APPEAL NO. 990128

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 17, 1998. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury, that he did not have disability, and that employer made a bona fide offer of employment, from which determinations claimant appeals, challenging the sufficiency of the evidence. Claimant also contends that there is no evidence to support two factual recitations in the discussion portion of the hearing officer's decision and order. Claimant also complains that the hearing officer admitted a videotape even though respondent (self-insured) answered claimant's interrogatories and denied that any videotapes were made. Claimant further contends that the hearing officer abused his discretion in admitting a medical record. Self-insured responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that he did not sustain a compensable injury. He asserts that the medical evidence shows that he did sustain a compensable injury lifting at work on _____. The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she 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). The 1989 Act defines "injury" as damage or harm to the physical structure of the body and as disease naturally resulting from the damage or harm. Section 401.011(26). A claimant may meet his burden to establish an injury through his own testimony, if the hearing officer finds the testimony credible. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. The mere recurrence or remanifestation of symptoms of the original injury does not equate to a compensable new aggravation injury. Texas Workers' Compensation Commission Appeal No. 962641, decided January 29, 1997. Whether there is a new injury or an aggravation of an old injury is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 962183, decided December 16, 1996.

Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that he sustained a lifting injury at work on _____, and that he injured his back and neck. Claimant said he had had prior injuries to his back and neck but that he sustained a new injury on _____. One of claimant's supervisors stated that claimant was a good worker but that he had always complained of back pain.

The hearing officer was the judge of the credibility of the witnesses and medical evidence. As the fact finder, he considered the issue of whether claimant sustained a compensable injury on _____, and resolved this issue against claimant. We will not substitute our judgment for his in that regard because the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain. Given our standard of review we will not overturn the hearing officer's decision. *Id*.

Claimant contends the hearing officer erred in determining that he did not have disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Because there was no compensable injury, there can be no disability.

Claimant contends the hearing officer abused his discretion in admitting a videotape that portrayed claimant doing yard work. Claimant asserts that the hearing officer should have excluded the videotape because, in response to claimant's interrogatories, self-insured answered that no videotapes had been taken. To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was, in fact, an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Claimant sent interrogatories to the self-insured asking whether any videotapes had been taken and self-insured replied that there were none. A videotape of claimant mowing and using a manual edger was admitted at the CCH. The parties admitted that claimant had already received the videotape before claimant sent the interrogatories to the self-insured asking if the self-insured had taken any videotapes. Therefore, claimant was already aware of the existence of a videotape. Claimant asserted that he was unable to ascertain who had taken the video and that the self-insured should have answered the interrogatories properly. Claimant complained that he was not able to ask the videographer whether he or she had actually videotaped claimant on that day. However, counsel for claimant said claimant did not have a basis for claiming that it was not claimant depicted on the videotape. Further, claimant admitted that he had mowed his lawn. Therefore, we perceive no error or abuse of discretion in the admission of the videotape.

Claimant contends the hearing officer erred in admitting the medical report of Dr. C, self-insured's required medical examination (RME) doctor. Claimant asserts that self-insured waited until December 1998 to obtain an appointment for claimant with Dr. C, that self-insured received Dr. C' s report and then exchanged it on December 15th, claiming that it exchanged it as soon as it was obtained. Claimant complains that self-insured had a duty to investigate the claim and obtain such a report at an earlier date so that claimant could then respond to the report. The parties are required to exchange all medical reports no later than 15 days after the benefit review conference (BRC), and thereafter, as they become available. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). Generally, if such reports are not timely exchanged, they cannot be introduced into evidence. Section 410.161. Counsel for the self-insured stated that, at the November 1998 BRC, the self-insured had requested that claimant be examined by Dr. C as an RME doctor, and that claimant refused to agree. Counsel

for the self-insured stated that the self-insured then had to seek a Texas Workers' Compensation Commission (Commission) order regarding the examination and that the delay was due to claimant's refusal to agree to an earlier examination. The better practice would have been to obtain the RME report earlier so that it could have been timely exchanged. However, under these facts, we conclude that there was no abuse of discretion in the admission of Dr. C's report. Even if there had been an abuse of discretion in the admission of the report, we perceive no reversible error. The hearing officer did not believe claimant's evidence that he had sustained a new injury and, in the decision and order, emphasized evidence other than Dr. C's report. We perceive no error.

Claimant contends the hearing officer erred in stating in the discussion portion of the decision and order that there is no evidence that there was any medical review of the self-insured's refusal to pay for treatment regarding a prior claim. However, claimant and his supervisor both testified that the self-insured had refused to pay for treatment for claimant's prior claim. Claimant also complains that there is no evidence that claimant "let it be understood that he thought he could just file a new claim and eliminate the problem" of having to proceed under his previous claim. However, there was evidence that claimant was angry about the self-insured's refusal to pay for treatment regarding the prior claim and that, soon after expressing anger, he filed a new claim. There is also an affidavit in the file from Ms. M, the workers' compensation "claims specialist," that she was told by the Facilities Maintenance Supervisor, Mr. G, that claimant stated that the self-insured was not paying for his doctors' visits on a prior injury "therefore he will have to file a new claim." The hearing officer could have considered this and the testimony from Mr. G in making this statement in the decision and order.

Claimant asserts that the hearing officer erred in determining that employer made a bona fide offer of light duty to claimant. He contends that there was a bona fide offer of employment for a period, that he did work light-duty for a while, but that the light-duty offer ended. There was evidence that employer made a written offer to extend claimant's light duty. Claimant said that the offer was made but then he was told that the light duty was not available. The issue of whether there has been a bona fide offer of employment is relevant to situations when a claimant has disability due to a compensable injury and is offered a position that complies with any work restrictions that may apply so that temporary income benefits may be reduced. Texas Workers' Compensation Commission Appeal No. 93777, decided October 13, 1993; *see* Section 408.103(e). The hearing officer heard the evidence and reviewed the written offer of light duty. He decided what weight to give to the evidence before him. He apparently disbelieved claimant's testimony and determined that claimant had declined the light-duty offer. After reviewing the evidence we conclude that his determination regarding bona fide offer is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

We affirm the hearing officer's decision and order.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge