APPEAL NO. 94331

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held in (city), Texas, on February 17, 1994, (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) did not sustain an injury in the course and scope of his employment on (date of injury), and that he failed to give his employer timely notice, without good cause, of the injury. The claimant disagrees with several of the hearing officer's findings, complains that a witness he desired to call was not allowed to testify and urges, in essence, that the evidence establishes that he did sustain an injury and gave timely notice to a supervisor of the employer. The respondent (carrier) asserts that there is sufficient evidence to support the hearing officer's decision and that the hearing officer was correct in excluding the testimony of the improperly identified witness.

DECISION

Finding error in the ruling of the hearing officer excluding testimony of a witness called by the claimant and being unable to reasonably conclude that the exclusion did not cause the rendition of an improper decision, we reverse and remand.

The claimant, an 18 year employee of the employer testified that he sustained a back injury on (date of injury), when he slipped and fell while getting off a forklift. The incident was apparently not witnessed by anyone else. He testified that he reported the matter to a supervisor, (Mr. F), who advised him to report it to his direct supervisor, (Mr. B). The claimant testified that he did so; however, this was denied by Mr. B in a transcribed interview of Mr. B which was admitted in evidence. Mr. B indicated that at sometime, the claimant mentioned a problem he was having with his leg. A statement in evidence from a coworker indicates that he, the coworker, observed the claimant telling Mr. B of the slip and fall incident.

There was conflicting evidence as to whether the claimant worked the next several days; the claimant originally stated that he only worked the day following the incident and later indicated he was not sure after the introduction of the employer's payroll records indicating that he worked the three days following the incident. In any event, the claimant testified the pain in his back and leg became so bad during that time period that his wife took him to an emergency room. The report from the emergency room shows a diagnosis of "Lumbar Radiculopathy Exacerbate" with a notation under history of "x 2 wks, denies injury." The claimant testified that this was not accurate and noted that the report also stated he was ambulatory but that he was taken into the emergency room in a wheelchair. The claimant was referred to another doctor whom he subsequently saw on May 26th and who took him off work. The claimant has not worked since and has received various treatment. A subsequent diagnosis in a report dated January 18, 1994, is stated as: "[a]n MRI scan was performed which shows an L5-S1 disc rupture with a free fragment up against the nerve root" and a recommendation for surgery is made.

As indicated, the hearing officer noted inconsistencies in the claimant's testimony and the other evidence and determined that the claimant had not proved a compensable injury or that he gave timely notice of his injury and that he did not have good cause for the failure to give timely notice. He notes in his Statement of Evidence that it was undisputed that the claimant reported a problem or condition with his hip and right leg to his supervisor but that it does not appear that he made sufficient statements to his supervisor to advise him it was work related. (Emphasis ours.)

It is apparent that the hearing officer was very conscientiously trying to determine the facts in this case where there were evidentiary conflicts and inconsistency, none of which alone was necessarily of great magnitude. In such a situation, the testimony of a key witness could reasonably tip the scales one way or another. That is the situation we find here with the witness, Mr. F, who was not permitted to testify. It was uncontroverted that Mr. F was an employer's supervisor. Although there was discussion and focus on when and whether the claimant adequately informed his supervisor of the asserted on-the-job injury, the law only requires that notice be given to "an employee of the employer who holds a supervisory or management position." Section 409.001(b)(2). We have never construed this provision to mean that notice can be given only to the employee's direct supervisor. *See* Texas Workers' Compensation Commission Appeal No. 92271, decided July 30, 1992. Given the proffer of what this witness would say as stated on the record and indicated in an attachment to the claimant's appeal, we cannot conclude that, if believed, there is no reasonable probability that the absence of this testimony caused the hearing officer to reach an improper decision. Under the circumstances of this case, the error could likely affect both the notice and compensability issues, given the common significance placed on the immediacy of notice of an injury.

The hearing officer refused to allow the testimony of Mr. F on the basis that he was not listed under both question No. 10(a) and No. 10(b) of the interrogatories provided for in Rule 142.19 and Rule 142.13, Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.19 and 142.13. Both the 1989 Act (Section 410.160) and the rules (Rule 142.13(c)) require disclosure of "the identity and location of any witness known to the parties to have knowledge of relevant facts." The form interrogatories in question 10(a) cover this information but in 10(b) provide for a listing of individuals who the party plans to have testify. Here the claimant, unrepresented, but assisted by an ombudsman listed Mr. F under No. 10(a) but did not list him under No. 10(b) indicating that he thought the notice under No. 10(a) met the discovery requirements. Although there is some basis of support for the hearing officer's conclusion that failure to name a prospective witness in both question No. 10(a) and No. 10(b) is grounds for excluding the testimony (*see* Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992) in other cases we have approved the exclusion of testimony where there has been no exchange whatsoever of the identity of a witness at any time. Texas Workers' Compensation Commission Appeal No. 91131, decided February 12, 1992; Texas Workers' Compensation Commission Appeal No. 91062, decided December 9, 1991. The carrier's counsel indicated on the record that he was not holding out to the hearing officer that he did not know about Mr. F, but only that

the claimant did not comply with question No. 10(b) of the interrogatories. However, in this case, the claimant testified that the reason that Mr. F was not listed in the earlier interrogatories was that he did not know his whereabouts and did not know if he could get him to appear. It was uncontroverted that Mr. F left the employ of the employer sometime after the incident of (date of injury). The claimant testified that he called the employer for Mr. F, was told Mr. F had been terminated and that he started looking for Mr. F after the benefit review conference. The claimant indicated that he was not able to find or get in touch with Mr. F. until just before the contested case hearing and did not list him as a witness to give testimony since he did not know if he would be available. The hearing officer held that no good cause was shown for the failure to list Mr. F under question No. 10(b). Under the circumstances, we conclude that this was an abuse of discretion. Generally, good cause is that degree of diligence an ordinarily prudent person would have exercised under the same or similar circumstances. *See* Texas Workers' Compensation Commission Appeal No. 91009, decided September 4, 1991. Decisions on good cause in the exclusion of documents and testimony is a matter generally left to the discretion of the hearing officer and we review for an abuse of discretion. *See* Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992, and cases cited therein. We do not lightly overturn a hearing officer discretionary actions and only do so under the particular circumstances presented here. As we indicated above, the testimony excluded is potentially of considerable significance given the setting of the case. It is also clear the claimant did disclose the identity of the witness in the first part of question No. 10 and it is also equally clear that opposing counsel was aware of the identity of the witness. (We recognize the principle that lack of surprise does not equate to good cause for failing to comply with discovery requirements.) *See* Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We are left with a situation where the intent of the disclosure procedures was met but that the actual appearance of a witness was in question because of his unknown whereabouts. There is no question that Mr. F was not in the employ of the employer when the claimant sought to contact him. And, the claimant's unrebutted testimony was that he tried but was unsuccessful in locating Mr. F until just before the contested case hearing. It is apparent that the claimant needed assistance in completing the interrogatories and obtained assistance from an ombudsman. He also indicated he did not list Mr. F as a witness to give testimony because he did not know his whereabouts at the time of the interrogatories and until just before the hearing. Under these circumstances, the hearing officer should not have excluded the testimony of Mr. F.

Accordingly, we reverse and remand for further consideration and development of evidence as deemed appropriate but including the testimony of Mr. F. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202.

See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge