopened on February 7, 1994.

but rather that claimant's neck problems were due to the non-work-related fall of November 1992. The hearing officer in her discussion of the evidence concludes:

> Based on careful consideration of all the evidence and testimony, I have concluded that the Claimant failed to satisfy his burden of proving by a preponderance of the evidence that he is entitled to the relief he seeks. Therefore, although an incident occurred on (date of injury), the Claimant suffered no injury as a result of the incident.

Claimant in a nine page handwritten appeal raises the following issues. First, claimant contends that the hearing officer failed "to take in account of [sic] the evidence . . . from [Dr. B]; [Dr. CS]; [Dr. N]; [various clinics and hospitals] and [Dr. DN]." Claimant also alleges the hearing officer did not consider the testimony of the witnesses, which included a brother, two sons, a coworker, the ombudsman and the assistant principal. In essence, claimant merely lists all the evidence and witnesses and makes a blanket assertion that the hearing officer did not consider that evidence. Our review of the record does not indicate that to be the case and in the absence of specifically what evidence claimant contends was not considered, we find the hearing officer patiently listened to over seven hours of testimony and made every attempt to allow claimant an opportunity to present his position.

Claimant contends that the carrier "didn't have anyone to collobrate [sic] his case . . . ." We point out that the burden is not on the carrier to prove the injury did not occur, but rather the burden is on the claimant to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Although the claimant testified to that effect, it is the hearing officer, as the trier of fact, who is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). The hearing officer heard the claimant's testimony and observed his demeanor. If there were conflicts or inconsistencies in the testimony it was up to the hearing officer to resolve those conflicts or inconsistencies. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). And the hearing officer may believe all, part or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ); Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

Claimant argues he was not allowed to subpoena certain witnesses such as carrier's adjustor, the principal of the school, the principal's secretary and Dr. N. No specific request was made on the record to subpoena Dr. N and it is not clear how Dr. N's referral of claimant for eye appointments in May 1992 through March 1993 affects this case. The other witnesses, such as the principal's secretary, who claimant did request to subpoena, but who did not testify, could add little to the resolution of whether the incident of (date of injury), caused claimant's current problems. We would note there was lengthy testimony and debate regarding what was said to and by Ms. W, claimant's coworker and Mr. E, the assistant principal. Claimant does not indicate what the school principal or his secretary

could have added to the proceedings given that the hearing officer found an incident had occurred on (date of injury). Carrier's adjustor, for whom claimant had requested a subpoena, apparently was no longer employed by carrier/employer but her successor was available, was called and did testify. We find no abuse of discretion by the hearing officer in failing to issue subpoenas for the persons requested.

Next, claimant alleges the hearing officer allowed carrier's attorney "to give false statements" but failed to specify what those statements were. Similarly claimant charges "that someone talked to [Dr. DN] and got him to sumitt [sic] a false statement around Jan. 25, 1994." There is no evidence of any such misconduct and no evidence what Dr. DN's January 25, 1994, report, if indeed there was one, might have said. Claimant's broad general allegations of improprieties without specifics or proof are not well taken. Nor did claimant put on the record, although given ample opportunity to do so, his allegations of improper ex parte communication between carrier's attorney and Texas Workers' Compensation Commission (Commission) officials.

Claimant alleges some type of error because he was not provided a copy of the tape recording taken by one of carrier's investigative personnel. Claimant obviously had the transcribed copy in that he offered and introduced it into evidence. The transcript, which claimant both introduced and which he testified was incomplete or inaccurate, was within claimant's power to withhold or explain. We find no error in the hearing officer failing to require carrier's attorney to provide claimant with information or tapes which carrier had not listed or offered as evidence.

Finally, claimant engages in an assertion that carrier's attorney violated discovery rules, again failing to specify which rules or how, and that the hearing officer allowed "lawyers to violate the Commion [sic] rules and the standards of the Justice System." Our review of the record discloses no basis in fact for any of claimant's allegations. In fact, our review indicates that the hearing officer allowed claimant more than adequate opportunity to present his case.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's factual determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not so find and consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge