

APPEAL NO. 991910

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 August 10, 1999. He (hearing officer) determined that the respondent (claimant) sustained a compensable injury and that he had disability from April 7, 1999, to the date of the CCH. Appellant (carrier) appeals these determinations on sufficiency grounds. Carrier also contends the hearing officer erred in placing the burden of proof on carrier and that he abused his discretion in excluding a surveillance videotape. Claimant responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

The carrier contends the hearing officer abused his discretion in excluding surveillance videotape evidence. Carrier sought to admit the evidence to show that claimant's range of motion (ROM) was better than he represented at the CCH. The claimant objected to its admission and argued it was not exchanged within 15 days after the benefit review conference (BRC). Carrier asserted that it had good cause for the failure to timely exchange the videotape and pointed out that it was exchanged as soon as it obtained a copy of the videotape. The hearing officer sustained the objection and did not admit it into evidence. The hearing officer noted that carrier "waited until much too late" to begin surveillance techniques.

Parties must exchange documentary evidence with each other not later than 15 days after the BRC and thereafter, as it becomes available. Rule 142.13(c) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)). A hearing officer may rule on the admissibility of evidence parties seek to introduce into the CCH record. Rule 142.2(8). Our standard of review regarding the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain reversal of a judgment 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 also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. 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). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Appeal No. 951943; *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986).

In this case, an investigator went to claimant's house on August 3, 1999, and posed as someone looking at claimant's home. The investigator talked to claimant and claimant was videotaped pointing and using his arms, exhibiting greater ROM than that claimed by claimant at the CCH. We conclude that there was no reversible error in excluding the

videotape in this case. In June 1999, claimant's doctor stated that his ROM was improving. A videotape showing claimant moving his arms would be of very minimal relevance to the issues in this case. We conclude that any possible error in the exclusion of this evidence was not calculated to cause nor did it cause an improper decision in this case.

Carrier contends the hearing officer's determination that claimant sustained a compensable injury to his shoulder is not supported by sufficient evidence. Carrier asserts that the hearing officer also erred in placing the burden of proof on carrier in this case.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). A claimant may meet his burden to establish an injury through his own testimony, if the hearing officer finds the testimony credible. See Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. An aggravation of a previous condition or injury can rise to the level of a new injury. Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991. To be compensable, generally, an aggravation must be a new injury and not merely a transient increase in symptoms from an existing condition. Texas Workers' Compensation Commission Appeal No. 94107, decided March 10, 1994. See also Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994.

Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that he injured his shoulder at work on _____, while using a tire iron. There was also evidence that claimant complained at work that he hurt his shoulder at home reaching for or changing a bed sheet. Claimant said he initially went to an occupational health clinic and then began treating with Dr. L about two weeks after the injury. After an MRI, Dr. L diagnosed shoulder tendinitis and a strain. Claimant said he was unable to work because of his injury from April 7, 1999, to the date of the CCH. The record contains off-work slips from Dr. L that state that claimant could not work at various times between April 14, 1999, and August 1, 1999.

Regarding the burden of proof, it does not appear that the hearing officer improperly placed the burden of proof on carrier. The hearing officer stated in the decision and order that "the facts presented by claimant represent a preponderance of the evidence in this case. Carrier has not presented facts to overcome those of the claimant." This indicates that the hearing officer found the facts in favor of claimant and that claimant met his burden of proof. The hearing officer merely noted that he would have considered contrary

evidence if it had been offered by carrier. Despite the hearing officer's wording in the discussion portion of the decision and order, we do not perceive that the hearing officer improperly placed the burden in this case.

The evidence conflicted regarding whether claimant was injured at work. Claimant testified that he injured himself at work using a tire iron. The hearing officer resolved the conflicts in the evidence. We will not substitute our judgment for the hearing officer's because his determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain.

Carrier next challenges the sufficiency of the evidence to support the hearing officer's disability determination. The applicable standard of review and the law regarding disability are set forth in Texas Workers' Compensation Commission Appeal No. 950264, decided April 3, 1995. The evidence from Dr. L and the claimant's testimony supports the hearing officer's disability determination. We will not substitute our judgment for the hearing officer's because his disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge