APPEAL NO. 991709

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 30, 1999, a hearing was held. After closing the record on July 14, 1999, he determined that respondent (claimant) sustained a compensable "back strain" injury on _____, and had disability beginning December 11, 1998, to February 12, 1999. Appellant (carrier) asserts that it is improper and unfair to allow claimant to prevail since he did not appear at the hearing, adding that it was not able to cross-examine claimant and arguing that the hearing officer should not have accepted claimant's evidence until after the show cause letter had been sent to him. Carrier also stated that claimant was not credible and asserted that he had not met his burden of proof. There is no response from claimant in the appeals file.

DECISION

We affirm.

The record reflects that claimant did not appear at the hearing on June 30, 1999, but his counsel did. The hearing officer's written decision states that claimant did not respond to the letter to show cause why he was absent; that letter allowed 10 days for a response. (We question why this letter, in evidence as Hearing Officer's Exhibit No. 4, informing claimant that he was to show cause why he missed the hearing and that he could request a hearing be reconvened, then states, "[i]f you do not want the hearing reconvened, you do not need to contact the Commission [Texas Workers' Compensation Commission].") Since there is no reply by claimant, we have no indication that the hearing officer's comment is not accurate.

At the hearing, claimant's representative offered 11 exhibits into evidence. There was no objection by carrier. The exhibits were admitted. Before the offer, the hearing officer had commented that claimant's counsel could offer evidence, adding that if he received no response to his show-cause letter to claimant, "[t]hen I will just look at the documents before me and consider the arguments and make a decision based on that."

The issues were whether there was a compensable injury (involving the lumbar spine based on lifting on _____) and disability. The representatives of the parties stipulated at the hearing in regard to claimant's employment, employer's coverage, and venue. Carrier also commented that it had "received responses pursuant to the order to compel" and added, "[w]e withdraw our motion for continuance." Hearing Officer's Exhibit No. 3 includes a Motion to Compel Answers to Interrogatories, directed to claimant, and an Order to Compel signed by the hearing officer on June 22, 1998. Carrier offered two exhibits into evidence (which were accepted), but did not offer the Answers to Interrogatories.

While carrier states that claimant avoided cross-examination by his failure to appear, carrier was not denied the right to cross-examine any witness presenting testimony. Had

the claimant been in attendance, he would not have been compelled to testify in his own behalf; carrier could have called him had he been present and had chosen not to testify, but carrier, as stated, did not object to the claimant's documentary evidence offered and asked for no continuance to call claimant itself. *See* Texas Workers' Compensation Commission Appeal No. 950122, decided March 10, 1995, and *compare to* Texas Workers' Compensation Commission Appeal No. 960464, decided April 22, 1996. Certainly when issues are to be decided upon which a claimant's credibility could be a significant consideration and the claimant does not appear, any hearing officer should strongly consider a carrier's request for continuance to call claimant as a witness.

There is little question in Appeals Panel decisions that a party's failure to appear at one hearing, even without good cause, does not result in that party being unable to present evidence. *See* Texas Workers' Compensation Commission Appeal No. 970121, decided March 4, 1997, and Texas Workers' Compensation Commission Appeal No. 962387, decided January 14, 1997. In addition, the absence of a party at the hearing does not preclude the hearing officer, absent an objection, from accepting evidence on that party's behalf at the hearing in which the party is absent (*see* Appeal No. 950122, *supra*). As a result, without an objection to the offer of documents by claimant's attorney at the hearing, the hearing officer was not obligated to wait to accept evidence until after the claimant responded to the letter pertaining to show cause.

As stated, even had claimant appeared at the hearing, he would not be compelled to testify in his own behalf. The record shows no steps having been taken by carrier, when claimant did not appear, to obtain a continuance to present his testimony; no attempt under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(f) to seek additional discovery from claimant based on the unforeseen development of his absence; and carrier did not offer claimant's answers to interrogatories which the record indicates carrier received and thereafter withdrew its motion for a continuance. The question of cross-examination in this case does not provide a meritorious basis for reversal of the decision.

Just because a party, represented at the hearing, does not appear personally at the hearing does not mean that such party, including a claimant seeking benefits, must never prevail on the issues. Certainly, the fact finder in many cases, depending on the issues and the other evidence, would be very reluctant to find for a claimant who did not, under oath, testify as to facts relevant to the issues being heard. Nevertheless, the fact finder is to consider all the evidence presented in reaching a determination; the hearing officer, when appropriate, may develop the evidence by ordering a medical examination of claimant; the hearing officer may even select notices and responses filed by the parties with the Commission and make them part of the record; the hearing officer may certainly give significant weight to the absence of any testimony by a claimant in his own behalf.

We conclude that just because claimant was absent from the hearing, at which documentary evidence was accepted on his behalf and at which documentary evidence and testimony were presented on behalf of the carrier, will not result in the decision of the hearing officer being overturned.

In regard to the evidence presented, Mr. R testified that he is general manager of employer. He said he was present at work on the day of the alleged injury. When asked if claimant delivered a television that day, Mr. R said:

> Not to my knowledge, no. I don't remember. There were so many transactions that day. His primary job title is delivery driver. So, yes, I'm more than sure that he did deliver one or two, maybe, TVs or a bedroom set that day.

Mr. R said that claimant told him of the injury the following day and he, Mr. R, said he told claimant he did not recall him leaving work with a back injury. Mr. R added, "[h]e had no back injury whatsoever." Mr. R also said that claimant on his application for employment with employer marked "no" to a question that asked if he had ever been injured while with another employer. One of carrier's exhibits was a report from the Commission saying that claimant had a "reportable claim" to his back on two prior occasions, both in 1997 with different employers. Certainly, Mr. R's testimony about claimant's answers on his application, coupled with the report of the Commission, raised a question of claimant's credibility.

Medical records provided by claimant's counsel show that he sought medical care from Dr. H on _____, reporting "back pain from lifting heavy boxes" with succeeding words illegible. On December 15, 1998, Dr. H noted a back strain from "lifting at work" on _____, and "woke up stiff" the next morning. Dr. H noted that claimant should not lift over 10 pounds. A drug test was reported as "negative." An x-ray showed no fracture but did show narrowed disc space at L5-S1.

Dr. W, D.C., prepared an Initial Medical Report (TWCC-61) on December 31, 1998. Dr. W diagnosed a lumbosacral root lesion and radiculitis. Dr. W noted a history of not just lifting at work but lifting a 27-inch television set. Dr. W was also of the opinion that carrying a 27-inch television set, which he said claimant did up stairs by himself, could cause a back injury. There is no medical/chiropractic record past February 12, 1999. On that date, Dr. W said that claimant could not perform his regular duties and gave an estimated return to work date of March 12, 1999.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. While another fact finder may have drawn different inferences from the evidence, including the fact that claimant did not choose to provide testimony under oath and that he did not provide information of past injuries on his application for work with employer, that is not a basis for the Appeals Panel to reverse the decision. The dates and notations of a work injury in the medical records could be accepted to show a prompt sequence of events relative to a claimed injury on _____, which, when coupled with Mr. R's testimony that claimant was lifting television sets that day and the other medical notation that claimant "woke up stiff" the next day (which could be interpreted to be not inconsistent with Mr. R's assertion that claimant did not look injured at the end of the day on _____), provided some evidence that an injury occurred at work.

Carrier's appeal in regard to disability is tied to its contention that claimant did not sustain his burden of proof. Claimant did not appeal the determination that disability ended on February 12, 1999. The evidence, including the opinion of disability by Dr. W provided on February 12, 1999, provided some evidence of disability.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge