APPEAL NO. 992038

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 2, 1999. The issues involved whether the respondent, _____, who is the claimant, sustained a compensable injury on _____; whether he had disability for the period from January 10 through February 22, 1999; and whether the appellant (carrier) was relieved from liability because of the failure to give timely notice of injury to the employer.

The hearing officer held that the claimant sustained an umbilical hernia and had disability for the period of time in question. She found that although the claimant did not give notice of his injury within 30 days, he had good cause, and the carrier was not discharged from liability.

The carrier has appealed and argues that the hearing officer committed reversible error by admitting a document, over its objection for failure to exchange, and indicates its belief that the hearing officer did so intentionally, to make up for a record otherwise devoid of evidence of causation. The carrier asserts that there is no evidence to support the finding of a compensable hernia, nor is there evidence of good cause for the failure to timely report the injury to the employer. The carrier points out that the claimant never presented evidence of good cause because, the claimant asserted, he had timely given notice. The carrier finally noted that there could be no trivialization because the claimant knew by January 15, 1999, of the seriousness of his condition and yet did not report it until February 1999. Finally, the carrier argues that there can be no disability where there is no compensable injury. The claimant responds that the decision is correct and should be affirmed.

DECISION

Affirmed.

The claimant was employed by (employer) as a delivery truck driver, which involved going outside the state while making deliveries. The claimant said that on _____, he delivered a dock plate to a location in (state 1). The claimant said that as he lifted this plate, along with another man, he felt a burning sensation around his umbilicus. He said he did not think much of it, although he was sore on the way home, and the pain went away later that day.

The claimant went on another trip a few days later to (state 3). He said that his truck got stuck in the snow somewhere in (state 3) and he got out to shovel snow away from his truck. The claimant said when he did this, the pain in that area started again. He discovered later on that he had a discharge from his navel. The claimant called his traffic manager, Ms. S. In light of the notice issue, it is worth setting out the conversation as testified to by Ms. S:

> He called me that afternoon. It was on _____ about 4:30, said he wasn't feeling good. He said his belly button was red and swollen and it hurt.
>
> And I questioned him. I asked him: Well, you know [claimant], what did you do? Did you do something different? He said, I shoveled some snow. And I said, Well, then, just let me know how you do and call me the next day.

According to the claimant, Ms. S told him that he could go see a doctor and he went to the emergency room (ER) at a hospital in (state 2). A registration record of that visit indicates that the hospital recorded that the injury was workers' compensation; that it occurred on _____; and that the employer was the subscriber. The claimant was diagnosed with cellulites in the navel area and given antibiotics. Although the carrier argues that a hernia was not found, there is no indication that the claimant was examined for a hernia and that it was ruled out. In fact, tenderness on examination in this area was recorded. The claimant's pain did not resolve and when he arrived back in (state 2), he went to a family doctor, Dr. M, who referred him to Dr. A. The claimant reported this referral to the employer.

The claimant was diagnosed with an umbilical hernia when a colonoscopy was done in order to check for cancer on January 15, 1999. Dr. A's report of his examination of the claimant prior to surgery noted that the claimant began to get an infection 10 days earlier while traveling. The claimant said that Dr. A told him that bouncing around in his truck would have caused an umbilical hernia to become infected. (This was the cause he gave to the adjuster during a telephone interview on February 4th.) Dr. A's reports prior to the claimant's surgery noted the presence of a mass over the navel, which Dr. A felt could indicate abdominal malignancy. The claimant was off work following his surgery until released by Dr. A effective February 22, 1999. On February 16, 1999, Dr. A's notes state:

> There is a note from the insurance company, basically the workman's comp, that the patient will not get reimbursed. There was a question that what we took was a lymph node. I believe this is nonsense. We will send a note to the insurance company.

The claimant felt that the hernia likely occurred when he picked up the dock plate on _____, because that was the first time he had problems. The claimant said he told both Dr. M and Dr. A about picking up the dock plate. The claimant said that Dr. M was not too concerned with that at the time, and Dr. A at first had the same reaction. The claimant also recalled that he told Ms. S about the dock plate incident when he called her. Ms. S testified that she first became aware of the workers' compensation claim when called by the human resources director "after" the claimant's surgery. She could not recall the exact date; she testified that if the Employer's First Report of Injury or Illness (TWCC-1) noted February 2, 1999, as the date of notification, she had no reason to doubt that. Ms. S agreed that she was at the supervisory level and a person to whom injury should be reported. She said that the claimant kept her informed of his progress and surgery.

A statement is in evidence from Mr. W, who was employed by an (state 3) business that may be a customer of the employer. Mr. W stated that he overheard the claimant reporting an injury by telephone on _____, at some time between 10:30 a.m. and 11:30 a.m. He photocopied his driver's license as a means of identity and the signature on the license and statement are substantially similar. Mr. W said that he was standing two feet away from the claimant while he was on the telephone.

At the beginning of the CCH, before any testimony was taken, exhibits were tendered by the claimant. The carrier objected to Claimant's Exhibit No. 5, which was a letter from Dr. A. The carrier and ombudsman both agreed that the letter had not been exchanged prior to the morning of the CCH. The ombudsman stated that although she had requested such a letter from Dr. A at the time of the benefit review conference (BRC), as she stated she would at the BRC, Dr. A had not answered her prior to the day of the CCH. The hearing officer simply stated that she would "overrule" the objection and consider it as going to the weight she would give the document. She then offered to hold the record open for 10 days to allow a motion for further discovery from the carrier. She denied a motion for continuance. She did this after the carrier asserted that because there was no medical evidence making a causal connection between the hernia and the claimant's work exchanged timely, that it opted not to develop its own medical evidence. It does not appear that the carrier requested further discovery.

ADMISSION OF CLAIMANT'S EXHIBIT NO. 5

We will note first that the allegation that the hearing officer intentionally devised to admit Claimant's Exhibit No. 5 as a means of making up for a dearth of evidence is utterly without foundation and is unwarranted. The exhibit was tendered and objected to at the outset of the CCH, before any evidence was admitted or testimony taken. If there was a dearth of evidence apparent at this point, it was grounded in the carrier's admission that it had failed to obtain medical evidence of its own that would refute that an umbilical hernia would occur from the activities described by the claimant since the inception of the claim. We have repeatedly stated, as a general proposition, that a claimant may establish a compensable injury through his own testimony, if believed, and medical evidence is not required. While a carrier does not have the burden of proof, it may be proceeding at its own risk if it does not prepare for the CCH to address what has been raised by the claimant at the BRC.

We agree that the hearing officer erred, however, when she did not cite a good cause basis for admitting the document. An objection to documentary evidence for the failure to exchange does not go to the weight of the document tendered--it goes to its admissibility. Section 410.161. Parties must exchange witness statements with each other. Section 410.160(3); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1)(C) (Rule 142.13(c)(1)(C)). The exchange of such information must be made not later than 15 days after the BRC and thereafter, "as it becomes available." Rule 142.13(c). The hearing officer is authorized to accept documents and rule on the admissibility of evidence at a CCH. Section 410.163(a)(4); Rule 142.2(8). The hearing officer must make a finding of

good cause as to documents not previously exchanged before admitting them. Rule 142.13(c)(3). While she may have been satisfied that the document was produced as soon as it was received, this was not the recited basis for the ruling.

Our standard of review for regarding the efficacy of the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. If the hearing officer abused her discretion, it is not reversible error unless the party raising the point of error shows that the admission or exclusion of the documents was reasonably calculated to and probably did cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 941533, decided December 30, 1994. We cannot agree that the admission of the opinion letter from Dr. A constitutes reversible error on the finding that the claimant sustained a compensable injury and is based on what the claimant told Dr. A. Dr. A's letter simply states that the claimant's hernia was a work-related injury. This is duplicative of the claimant's testimony and his interview with the adjuster, let in without objection. There is sufficient support for the finding that the claimant sustained his hernia as he stated, on _____ (or on (alleged date of injury), when aggravated by shoveling snow).

NOTICE TO THE EMPLOYER/GOOD CAUSE

The hearing officer has found that the claimant trivialized his injury until January 15th, when the hernia was diagnosed. This was still within the initial 30-day period for giving notice. The carrier asserts that good cause (*i.e.*, trivialization) must continue to the date of notice. However, we do not necessarily agree that this means that notice must be given instantaneously when the seriousness of an injury is appreciated and a reasonable amount of reaction time can be allowed by a hearing officer. Texas Workers' Compensation Commission Appeal No. 93649, decided September 8, 1993. She could believe that a delay until February 2nd or 5th was reasonable. However, we will uphold the hearing officer's judgment if it can be sustained on any reasonable basis supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.- El Paso 1989, writ denied); Texas Workers' Compensation Commission Appeal No. 950791, decided July 3, 1995.

The conclusion of law that the carrier is not discharged from liability for the claim is supported in this case by evidence of timely notice. Sections 409.001(a)(1) and (b) require that the injured employee give notice of an accidental injury to a person in a supervisory or management capacity within 30 days. However, the notice given, while it need not be fully detailed, should at a minimum, apprize the employer of the fact of an injury and the general area of the body affected. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.- El Paso 1989, writ denied). Notice and the exceptions thereto are to be broadly construed. *See* DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980); Texas Workers' Compensation Commission Appeal No. 980840, decided June 8, 1998.

In this case, Ms. S specifically asked the claimant if he had done something different

that would account for his swollen navel area. He was making a delivery in the course and scope of his employment at the time that he called in to his office. He reported he had shoveled snow. A reasonable inference is that Ms. S was asking what the claimant had done differently on the job that might have caused the condition he reported and she was given an answer concerning an activity he could not have been performing at home for personal reasons. Furthermore, the hospital emergency records indicate that the injury was workers' compensation and that the employer was the contact and the subscriber. Finally, Ms. S stated that it was when the human resources director called her at some time "after" the claimant's surgery that she understood that the claimant had filed a claim for workers' compensation. There is, thus, support for timely notice that precludes discharge of the carrier from liability.

OCCURRENCE OF AN INJURY

A claimant's testimony alone may establish that an injury has occurred and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.- Houston [1st Dist.] 1987, no writ). The facts set out in a medical record are not proof that a work-related injury in fact occurred. Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.- Texarkana 1977, no writ); the absence of a history of injury, likewise, does not conclusively prove that there was no injury. Both situations (each of which is present here, since the ER records show this as a work-related injury) present facts for the hearing officer to weigh. In this case, the claimant's testimony alone about the sequence of events, obviously believed, established sufficient support for the occurrence of a hernia arising from the claimant's employment, without considering Dr. A's subsequent letter.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). In considering all of the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We affirm the decision and order of the hearing officer on all points appealed.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge