APPEAL NO. 990609

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 982829, decided January 15, 1999, the Appeals Panel reversed for evidentiary reasons the determinations of the hearing officer that the respondent's (claimant) compensable left leg injury of _____, did not include a low back strain/sprain and that the claimant did not have disability. A hearing on remand was held on February 16, 1999, after which the hearing officer, determined that the compensable injury did include a low back sprain/strain and that the claimant did have disability from June 19 to August 27, 1998. The appellant (carrier) appeals these determinations, again asserting error in the admission of evidence and that these determinations are against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant testified at the first contested case hearing (CCH) that as he was climbing a ladder out of a tank, the ladder gave way and he slipped. He said he scraped his left shin and injured his lower back as he dangled from the floating roof of the tank. The carrier accepted liability for the left shin injury. A substantial portion of both the original CCH and CCH on remand dealt with the admissibility of the claimant's testimony and his three documentary exhibits. The carrier argued that because the claimant did not answer interrogatories, specifically an interrogatory which asked the claimant to produce the documents and provide a list of the names of witnesses on which he was relying to support his claim, he should not be allowed to testify about the matters that should have been disclosed in answers to the interrogatories. These matters generally pertained to his treatment by various doctors. He was allowed to testify at the first CCH and was subject to cross-examination on the circumstances of how he claimed to have injured himself and what injuries (abrasion of the left shin and low back sprain/strain) he sustained.[1]

The claimant appealed the exclusion of parts of his testimony and his documentary evidence. We reversed and remanded for reconsideration of these evidentiary rulings in light of the applicable law and regulations governing proper sanctions for failure to answer interrogatories.[2] The question of the limitations imposed by the hearing officer on the

[1]He also provided an account of what various doctors had told him about his injuries, without cross-examination, under a "Bill of Review" procedure not objected to by the carrier.

[2]In Appeal No. 982829, *supra*, we commented that "[b]ecause no objection was made at the CCH to the introduction of any documentary evidence on the grounds of lack of timely exchange, we consider any such objections now waived and construe the evidentiary rulings of the hearing officer to have been based solely on the claimant's failure to respond to the interrogatories." At the CCH on remand the carrier's attorney challenged this characterization of his position. We have again reviewed the record of the first CCH and maintain our position that an untimely exchange was never the basis of the carrier's objection to the claimant's evidence.

claimant's testimony became moot at the CCH on remand because the claimant failed to appear. His attorney did appear, but was not able to account for the claimant's whereabouts and the hearing proceeded.

At numerous points throughout the CCH on remand, the claimant's attorney offered into evidence three documentary exhibits. Two were excluded for lack of good cause for untimely exchange. This ruling has not been appealed. Claimant's Exhibit No. 1, an Initial Medical Report (TWCC-61) with attachment of Dr. M, D.C., was admitted over the objection of the carrier. In this report, Dr. M recounted the claimant's history and diagnosed, among other things, a lumbosacral sprain/strain, which Dr. M attributed to the incident at work on _____, and placed the claimant in an off-work status. Dr. M returned the claimant to light duty on August 27, 1998.

The carrier introduced the statements of various management personnel and coworkers that the claimant did not complain of a back injury at the time of the incident. It further argues that the low back injury was simply a spite claim because the claimant was terminated effective June 19, 1998, for reasons, according to the employer, unrelated to this claimed injury.

The hearing officer admitted Claimant's Exhibit No. 1 (Dr. M's report) for these reasons stated in Finding of Fact No. 3:

> Claimant articulated good cause to admit Claimant's exhibit no. one in that Claimant received a copy of that exhibit from Carrier during the benefit review conference [BRC]. In addition, Claimant [sic, should be Carrier] did not claim surprise as to Claimant's exhibit no. one.

This finding of fact is problematic for a number of reasons. First, it states that the carrier exchanged the exhibit with the claimant at the BRC. If true, we have held that a reverse exchange, from the claimant to the carrier of the same document, was not required to permit the claimant to introduce that document. Texas Workers' Compensation Commission Appeal No. 91088, decided January 15, 1992. Under these circumstances, because the exchange was timely made, no finding of good cause was necessary. Second, while lack of surprise may be considered by the hearing officer in arriving at a good cause determination for untimely exchange, lack of surprise does not in itself eliminate the requirement imposed by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)) for timely exchange. Third, this finding of an exchange at the BRC is significantly at odds with the basis (not articulated by the hearing officer in her first decision and order and which motivated the original appeal), for excluding the document at the first CCH, that is, lack of timely exchange. In its appeal of the admission of Claimant's Exhibit No. 1, the carrier again argues that there was no good cause to fail to answer the interrogatories. In Appeal No. 982829, *supra*, we addressed the question of the effects of failure to answer interrogatories and specifically noted that such failure does not in itself compel the exclusion of evidence. Nothing in the carrier's latest appeal persuades us to retreat from this position. The carrier also argues on appeal that Claimant's Exhibit No. 1

was not timely exchanged. There was some evidence from which the hearing officer could conclude that the exchange actually took place at the BRC. For this reason, we find no abuse of discretion by the hearing officer in admitting this document on the basis of timely exchange. In reaching this conclusion, we regard as surplusage her further finding of good cause.[3]

In appealing the substantive determinations that the claimant's compensable injury included a low back sprain/strain and that he had disability, the carrier references evidence it believes was favorable to its position and again argues that the claimed back injury was in retaliation for the claimant's termination from his position with the employer. These were factual questions for the hearing officer to determine and her resolution of both the extent of injury and disability questions could be based on the testimony of the claimant alone, if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993.[4] The evidence was in some conflict, but there was also the seeming anomaly of the carrier accepting a shin scrape injury but not a low back strain from dangling over the tank opening. In any case, we will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the testimony of the claimant at the first CCH and the report of Dr. M, considered persuasive by the hearing officer, sufficient to support her findings of fact and conclusions of law on the disputed issues.[5]

[3]The carrier in its appeal argues that the claimant's attorney's assertion of "computer problems" as the cause for the lack of a timely response to the interrogatories was first raised at the CCH on remand. While this is true, we note that the hearing officer did not rely on this representation in reaching her decision to admit Claimant's Exhibit No. 1.

[4]In all fairness, we feel compelled to observe that apparently the hearing officer did not consider the claimant's testimony alone sufficient to support a finding in his favor on both issues because after the first CCH in which Dr. M's report was not admitted, the hearing officer found against the claimant. After the second CCH, in which Dr. M's report was admitted, she found in favor of the claimant.

[5]One final comment is necessary. At the CCH on remand the claimant's attorney requested the hearing officer consider the claimant's testimony submitted under a "Bill of Review." The carrier objected, noting that this testimony was not subject to cross-examination. In her discussion of the evidence, the hearing officer commented on this request and objection, but did not make it clear whether she did or did not consider this part of the claimant's testimony in her decision and order on remand. Error was not asserted on this basis by the carrier in its appeal. In these unusual circumstances, hearing officers should clearly respond to the objection both on the record and in the decision and order.

For the foregoing reasons, we affirm the decision and order of the hearing officer on remand.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge