

APPEAL NO. 992056

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 18, 1999. She (the hearing officer) determined that the respondent's (claimant) \_\_\_\_\_, injury was a producing cause of her current ruptured posterior tibia tendon in the left ankle and that a subsequent intervening injury was not the sole cause of the ruptured tendon. The appellant (carrier) appeals these determinations, contending that they are not supported by the evidence and that the hearing officer improperly considered medical evidence not timely exchanged with the carrier. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a left ankle injury in a nonwork-related motor vehicle accident in May 1995. She experienced, she said, ankle swelling and redness. X-rays and an MRI revealed soft tissue swelling, but no fracture. She apparently first saw Dr. J for this injury. His diagnosis was posterotibial tendonitis. Dr. J referred the claimant to Dr. C, who in a report of September 5, 1995, gave his impression of the injury as "[p]osterior tib tendon tear, type I." On \_\_\_\_\_, the claimant suffered trauma to her left ankle at work. The carrier accepted the injury, which it described at the CCH as tendonitis. The claimant returned to Dr. C for treatment consisting of medications, injections, and a fitted shoe.

The last record of Dr. C offered into evidence by the claimant before the \_\_\_\_\_, injury was dated November 21, 1995. The next record of Dr. C is dated April 2, 1996, and addresses an unrelated matter. On July 12, 1996, Dr. C wrote that the claimant was doing well with no complaints of ankle pain. He described her recovery as "complete . . . with a 0% permanent partial impairment." The hearing officer noted the gap in Dr. C's records and stated that the missing records were "important to the case" because the compensable injury occurred during this period. She directed the parties to search the files of the Texas Workers' Compensation Commission (Commission) for records pertaining to this time period and they were found. The hearing officer made the records a hearing officer's exhibit and considered them, over the objection of the carrier that it had never seen them before,<sup>1</sup> in reaching her decision. In issue are records for visits on December 8 and 14, 1995; January 5, 1996; and February 6 and 27, 1996. The December 8th record from Dr. M, a colleague of Dr. C, contains an impression of "[c]ontusion of prior inflamed posterior tibial tendon." The remaining records up to February 27th reflect the status of her recovery.

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<sup>1</sup>The carrier also requested a continuance to review these records. The request was denied.

The claimant entered a police academy for training in September 1998. Because, she said, her ankle was still bothering her, she asked Dr. J to advise her about what physical activities she could engage in. In \_\_\_\_\_, while walking in training to meet a running requirement, the claimant said, she heard a pop in her ankle and then noticed swelling. In a report of October 6, 1998, Dr. C wrote that the claimant experienced increased pain as a result of running as part of her police academy training. The claimant testified that this was wrong in that she did not run, but walked. In a report of November 3, 1998, Dr. C stated the claimant "injured herself while she was trying out for the police academy." An MRI report on November 20, 1998, showed a posterior tibial tendon tear of the left ankle "consistent with an associated tenosynovitis." On December 21, 1998, the claimant underwent a medial calcaneal osteotomy. On March 2, 1999, Dr. C wrote that he had discussed with the claimant the "length" of the claimant's workers' compensation injury and that the current condition of the tendon was "indeed related to the work comp injury." He further explained that the tendinitis never resolved and, subsequently, the tendon "failed." In a letter to the claimant on April 27, 1999, which was requested by her, Dr. C wrote that "the subsequent rupture of your posterior tib tendon is a natural consequent of posterior tib tendinitis." He explained that, in some cases, the tendinitis heals naturally and, in other cases, the tendon eventually ruptures.

Dr. X reviewed the claimant's medical records at the request of the carrier and concluded that the tendonitis "would have certainly resolved by six months from the date of onset." He said the MRI in 1995 "was indicative of tendonitis and not a frank tear." Therefore, he believed the claimant suffered a new injury in \_\_\_\_\_.

We address the evidentiary objection first. The parties were required to exchange documentary evidence within the time table prescribed in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13). Evidence not timely exchanged may be admitted upon a finding of good cause. The hearing officer did not expressly find good cause for the claimant's failure to timely exchange the six reports of Dr. C, but, instead, relying on the obligations imposed by Section 410.163(b) to ensure the full development of the facts required to resolve the disputed issues, attached these documents to the record as hearing officer exhibits. Section 410.163(b) does not grant the hearing officer the right to become, in effect, a surrogate party at the CCH. We have noted in the past that a hearing officer is not to become an advocate for either party. Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992. Rather, it is the parties themselves who are primarily responsible for presenting their case and protecting their own interests. In this case, there was an obvious gap in Dr. C's medical records as offered by the claimant into evidence. The gap centered directly around the compensable injury of \_\_\_\_\_. It was inexcusable for the claimant not to have noticed this gap and taken steps to fill it. Indeed, the records covering this period were found in the Commission's files. Under these circumstances, we believe it was improper for the hearing officer to shore up the claimant's case under the guise of ensuring a full development of the record, or at least not to have granted the carrier's request for a continuance to examine these records. See Texas Workers' Compensation Commission Appeal No. 980639, decided May 14, 1998. Evidentiary rulings are reviewed on an abuse of discretion standard, and such rulings constitute reversible error only if they probably resulted in an improper decision.

Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In this case, five of the six reports complained of discuss only the status of the claimant's condition. The other provides an impression ("contusion of prior inflamed posterior tibial tendon"). Given the other evidence, particularly the pre- and post-1995 MRIs and Dr. C's later letters directly addressing causation of the tendon tear or rupture, we do not believe that any error in considering these documents was prejudicial.

Section 401.011(26) 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." Whether subsequent damage or harm naturally results from the initial injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93672, decided September 16, 1993. In this case, the carrier insisted that it only accepted a tendinitis injury on \_\_\_\_\_, and that that is all the damage the claimant sustained on that date. The report of Dr. X supports this position. The carrier argued that Dr. C even admitted as much when he referred to the later tendon tear or rupture as related to activity at the police academy and only later changed his mind on causation when prodded to do so by the claimant. The claimant, making a distinction between tendinitis or tear and a later rupture of the tendon, relies on Dr. C's latest statement of causation. The parties both seem also to rely on the two MRIs to support their positions. The hearing officer is the sole judge of the weight and credibility of the evidence, including the weight to be given Dr. C's letter on causation written to and at the request of the claimant. Section 410.165(a). Clearly, there was evidence of a ruptured tendon that did not exist before \_\_\_\_\_. There were competing medical views on what caused the rupture, that is, whether it naturally progressed from the tendinitis/tear or was caused solely by the physical activities of the claimant in \_\_\_\_\_. 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). The hearing officer found the claimant credible in her account of her activities in \_\_\_\_\_ and Dr. C in his opinion of causation. Under our standard of review, we find this evidence sufficient to support the ultimate findings of fact and conclusions of law on the disputed issues.

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

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Alan C. Ernst  
Appeals Judge

CONCUR IN THE RESULT:

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Gary L. Kilgore  
Appeals Judge

CONCURRING OPINION:

As I see it, the exchange requirements are there so that both parties will swap information in their possession or control well before a hearing; the decision should be made on the facts, not a distorted picture of the facts. The requirement to exchange information is not limited, as is so often argued, to only those documents one intends to present as exhibits; only expert reports are so qualified. Section 410.160. Consequently, I cannot agree with the language that takes the claimant to task for not presenting the medical records found in the Texas Workers' Compensation Commission's files, since it appears to me that the carrier had equal responsibility. For her part, the hearing officer undertook to carry out the statutory directive to complete the record, a directive which places our hearing officers in a more "pro active" position than a trial court judge. If the hearings process were intended to entirely parallel the court system, the legislature would not have pulled binding dispute resolution into an agency hearings system. I otherwise concur in the decision.

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Susan M. Kelley  
Appeals Judge