

APPEAL NO. 990529

On February 9, 1999, a contested case hearing (CCH) was held. The CCH 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 CCH were: (1) whether respondent (claimant) sustained a compensable injury on _____; and (2) whether claimant has had disability resulting from the injury on _____, and if so, for what period of time. The appellant (carrier) requests reversal of the hearing officer's decision that: (1) claimant sustained a compensable injury on _____; and (2) as a result of the compensable injury, claimant has had disability from February 12, 1998, through the date of the CCH. The claimant requests affirmance and suggests carrier's appeal was not timely filed. Carrier's appeal was timely filed.

DECISION

Affirmed.

On Wednesday, _____, claimant had been employed by the employer as a pre-need funeral service sales representative for approximately four weeks. Claimant testified that the employer had an office with three or four telephones but had about 20 sales representatives and that he had one room in his house that he used as an office for conducting business for the employer. Claimant said that on occasion he would take his wife with him when he went knocking on doors to solicit business because people were more apt to open their doors if they saw a couple. Claimant's wife did not work for the employer. Claimant said that on _____, he went to the scheduled 9:00 a.m. sales meeting at the employer's office; that he took his wife to work with him that day but that she stayed in the car during the meeting; that he then took his wife with him when he drove to some follow-up appointments with prospective customers; that he and his wife then went to another area of town and attempted to solicit business by knocking on doors; that at about 1:00 p.m. he and his wife were driving to a scheduled 2:00 p.m. appointment at the home of AG; that AG was interested in purchasing an insured type of funeral service plan; and that another employee, JZ, was to meet him at AG's house because JZ had an insurance license and so could sell an insured type plan and claimant did not have that license, although he could sell trust plans for funeral services.

Claimant further testified that he needed to obtain an application from his office in his home for the appointment with AG; that he intended to drive to his home to obtain that form on the way to the appointment; that before he reached his home he was involved in a motor vehicle accident (MVA); that he and his wife were taken to the hospital from the site of the MVA; that his only purpose in going to his home was to obtain the form for his appointment with AG and to check if he had any messages for new appointments; that although he and his wife had not had lunch, he was not going home to have lunch; that his wife was going to go with him to his appointment with AG; that he was not going to his home to drop off his wife; that the employer does not furnish him a company vehicle and does not pay him for mileage or give him a car allowance; that he is paid on a commission basis; that sometime

after he was released from the hospital following the MVA he had someone drive him to see another prospective customer he had had an appointment with while in the hospital but that no sale was made and that he was not in a physical condition to go on that visit; that he is a licensed adjustor; and that he has been physically unable to work since his MVA.

JZ stated in a written statement that claimant had asked him to help with two appointments claimant had the afternoon of _____, one at 2:00 p.m. and the other at 4:00 p.m. AG stated in an affidavit that he had an appointment with claimant at 2:00 p.m. on _____, but claimant never came by. TF stated in a written statement that in _____ a sales manager announced that claimant had been involved in an MVA while on his way to an appointment. KG, claimant's supervisor, stated in a recorded statement that she was told that claimant and his wife were on their way home when the MVA occurred and that it was not normal or customary for an employee to have their spouse with them when working. Claimant said that at a prior meeting, KG said that she thought that having a spouse accompany an employee when making sales was a great idea and encouraged it.

The evidence reflects that claimant was driving his own vehicle at the time of the MVA, that the MVA happened at about 1:35 p.m. on _____, that the MVA occurred several blocks from claimant's house but on a route that would also take claimant to AG's house, and that the accident happened before claimant reached the street on which he resides.

Claimant was taken to the hospital from the site of the MVA and he was discharged from the hospital on February 15, 1998. The discharge summary reflects that claimant had multiple left rib fractures and complained of left chest pain. Claimant has been treating with Dr. L for injuries sustained in the MVA. In March 1998, Dr. L wrote that claimant had a spontaneous pneumothorax likely related to his rib fractures and referred claimant to Dr. LE, who noted that claimant was treated in the hospital for his multiple rib fractures and pneumohemothorax occurring as a result of his MVA of _____ and that he required insertion of two chest tubes and an intercostal nerve block. That hospitalization occurred in March 1998. On April 13, 1998, Dr. LE wrote that claimant was almost completely asymptomatic and doing well. Dr. L wrote on June 12, 1998, that claimant told him on that date that he had had complaints of neck, back and shoulder pain since the MVA and Dr. L gave an assessment of persistent muscular pain and referred claimant for physical therapy. Dr. L noted in October 1998 that claimant had chronic chest pain secondary to his rib fractures. There are several notes from doctors that reflect that claimant has been unable to work since his MVA. Claimant said that Dr. L has not released him to return to work. In evidence were maps showing the locations of claimant's home, AG's home, the employer's office, the neighborhoods claimant said he went to on _____, the MVA site, and the route claimant took from the area he was soliciting business to the MVA site.

The hearing officer found that on _____, claimant was driving his own car from a neighborhood where he solicited business for his employer toward the location of a customer with whom claimant had an appointment at 2:00 p.m.; that claimant's wife accompanied him on _____ to assist claimant with his work; that claimant and his wife

intended that his wife would accompany the claimant at his appointment; that claimant drove toward his home deviating from one of the two most direct routes from the neighborhood to the customer's house; that his sole purpose in stopping at his home was to pick up business forms from his office at home to use at the 2:00 p.m. business appointment; that if he had not needed the business forms, claimant would not have driven to his home; that at 1:35 p.m. on _____, before claimant reached his home, claimant was injured in an MVA; that on _____ claimant sustained an injury that arose out of and was in the course and scope of his employment with the employer; and that from February 12, 1998, and continuing through the date of the CCH, the claimant was unable, due to his injury in the MVA, to obtain and retain employment at a wage equivalent to his pre-injury wage. The hearing officer concluded that claimant sustained a compensable injury on _____, and that as a result of the compensable injury, claimant had disability beginning on February 12, 1998, and continuing through the date of the CCH.

Carrier contends that claimant was not injured in the course and scope of his employment because he was injured going to his home and thus the "coming and going" rule applies. Carrier does not explain how the "coming and going" rule applies in a situation where an employee is soliciting business for the employer on the day of injury and is injured in an MVA while going to his office in his home to pick up business forms on the way to an appointment to sell an employer service to a prospective customer. Carrier speculates that claimant had concluded his employment activities at the time of the MVA and was going home for lunch. Carrier contends claimant deviated from the course and scope of his employment. The hearing officer could find from the evidence that no deviation was made and that claimant was in the course and scope of his employment when injured. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. We conclude that the hearing officer's findings are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The benefit review conference (BRC) was held on January 14, 1999, and the CCH was held less than 30 days later on February 9, 1999. Carrier objected to the admission of claimant's medical records because carrier did not receive them from the claimant until February 8, 1999, and objected to an EMS report and AG's affidavit dated February 4, 1999, because it did not receive those exhibits from the claimant until the date of the CCH. Apparently the medical records, except for the EMS report, were mailed to the carrier on February 4th. The 15th day after the BRC was January 29th. The hearing officer heard the claimant's and carrier's positions regarding whether good cause existed for not exchanging the exhibits that were objected to within the 15-day time period for exchange and ruled that claimant had good cause for the late exchange. Carrier appeals that ruling. We cannot conclude that carrier has shown that the hearing officer abused his discretion in his ruling on good cause.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge