APPEAL NO. 991576

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 2, 1999, a contested case hearing was held. With regard to the three issues before him, the hearing officer determined that respondent (claimant) sustained a compensable left elbow and cervical spine injury on Injury 2 (all dates are 1998 unless otherwise noted), that appellant (carrier) had not timely or sufficiently contested compensability of the claim and that claimant had disability from December 15, 1998, through April 23, 1999.

Carrier appeals the hearing officer's decision on all the issues, citing evidence that it believes supports its position regarding the mechanics of the accident, what claimant may have told the police officer, that claimant waited several days before seeking medical care and that the hearing officer erred in excluding another hearing officer's decision and order involving claimant's codriver. Carrier cites Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) for the proposition if there is no injury there can be no recovery even if compensability was not timely contested. Carrier contends there was no injury so there can be no disability. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging the decision is supported by the evidence.

DECISION

Affirmed.

Claimant had been employed by the employer freight line as a truck driver for about 10 years. It is undisputed that claimant sustained a cervical injury in injury 1 (not at issue here) and had surgery for that injury. Claimant testified that on Injury 2 at about 11:00 p.m. he was driving a tractor rig with two trailers while his codriver was asleep in the cab sleeper, when a passenger car hit the right rear tire of the front trailer. Claimant was driving from City 1 through City 2 at the time. There was considerable testimony regarding the mechanics of the motor vehicle accident (MVA), the extent of damage to the vehicles, and how claimant jerked the steering wheel and then slammed on the brakes causing the codriver (a 280-pound, 6'3" man) to fall or catapult onto claimant. A police report and a transcribed statement from the investigating officer indicated that claimant said that he was not injured. Claimant stated that he in fact had been injured but wanted to continue his route to (Country). Claimant testified that he was in pain (five on a scale of one to 10), reported the accident (but apparently not the injury) when he got to (Country), continued his run and returned to City 1 on September 11th. Claimant testified that he had been seeing Dr. PM and tried to get an appointment with him on his return to City 1 but that Dr. PM was not taking any new workers' compensation cases. Claimant subsequently sought treatment for his work-related injury with Dr. MM, D.C. Claimant testified that upon returning to City 1 on September 11th he had also sought care from Dr. R for nonwork-related "congestion," sinus problems and headache. Claimant testified that he had not mentioned his work-

related injuries to Dr. R because Dr. R was his family doctor and did not "do" workers' compensation.

In evidence are a series of off-work slips beginning on September 9th, taking claimant off work a day or two at a time through December 14th. Claimant testified that he needed to continue working in order to support his family. In evidence is an initial narrative report dated October 5th from Dr. MM, giving a date of injury of Injury 2, the history of the MVA and allowing claimant to "continue to work" with restrictions. Dr. MM stated the accident resulted in unspecified cervical soft tissue injuries and specifically cited Section 408.021(a) of the Texas Workers' Compensation Act. Dr. MM noted the injury 1 injury and fusion at the C5-6 level. A cervical MRI performed on October 22nd noted a "broad posterior disc bulge/protrusion" at the C6-7 level. An "electroneuromyography report" of December 14th was "abnormal." Claimant testified that he was not able to work after December 14th because of the pain and that Dr. MM took him off work. Dr. M, a referral doctor, in a report dated February 11, 1999, assessed cervical radiculopathy, left shoulder sprain/strain, and left elbow tendinitis.

Carrier maintains that claimant was not injured in the very minor MVA on Injury 2 and cites complaints of neck pain as recent as April (due to the injury 1 injury) and the fact that claimant told the investigating police officer that he was not hurt. Carrier also disputes that the mechanics of such a minor MVA could cause the 280-pound codriver to be thrown out of the sleeper onto claimant and claimant's delayed (according to carrier) attempts to seek medical care until a week after the accident.

The hearing officer, in his Statement of the Evidence and Discussion, comments:

> Carrier did not timely and sufficiently contest compensability. Carrier received written notice of the claimed injury on (alleged date of injury), and contested compensability on December 15, 1998. The TWCC-21 [Payment of Compensation or Notice of Refused/Disputed Claim] only contests disability and, therefore, does not meet the sufficiency requirements. Regardless of the failure of Carrier to properly contest compensability, Claimant and the medical evidence are persuasive that Claimant at least sustained a compensable injury to his left elbow and cervical spine and had disability from December 15, 1998, through April 23, 1999. Claimant is not persuasive to periods of intermittent disability alleged to have occurred prior to December 15, 1998.

Carrier, in its appeal, commented that there "was no evidence presented by the Claimant from which the Hearing Officer could determine when the Carrier first received written notice of claim." Carrier filed a TWCC-21 dated December 15th, which stated that carrier's first written notice of injury was October 12th and disputed disability because there was "no medical documentation" to support disability from "a new incident and/or injury." The TWCC-21 recites a date of injury of Injury 2 and was received by the Texas Workers' Compensation Commission on December 15th. By carrier's own documentation, it

received written notice of a claimed injury on October 12th and did not contest disability from that injury until December 15th.

Whether or not the accident happened as claimant alleged, how much the tractor trailer weighed, etc., and whether the physics of the accident were possible were all factual determinations for the hearing officer to resolve. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

Carrier offered into evidence another hearing officer's decision and order on the codriver's claim for injuries. The hearing officer sustained claimant's objection and excluded that document, commenting that it contained another hearing officer's interpretation and observations and the hearing officer has "to make [his] own interpretation of what the witnesses say." We review the admission or exclusion of evidence on an abuse of discretion standard. To obtain reversal of a decision based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was, in fact, an abuse of discretion, and then show that the error was reasonably calculated to cause, and probably did cause, the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). We find no abuse of discretion in excluding the decision and order involving the codriver.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are 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, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Judy L. Stephens
Appeals Judge