APPEAL NO. 991855

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 7, 1999, a hearing was held. He (hearing officer) determined that appellant (claimant) was not injured when he fell at work on _____, that claimant did not notify employer of any work injury within 30 days and employer had no actual knowledge of an injury, that claimant made an informed election of remedies, and that claimant did not have disability. Claimant asserts, generally, in regard to the hearing officer's Statement of Evidence, findings of fact, and conclusions of law, that each is "contrary to and unsupported by substantial evidence," without further specificity (presumably including those findings of fact to which the parties stipulated). In addition, claimant states that the hearing officer did not limit the issues as claimant proposed in his Response to the Benefit Review Officer's list of issues, that the hearing officer did not issue subpoenas as requested, that the hearing officer refused to permit him to "present exhibits and witness testimony," set unreasonable time limits, was "rude and unprofessional," and was biased against him. Respondent (carrier) replied that the findings of fact and conclusions of law should be affirmed and that the Decision and Order at the conclusion of the hearing officer's decision should be consistent with those findings of fact and conclusions of law.

DECISION

We affirm, as reformed.

Claimant worked for (employer), on _____. He testified that on that day he was walking through a job site when he stepped in a hole that was covered by plastic and fell, injuring his right ankle. He said his supervisor, Mr. W, was present and assisted him in getting up. He sought medical/podiatric care that same day. He agreed that he had been in a motor vehicle accident (MVA) on **Previous injury date**. He said that he missed work the rest of the week and part of the next workweek. Otherwise, he was able to work, with some time off from time to time; some medical records indicate he had arthroscopic surgery to the ankle in early September 1998; he was terminated on September 15, 1998.

Four issues were reported from the benefit review conference (BRC): compensable injury, notice, election of remedies, and disability. Claimant's response to the BRC report said that carrier only questioned "whether the claimant was injured" and did not mention "compensable"; claimant also said that carrier did not raise the issue of disability, but conceded that carrier did raise the notice and election of remedies issues at the BRC. The hearing officer, on the record, indicated that he considered this response and the BRC report, which listed the four issues and gave the positions of both parties as to each, in denying the motion to limit the issues. Having examined the claimant's response to the BRC report, the BRC report itself, and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) which specifically addresses "additional" issues, we do not find that the hearing officer erred in considering all the issues as reported from the BRC. We note that no issue of carrier waiver, in regard to disputing compensability under Section 409.021, was proposed to be added.

Claimant also takes issue with the denial of his requests to subpoena 12 people plus the employer and "(company A)," an agent of carrier, as witnesses at the hearing. The hearing officer found no good cause and denied the subpoenas. Claimant's two requests do not indicate that any attempts had been made to arrange for each of the listed witnesses to provide evidence either in person at the hearing or through documents provided. *See* Rule 142.12(d) which refers to whether the information may be "adequately obtained by deposition or affidavit." The persons addressed by the claimant's requests for subpoenas include claimant's son and three doctors who treated claimant. We note that four of the people named in the requests for subpoena, claimant's son, one doctor, claimant's supervisor at the time of the alleged incident, and the person who fired him, all testified. While we find no error in denying the requests for subpoena based on the information provided in the requests, the provisions of Rule 142.7, the order denying the requests which found no good cause, and the hearing officer's denial at the hearing, which was also based on no good cause, we do not base our decision on some notations in the margin of one of the requests which say "work product" in addition to "no good cause." Such "work product" notes do not appear to have any relationship to attorney work product and no attorney work product appears to be set forth in the request for subpoenas.

At the hearing, the evidence was sharply in conflict as to injury, but was not conflicting that some sort of accident happened. Claimant and his son testified that when claimant fell at work he said his ankle (or leg) hurt. Claimant testified that he said "I'm okay but my ankle hurts." Claimant said he also called Mr. W the next morning, told him he could not get his boot on over his swollen ankle, and said "get the first report filed," which Mr. W then said he would do. Mr. W testified that he was standing nearby when claimant "tripped over a barricade that was near a hole"; Mr. W said he asked claimant if he needed to go to the hospital or fill out an accident report, to which claimant replied, "no, I'm fine." Mr. W said claimant did not say, "No, I'm fine except my ankle hurts." He also said claimant got up and walked "fine." He added that claimant told him a "week or so" later that he had had an MVA, his ankle was swollen, and he was going to the doctor "over the car" wreck; Mr. W said claimant never said he was seeing a doctor about an injury at work. He also said, though, that claimant had missed no work after the MVA of **Previous injury date**, prior to the accident at work on _____. After the latter time, Mr. W said that claimant missed about 24 hours from work due to his ankle.

Claimant also said that in middle to late 1998 he learned that his personal insurance had been used to pay part of the medical bills. Claimant had testified that he originally went to Dr. M, a podiatrist, for his ankle injury but then, after two visits, on the recommendation of a friend, began seeing Dr. D. (Dr. D's records, briefly described hereafter, indicate claimant first saw him approximately one year after the incident.) In answer to questions from the hearing officer, claimant said that he knows the difference between workers' compensation insurance and medical insurance and that he told Dr. D to file his bills under claimant's personal insurance. He explained that he knew the carrier would dispute workers' compensation. He added that he wound up paying a significant part of the medical bills himself. He acknowledged, "I stretched the truth" (that he withheld information) in his conversation with Dr. D's insurance worker.

Mr. S testified that he was a supervisor but not claimant's supervisor until November 1997. At that time he became construction superintendent and as such was a supervisor from November 1997 through September 1998. He said claimant was not off work an unusual amount of time and did not miss work due to an injury. He agreed that a report of injury involving a paint bucket falling onto claimant's shoulder was made in August 1998. He said, however, that he did not hear of a _____, injury until after claimant had been terminated. When he heard of such an allegation, he asked Mr. W about it and he replied that he only knew of claimant having slipped on some plastic about which claimant had said he was fine. He said that in May 1998 he had begun documenting claimant's poor performance, citing examples back to March 1998. Three such letters were given to claimant from May into August 1998. Then, on September 15, 1998, Mr. S terminated claimant after a dispute between claimant and a foreman, Mr. H. Claimant stated that he did not perform poorly and was terminated because of his workers' compensation claim.

Dr. M testified that he has treated and known claimant for years. Claimant came to see him on _____, about his right ankle, saying he had stepped in a hole at work. Dr. M said he saw claimant twice and that claimant had a torn ligament which was consistent with having stepped in a hole. He said he gave claimant cortisone shots. He said that claimant began seeing Dr. D and Dr. D did an "arthroscopic exam" in September 1998. Dr. M said that there was a "mix-up" at his office and his bill was sent to claimant's personal insurance. In response to a question on cross-examination, Dr. M said that if claimant had told him he had been in an MVA a week before the incident that was mentioned, he "possibly" would have thought claimant's injury was consistent with that type of (car) accident.

When Dr. M was testifying, claimant's counsel objected to evidence relative to the Previous injury date, MVA. Claimant's counsel's objection was overruled and counsel then asked for a continuing objection, to which the hearing officer said, "please, that way you won't have to pop up like a jack in the box all the time."

The record of hearing contains only limited records from Dr. D, but those in evidence indicate that Dr. D's initial treatment of claimant did not occur until September 1, 1998. At that time Dr. D reported that claimant had a right ankle injury on: "**previous injury date** that was an inversion type of an injury in a[n MVA]." Dr. D added that initially claimant had been "treated with a fracture walker." Dr. D said claimant reported the ankle was still unstable. The records are not clear as to when the arthroscopic exam took place, but it appears to have been done on September 2, 1998. Dr. D then noted on October 9, 1998, that claimant

> asked that I change his injury date from **previous injury date** to _____ as this had been an error in the original dictation. I accommodated him in that regard. [Claimant] had reported the original injury date as previous injury date. However, at that time he had taken three Vicodin and was not thinking straight.

Carrier provided two statements from employees present on _____, when claimant had his accident at work. One, Mr. D said that claimant "stumbled" on that day but that claimant never said he was injured. Mr. E said that claimant tripped while climbing through a barricade, but got right back up. He said that claimant had been involved in an MVA the week before, was in the hospital, and injured his leg, knee or ankle. He added, "he had some kind of brace on his lower leg."

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. As fact finder he gave more weight to the evidence of Mr. W than that of claimant, saying in his Statement of Evidence that there was "no credible evidence claimant notified his employer within 30 days." A finding of fact was made that said claimant did not sustain a compensable injury. An accident does not necessarily result in an injury. *See* Texas Workers' Compensation Commission Appeal No. 92276, decided August 5, 1992. The hearing officer also said in his Statement of Evidence that it appears to be a claim made in retaliation for termination. Since claimant's Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) was signed on August 19, 1998, and he was not terminated until September 15, 1998, unless the form was misdated, it did not result from termination. However, the claim form is dated after claimant had received two warning letters from Mr. S and it is dated the same date as Mr. S's last warning letter prior to the termination. More significantly, the evidence that claimant continued to work for approximately a year after the alleged injury, the witnesses' evidence that no injury was apparent, and the entry by Dr. D referring to the Previous injury date, MVA, not the _____, fall (as Dr. M had referred to at the time of the fall) provide sufficient support for the determination that no compensable injury occurred. (The hearing officer could choose to give more weight to claimant's history given to Dr. D almost a year later than he did to the history claimant gave Dr. M the day of the incident, although normally a fact finder may consider evidence closer in time to the event to be more probative than that provided months later.)

Claimant's testimony, in particular his answers to the hearing officer about knowing the difference between medical insurance and workers' compensation insurance and having told Dr. D's office to use medical insurance, provides some evidence to support the determination that an election of remedies was made, especially in light of the general nature of the appeal as to this determination.

The record reflects that the hearing officer was direct with counsel for both claimant and the carrier. For instance, the hearing officer told claimant when carrier's counsel was cross-examining him and had asked a question with a double negative, "don't let him put words in your mouth," referring to such questions as confusing. The claimant also states that the hearing officer unreasonably limited the presentation of evidence. (We note that all exhibits offered by claimant were admitted into evidence; we also note that all witnesses claimant called at the hearing were allowed to testify.) The hearing officer did impose some time limits.

After the claimant had examined Dr. M and Mr. S, and after one and one-half audiotapes had been used, but before claimant and his son were called to the stand, the hearing officer announced that he had another hearing scheduled for later the same day and told claimant he had 30 minutes to complete his presentation of evidence. After cross-examination was completed of claimant himself, the hearing officer announced that claimant had used his 30 minutes but would be allowed one minute for redirect and five minutes for testimony from his son. Both were completed satisfactorily with no further instruction. Carrier only presented one witness. Thereafter, the hearing officer gave each party two minutes for closing, again referring to his second scheduled hearing. Claimant closed and carrier's counsel at some point was interrupted to be told that he had one minute to go.

We cannot conclude from an examination of the record that the hearing officer was biased against either party. Neither do we find that either party was unreasonably restrained from presenting its evidence in regard to the issues before this hearing. The allegation of rudeness does not raise a question that could result in any change in the outcome of the hearing.

Finding that the findings of fact and conclusions of law are sufficiently supported by the evidence, we affirm. We reform the Decision and Order at the end of the hearing officer's decision to read that "carrier is not liable for workers' compensation benefits consistent with the findings of fact and conclusions of law provided herein."

_____
Joe Sebesta
Appeals Judge

CONCURRING OPINION:

I concur in the result. Even if the evidence was insufficient to support the hearing officer's determinations regarding election of remedies, there would be no remand given the resolution of the other issues in this case. Therefore, I concur in the affirmance.

_____
Judy L. Stephens
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge