APPEAL NO. 991699

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 July 20, 1999. He (hearing officer) determined that the respondent (claimant) sustained a compensable injury on _____, and that he gave his employer timely notice of the injury. The appellant (carrier) appeals these determinations, contending that they are against the great weight and preponderance of the evidence. The carrier also urges error in an evidentiary ruling which excluded three transcribed statements. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The claimant testified that he worked in a management position of engineering support for the sales staff. He said that on Thursday, _____, while on a business trip to California, as he lifted his luggage and equipment out of the trunk of his car, he felt pain radiating from his neck. At the time, he said he "minimized" his condition and was back in the office the following Monday in Dallas. He first sought medical care on July 21, 1998, and was eventually diagnosed with cervical herniation. He further said that as a result of his July 21, 1998, visit to an emergency room, he wore a neck brace at work, which was obvious to his coworkers and management. Within a week or two of July 21, 1998, he said, he had "informally" advised management officials multiple times about his injury. Because he worked in executive management, he said that virtually everyone he told about his injury was a management official and they shared his concern about his being able to continue working. He further admitted that he attempted to play in an employer-sponsored golf tournament on July 18, 1998, but could not finish play because of his pain. He denied that he sustained the injury playing golf and insisted that he had reported it to several managers before the tournament. He also denied that his injury was preexisting.

In a letter of January 26, 1999, Ms. R, the manager of human services for the employer, wrote that "management was notified Tuesday, July 21, 1998, of [claimant's] injury that occurred on Friday [sic], _____, while on . . . company business." Several other signed statements of coworkers support his contention that he advised them of his injury before the golf tournament.

We address the evidentiary objection first. The carrier offered into evidence unsigned transcriptions of telephone conversations between an adjuster and three employees, including Ms. R. The conversations occurred on October 20 and 26, 1998. The transcripts were sent to the claimant on June 28, 1999, in the words of the carrier's representative, "as soon as they became available." The claimant objected for lack of timely exchange. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13) which provides for the exchange of documents within 15 days of the benefit review conference (March 24, 1999) and thereafter as additional evidence "becomes available."

Rule 142.13(c)(2). The hearing officer found no timely exchange based on the delay between recording and transcription and noted that the CCH was originally set for May 21, 1999, before the exchange even took place. Under these circumstances, he impliedly considered the documents to be "available" well before they were exchanged. At the CCH, the carrier's representative could say no more than she exchanged them when they became available and offered no explanation for the delay. On appeal, the carrier presents the same argument for their admission without explaining why they only became available on June 28, 1999. Based on our review of the record, we find no abuse of discretion in the hearing officer's refusal to admit these statements over the claimant's objection for failure to comply with discovery rules.

The claimant had the burden of proving he sustained a compensable injury as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so was a question of fact for the hearing officer to decide and could be decided based on his testimony alone if deemed credible by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer obviously found the claimant credible in his assertion that he injured himself on _____, not before then or during the golf tournament. In its appeal, the carrier asserts that the claimant was "not believable" because he was "vague" in his testimony on various points and because Dr. J, a treating doctor, said the herniation "could have been present" before the claimed injury and the claimant himself offered such speculation with Dr. J. The claimant described this conversation as essentially the result of his still being in "denial" at the time. The carrier also argued that the claimant was asserting a work-related injury in order to avoid making the co-payments associated with his group health plan. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). In his role as fact finder, he could accept or reject in whole or in part any of the evidence. Texas Workers' Compensation Commission Appeal No. 93819, decided October 28, 1993. 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 that the testimony of the claimant, considered credible and persuasive by the hearing officer, provided sufficient evidence to support the determination that he sustained a compensable injury as claimed.

Section 409.001 generally requires the claimant to give the employer notice of the injury within 30 days of its occurrence. Failure to do so, with certain exceptions not here relevant, relieves the employer and carrier of liability for benefits. Section 409.002. Whether, and, if so, when, notice is given are questions of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994. In this case, the claimant testified that he gave timely notice and Ms. R's letter of January 26, 1999, on its face, established timely notice. The carrier argues that the correct date of notice is more properly contained in the Employer's First Report of Injury or Illness (TWCC-1), also prepared by Ms. R on September 2, 1998, which reflects August 27, 1998, as the "date reported." The carrier also refers to various e-mails between the claimant and

Ms. R in September 1998 which address perceived problems with the TWCC-1, but do not mention problems with the "date reported" block. It further suggested at the CCH that Ms. R was somehow pestered by the claimant into writing the January 26, 1999, letter. The hearing officer again found the claimant credible and could have concluded that the letter of January 26, 1999, coming later than the e-mails and the TWCC-1, was more accurate. Under our standard of review, we find this evidence sufficient to support the hearing officer's finding of timely notice.

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

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge