APPEAL NO. 990697

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 12, 1999. She (hearing officer) determined that the respondent (claimant) sustained a repetitive trauma injury to his left upper extremity in the form of ulnar impingement with abutment of the ulnar head and lunate with triangular fibrocartilage deficiency in the course and scope of his employment; that he did not sustain an injury to his right upper extremity in the course and scope of his employment; that the date of injury is _____; that the claimant timely reported the injury to his employer on December 8, 1998; that he had disability beginning on October 13, 1998, and continuing through the date of the hearing; and that the claimant is not barred from pursuing workers' compensation benefits because of an election of remedies. The appellant (carrier) requested review, urged that the hearing officer erred in admitting a note from Dr. H, the claimant's treating doctor, over its objection and in permitting the claimant to testify after he did not respond to interrogatories; contended that the determinations adverse to its interest are against the overwhelming weight and preponderance of the evidence; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor on all of the issues. A response from the claimant has not been received.

DECISION

We affirm in part and reverse and render in part.

We first address the contention that the hearing officer erred in admitting the report of Dr. H dated March 12, 1999. In a brief letter dated January 26, 1999, Dr. H wrote, "[s]ince we cannot prove the exact date of onset for [claimant's] injury, his injury is caused by on the job injury of repetitious trauma." At the request of the carrier, Dr. P reviewed medical records and the Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) dated December 7, 1998, of the claimant. Apparently, Dr. P was asked, "[i]s aseptic necrosis more likely an ordinary degenerative disease of life or caused by claimant's job duties." In a report dated February 8, 1999, Dr. P stated that there was a paucity of information from the treating physician relating to the history of the symptoms, the details of the symptoms, and the physical examination; that radiological studies revealed aseptic necrosis of the left carpal lunate; that there was no documentation that the condition is related to the work duties, work environment, or repetitive duties at work; that the condition would have had to have been present for approximately two years; that the treating physician furnished no documentation to support a causal relationship between the diagnosis and repetitive motion; and that the aseptic necrosis was not caused by the repetitive motion of which the claimant complained. On February 15, 1999, the attorney representing the claimant wrote a letter to Dr. H, attached a copy of the report of Dr. P, and asked for a rebuttal to the report of Dr. P. At the hearing, the attorney stated that his office contacted the office of Dr. H almost daily in an effort to obtain a response from him. The claimant testified that he went to the office of Dr. H on March 12, 1999, the

date of the hearing; that he was examined by Dr. H; and that he obtained a note from Dr. H. In the brief note, Dr. H wrote:

> [Claimant's] current condition is ulnar impingement [with] abutment of the ulnar head and lunate with triangular fibrocartilage deficiency. This is work related in my opinion with an overuse type phenomenon.

The note was given to the carrier just prior to the start of the hearing. The hearing officer determined that the claimant did not timely exchange the note from Dr. H, but that the claimant had good cause for not exchanging it sooner. Evidentiary rulings by the hearing officer on documents which are admitted or not admitted are generally viewed as being discretionary on the part of the hearing officer. Texas Workers' Compensation Commission Appeal No. 94816, decided August 10, 1994. The standard of review on such evidentiary issues is abuse of discretion. Texas Workers' Compensation Commission Appeal No. 93580, decided August 26, 1993. In determining whether there was an abuse of discretion, we look to see if the hearing officer acted without reference to any guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). In the case before us, the hearing officer did not abuse her discretion in finding that the claimant had good cause for not exchanging the note of Dr. H earlier because he used due diligence in obtaining the note and exchanged it soon after receiving it.

We next address the hearing officer's overruling an objection to permitting the claimant to testify. The attorney representing the carrier stated that on January 27, 1999, interrogatories were hand delivered to the attorney representing the claimant and that the carrier has not received answers to the interrogatories; cited Texas Workers' Compensation Commission Appeal No. 92309, decided August 19, 1992; and argued that the claimant's testimony related to unanswered interrogatories should not be permitted. In Appeal No. 92309, the Appeals Panel stated that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13) pertaining to discovery does not explicitly provide for sanctions for noncompliance with its provisions, although the good cause determination provision obviously implies the power of the hearing officer to exclude from evidence unexchanged information and documents absent a showing of good cause. In the case before us, the interrogatories in evidence are the standard interrogatories provided for in Rule 142.19 and do not contain any interrogatories specific to the claim under consideration. There has not been a showing that answers to the interrogatories would have produced any information that the claimant had not already provided to the carrier. The same general rules that apply to admitting or not admitting a document apply to permitting or not permitting a witness to testify. The hearing officer did not abuse her discretion in permitting the claimant to testify and answer all questions he was asked. Texas Workers' Compensation Commission Appeal No. 982829, decided January 15, 1999.

The Decision and Order of the hearing officer contains a detailed statement of the evidence and the medical evidence was summarized and quoted from earlier in this decision. Briefly, the claimant, who began working for the employer on oil rigs in August

1999, testified that he had slight pain in his right wrist in July 1998; that the pain became worse; that he continued to work until October 12, 1998, when the pain became so bad that he could not work any more; that on October 13, 1998, he told the employer about the pain, and the employer suggested that he go to a doctor; that he, the claimant, did not know what the problem was and thought that it might be carpal tunnel syndrome; that he saw Dr. H on October 19, 1998; that Dr. H told him that he could not determine what the problem was from a visual examination and that tests would have to be conducted; that he used his health insurance to pay Dr. H and applied for short-term disability benefits on October 21, 1998; that on _____, Dr. H told him that it could be work related because of the type of work he had been doing; that Dr. H used medical terms and that he does not remember exactly what was said; that he called Mr. S, his drilling supervisor, on _____, and told him that it was work related; that Mr. S told him to file under workers' compensation; that he and Mr. S completed paperwork; and that he notified the health insurance carrier and the disability carrier that he had filed a workers' compensation claim. He said that he had surgery on the left wrist on January 11, 1999; that since he stopped working on October 12, 1998, he has been unable to work; that he cannot now work; and that after his left side heals sufficiently, he will have surgery on the other side. Mr. W, who handles workers' compensation claims and other insurance matters for the employer, testified that he knew that the claimant had filed a claim for short-term disability after he stopped working for the employer and that he, Mr. W, first learned that the claimant was claiming a workers' compensation injury on December 8, 1998.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis , 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). That different factual determinations could have been made based upon the same evidence is not a sufficient basis to overturn factual determinations of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. The hearing officer's determinations that claimant sustained an injury to his left upper extremity in the course and scope of his employment; that the date of the injury is (alleged date of injury); that the claimant timely notified his employer of the injury; and that the claimant is

not barred from pursuing workers' compensation benefits because of an election of remedies are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support those determinations of the hearing officer, we will not substitute our judgement for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We finally address the determination that the claimant had disability beginning on October 13, 1998. The hearing officer determined that the claimant's date of injury is _____. In Texas Workers' Compensation Commission Appeal No. 981116, decided July 2, 1998, the Appeals Panel held that disability cannot exist prior to the date of injury. The evidence is sufficient to sustain a determination that the claimant had disability beginning on _____, and continuing through the date of the hearing. We reverse the hearing officer's decision concerning disability and render a decision that the claimant had disability beginning on _____, and continuing through the date of the hearing.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge