APPEAL NO. 990774

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 February 3, 1999. The hearing was recessed, both parties submitted additional evidence and closing argument, and the record closed on March 19, 1999. The issues at the CCH were did the appellant (claimant) sustain a compensable injury on Injury 1, and is the respondent (carrier) relieved of liability pursuant to Sec. 409.002 because of the claimant's failure to notify her employer of the injury within 30 days, as required by Sec. 409.001. The hearing officer determined that the claimant did not sustain a compensable injury on Injury 1, and did not report the alleged injury within 30 days or establish good cause excusing her failure to give timely notice, and the carrier is relieved of liability. The claimant appeals, urging that she did sustain an injury on Injury 1, the injury was reported on Injury 1, and the carrier should not be relieved of liability. The claimant also urges error in some of the hearing officer's evidentiary rulings. The carrier responds that the hearing officer's decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked for employer as a certified nurses aide at a nursing home. It was undisputed that the claimant sustained a compensable injury on Alleged injury, to her right wrist and did not lose any time from work. The claimant testified that she sustained an injury to her neck on Injury 1. While lifting a patient, she turned her head, and felt a snap in her neck. The claimant testified that on the date of injury, Injury 1, she reported the injury to Ms. D, her supervisor, a licensed vocational nurse on duty. The claimant stated that she told Ms. D that she had hurt her neck and was losing the feeling in her arms. This conversation was witnessed by Ms. A, a mildly retarded resident of the nursing home. The claimant testified that she witnessed Ms. D calling Ms. L, the supervisor of all the nursing employees. The claimant stated that after the conversation, Ms. D told her to go home, but did not tell her to fill out an accident report. The claimant testified that at her next doctor's visit with Dr. C for an Alleged injury, injury, she told Dr. C she had been injured on Injury 1. The claimant asserts that the medical evidence clearly establishes she sustained an injury to her neck on Injury 1.

Dr. C's notes of December 4, 1997, state "[n]eck with full ROM, nontender." Dr. C also completed a Specific and Subsequent Medical Report (TWCC-64) for that visit and states:

> [Right] arm [continues] to have pain into the fingers with numbness and tingling and pain radiation back up into her shoulder. She also has numbness and pain from her [left] shoulder down to her hand. Denies any trauma.

In his notes of December 29, 1997, Dr. C states, "[s]he continues to have pain on rt. side of neck and there is a trigger point on the upper SCM muscle." To further clarify these notes, Dr. C wrote a letter on May 12, 1998, which indicates that on January 12, 1998, the claimant started complaining of right-sided neck pain with a knot over her paraspinal muscles and that she had also complained of this at a previous visit on December 29, 1997. A cervical myelogram performed on September 3, 1998, indicates an extradural defect at the level of C5-6 and a partial amputation of the left C6 nerve root sleeve.

The carrier asserts that the claimant did not sustain a compensable injury on Injury 1. The carrier argues that none of the medical records mention a new injury until October 6, 1998, and the claimant's own hand-written statement does not discuss a neck injury on Injury 1. The carrier urges the claimant did not report the injury to the employer until May 22, 1998. The carrier presented employer time records which indicate that Ms. D did not work on Injury 1, and presented witness statements of several supervisors on Injury 1, who indicate that the claimant did not report an injury on Injury 1.

The claimant had the burden to prove that she injured herself as claimed on Injury 1. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether she did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer, as fact finder, may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer was the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). He resolved contradictions in the evidence against the claimant and concluded that the claimant did not meet her burden of proving she sustained a compensable injury. When reviewing a hearing officer's decision, we will reverse such decision only if it is so contrary to the overwhelming weight 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). We find there was sufficient evidence to support the determination of the hearing officer that the claimant did not injure her cervical spine on Injury 1, while working for employer.

Section 409.001 requires that an employee notify the employer of an injury not later than the 30th day after which the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. The testimony of the claimant that she reported the injury to Ms. D on Injury 1, is in direct conflict with the carrier's evidence that Ms. D was not working that day. The hearing officer, after considering all of the evidence, including the statement of Ms. A, found that the claimant did not report the alleged injury within 30 days of Injury 1. Whether, and if so, when, notice is given is a question of fact for the hearing officer to decide. We find there was sufficient evidence to support the determination of the hearing officer that the claimant did not timely report the injury or establish good cause for failure to give timely notice.

The parties must exchange witness statements with each other. Section 410.160(3); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 142.13(c)(1)(C) (Rule 142.13(c)(1)(C)). The exchange of such information must be made not later than 15 days after the benefit review conference and thereafter, "as it becomes available." Rule 142.13(c). The hearing officer is authorized to accept documents and rule on the admissibility of evidence at a CCH. Section 410.163(a)(4); Rule 142.2(8). Our standard of review for regarding the efficacy of the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. If the hearing officer abused his discretion, it is not reversible error unless the party raising the point of error shows that the exclusion of the documents was reasonably calculated to and probably did cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 941533, decided December 30, 1994.

The claimant asserts that the hearing officer erred in considering the carrier's witness statements that were not admitted. A review of the record indicates that the carrier's exhibits 1 through 5, the witness statements of Ms. Se, Ms. Mc, Ms. Ho, Ms. Du and Ms. Sh, were originally objected to by the claimant's counsel on the basis that they were not timely exchanged. The carrier did not deny the claimant's assertion that the documents were exchanged by fax on the day prior to the CCH. The carrier responded to the objection, stating that she was recently obtained as counsel the week prior to the CCH. The objection was sustained by the hearing officer on the grounds that the documents were not timely exchanged and no good cause was found. Subsequent to that ruling, and after the testimony of the claimant, the hearing officer instructed the claimant's counsel to obtain a written statement from Ms. A, the carrier to obtain the time records and/or statement of Ms. D, and for both parties to exchange the documents once obtained. After this instruction, the carrier requested that the carrier's exhibits 1 through 5 be admitted, and stated that, with the record open, the claimant would have a chance to question those witnesses. The hearing officer then admitted carrier's exhibits 1 through 5, without articulating a finding of good cause. The claimant's counsel responded to the ruling, stating that he wanted the employer's assistance in speaking with all of the employees involved. The claimant's counsel did not urge an objection to the admission of those exhibits; therefore, he did not preserve any error with respect to the admission of those documents for purposes of appeal. Those documents were admitted and considered by the hearing officer. Any error, if any error occurred, has not been preserved on appeal. Even if the hearing officer abused his discretion in admitting the document, the claimant has not shown that the exclusion of the documents was reasonably calculated to and probably did cause the rendition of an improper decision. We note that, while the claimant asserts the hearing officer did not allow the witness statement of Ms. A, the hearing officer's Exhibit No. 3 contains the recorded statement of Ms. A taken on February 17, 1999; it was admitted and considered by the hearing officer.

The decision and order of the hearing officer are affirmed.

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Dorian E. Ramirez
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Gary L. Kilgore
Appeals Judge