

APPEAL NO. 991429

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 June 15, 1999. She (hearing officer) determined that the respondent (claimant) sustained a compensable neck and shoulder injury "on or about" _____, and had resulting disability from March 18, 1999, through the date of the CCH. The appellant (carrier) appeals these determinations, contending both legal error and insufficiency of the evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The claimant worked as a veterinarian's helper at an animal clinic. He testified that he injured his neck and arm while lifting a "yellow lab" canine weighing about 90 pounds either into a bathtub or onto an examining table. He said he told Mr. R, his immediate supervisor, the same day, and thought the pain would go away. He stated that this occurred between 10:00 a.m. and 11:00 a.m. on _____. This was a Thursday and Fridays and weekends were normally his days off. He further said that he was "afraid" to tell Dr. S, the veterinarian owner of the clinic, that he injured himself because he feared for his job and believed Dr. S would ignore his complaint. He also said the lifting incident was unwitnessed.

The claimant first received medical care from an emergency room (ER) early on the morning of March 18, 1999, because, he said, his pain by then became so severe he could not go to work. Records of this visit reflect the cause to be lifting a "heavy dog." According to the claimant, he "forgot" the date of the incident when he was at the ER, but told the doctor that he had hurt about a week. X-rays showed cervical disc disease. He was also diagnosed with a pinched nerve and right shoulder strain. The claimant testified that he informed Dr. S of the claimed injury on the day of his treatment at the ER.

In a transcribed interview, Mr. R stated that the claimant told him a couple of weeks before the claimed injury that he had a problem with his neck because he slept "the wrong way." He said he never reported to him an accident at work.

Dr. S testified that he first found out about this claimed injury when called by ER personnel on March 18, 1999, and discussed it later that day with the claimant. He said that the claimant told him he hurt himself lifting a dog, but did not remember the dog or the date. Dr. S also recalled that at the benefit review conference the claimant could not remember how or when he hurt himself. Dr. R also produced the daily records of services rendered at the clinic for the period of March 10-12, 1999, as well as a separate "bath chart" of dog bathing and dipping. The records, titled "Itemized Daily Audit Trail Report," show the transactions for these three days. These records cross-reference by number to other records (not in evidence) which presumably contain information about the breed and

weight of the dog treated on a particular day. The breed of dog is not reflected in the records in evidence and only for bathing and dipping services is the dog described as "heavy or medium." Dr. S admitted that no system is perfect, but also said that he does not provide services for free and sought to keep as accurate records as possible. He said that his records showed that the heaviest dog bathed on _____, was a basset hound which weight 54 pounds.

The hearing officer made the following comments in her decision and order:

I believe that the Claimant hurt his neck and/or shoulder lifting a dog, but I suspect that the date of the injury is not _____, but some other date within a few days of _____. There are no records from the Employer which reflect a heavy dog was treated by the Employer on _____, and no heavy dog was bathed on the 10th, 11th, or 12th day of March, but no records were offered concerning the type and weight of animals treated on the 10th or 12th. [Emphasis added.]

She then made findings of fact that "On or about _____, the Claimant lifted a heavy dog so that veterinary services could be administered," Finding of Fact No. 2, and that "[a]s a result of lifting the dog, the Claimant injured his neck and his shoulder." She concluded that the claimant sustained a compensable injury "on or about _____."

In its appeal, the carrier quotes the first sentence of the hearing officer's comments as quoted above and continues:

However, the claimant's testimony as well as his attorney's position throughout the [CCH] was that his date of injury was _____. The carrier prepared its defense on the basis that the claimant was alleging a date of injury of _____. The insured produced records for March 10th, 11th and 12th, 1999 based upon the claimant's allegations that he was injured on _____.

* * * *

. . . the claimant had the burden of proving that he was injured on a specific date within the course and scope of his employment. If the Hearing Officer is going to find that the claimant's date of injury is not _____, or if it is more than one day before or after _____, that is inconsistent with the legislative intent that a claimant who alleged a specific injury occurring at a specific time and place, prove an injury for that date Consequently, the carrier prepared its defense and submitted the specific exhibits that it did to dispute a date of injury of _____.

In a case such as this where a claimant is alleging an unwitnessed injury, it is virtually impossible to prepare a defense if the claimant is not held to a

specific date of injury. As a consequence of the Hearing Officer's determination to go beyond the date of injury that was being contested, the carrier believes that the Hearing Officer abused her authority.

We first observe that we do not construe this appeal as raising an issue of whether the hearing office impermissibly shifted the burden of proof to the carrier and do not address this question. Nor do we consider it an objection to finding a date of injury at variance with that asserted by the claimant. The Appeals Panel has noted that dispute resolution proceedings are not governed by formal rules of pleading and a hearing officer may find from the evidence a date of injury different from that asserted by the claimant, particularly, but not limited to, cases asserting an occupational disease where the date of injury can be somewhat fluid. Texas Workers' Compensation Commission Appeal No. 950061, decided February 24, 1995. In cases of accidental injuries, the variation in the date of injury found and the date claimed is generally limited to one or two days or the choices of dates of injury are limited. Texas Workers' Compensation Commission Appeal No. 970107, decided March 5, 1997 (Unpublished). The hearing officer has a duty to select a date of injury when there are discrepancies in the date claimed. Texas Workers' Compensation Commission Appeal No. 94713, decided July 12, 1994.

We construe the appeal to be essentially that it was "virtually impossible to prepare a defense if the claimant is not held to a specific date of injury." While the hearing officer would have been better advised not to have referred to dates "within a few days of _____" and then make a finding of fact of an injury "on or about _____," we believe that in fact the hearing officer limited her determination of a compensable injury to either the day before or the day after _____, and did not range beyond this period in searching out a plausible date of injury. The carrier introduced evidence of clinic records covering the three days of _____. They thus addressed the precise period of time that the hearing officer focused on. A further reading of the decision and order reveals that the finding of a compensable injury was not the result of depriving the carrier of the opportunity to submit evidence for the real time period in issue, but a failure of that evidence to be persuasive for the reason that the treatment records for other than bathing did not contain evidence of the breed or weight of the dog. Arguably, if the carrier had also introduced the clinic records cross-referenced in these records that information would have been available to the hearing officer and she could have determined whether the claimant was credible in his assertion that he lifted a "heavy dog." While it is true that the claimant focused on _____, and a 90 pound "yellow lab" the hearing officer could reasonably infer from this testimony that the claimant was injured lifting a "heavy dog" on or about this date.

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). That a different factual determination could have been made based upon the same evidence is not a sufficient basis to overturn a factual determination of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. Given the limited nature of the appeal, the claimant's

testimony that he lifted a "heavy dog," and the framing of the issue as "on or about _____," we find no legal error or denial of rights of the carrier to defend itself and that the evidence is otherwise sufficient to support the compensability determination of the hearing officer.

The carrier appealed the finding of disability on the basis that there was no compensable injury. Having affirmed the finding of a compensable injury, we also affirm the finding of disability.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge