APPEAL NO. 000320

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 January 14, 2000. The issues at the CCH were whether the respondent's (claimant) headaches and cervical and lumbar conditions are causally related to her injury of _____, and whether the appellant (carrier) waived its right to contest the alleged compensability of those conditions. The hearing officer determined that claimant's compensable injury of _____, extends to and includes her cervical and lumbar spine but does not extend to or include her headaches, and that carrier timely disputed the alleged compensability of claimant's headaches and cervical and lumbar injuries and therefore has not waived its right to dispute compensability of such injuries. The hearing officer's determinations that the compensable injury does not include the headaches and that carrier timely contested compensability have not been appealed and will not be addressed further.

Carrier appeals, contending that the hearing officer's decision is based on exhibits which should have been excluded as not having been timely exchanged and the testimony of a witness whose identity had not been timely exchanged. Carrier also appeals the determinations that the compensable injury includes the cervical and lumbar spine as not supported by the evidence. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The appeals file does not contain a response from claimant.

DECISION

Affirmed.

Carrier first appeals the rulings of the hearing officer admitting Claimant's Exhibits Nos. 1 and 2, and the testimony of Ms. H as not being timely exchanged, or timely disclosed in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). Rule 142.13(c) deals with the parties' exchange of documentary evidence and Rule 142.13(c)(1) provides that the "parties shall exchange" certain information "no later than 15 days after the benefit review conference [BRC]." The information includes all medical records and reports, witness' statements and the identity and location of any witness with knowledge of relevant facts. Rule 142.13(c)(2) provides that additional documentary evidence shall be exchanged "as it becomes available," and Rule 142.13(c)(3) provides that additional documentary evidence not previously exchanged will be brought to the hearing and the "hearing officer shall make a determination whether good cause exists for a party not having previously exchanged such information or document to introduce such evidence at the hearing." We review the hearing officer's determinations on the admission and exclusion of evidence on an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994.

The BRC in this case was held on December 14, 1999; therefore, the normal exchange would be required by Wednesday, December 29, 1999. Claimant's Exhibit No. 1, which contains claimant's various medical records and identifies Ms. H as a witness, was exchanged on Tuesday, January 4, 2000. Claimant said that she was ill with the flu the week of December 29th and the exchange was further delayed because of the New Year's holidays and that the records had been discussed at the BRC. The hearing officer, on the record at the CCH, found that claimant had good cause for the untimely exchange, presumably because of claimant's illness and the holidays.

Claimant's Exhibit No. 2 consisted of billing records of the (clinic), a "pertinent data sheet" and a note stating "Our HCFA's are mailed to insurance carrier with the report attached." Claimant, through the ombudsman, represented that the records had initially been timely requested and that the ombudsman had made several telephone calls inquiring about the records prior to the CCH, and had only received the records a few minutes before the CCH on January 14, 2000, when they were exchanged with the carrier. The hearing officer ruled that Claimant's Exhibit No. 2 was just a composite of information the carrier already had, and that claimant did not have access to the documents until 10 minutes before the CCH when it was exchanged. The hearing officer found good cause for the untimely exchange, presumably based on Rule 142.13(c)(2).

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. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). The hearing officer obviously accepted claimant's representations regarding her illness and the attempts to obtain the billing records. We conclude that there was no abuse of discretion in the admission of the records and identifying Ms. H as a witness.

On the merits, claimant was employed as a baker at (employer) on _____ (all dates are 1999), when she slipped and fell on the ice in the walk-in freezer. Claimant testified that she fell on her buttocks on a concrete floor, twisting her left foot as she fell. It is undisputed that claimant suffered, and carrier has accepted liability for, a fractured left ankle. Claimant was taken to the hospital and her left ankle and leg were placed in a cast. Ms. H testified that when claimant came home from the hospital on April 2nd, she noticed a hand-sized bruise on claimant's buttocks. Claimant testified that she began to notice low back pain in April when she began to move around with the cast and that she thought perhaps the cast was causing the low back pain. Claimant testified that later in April when she began to discontinue her pain medication, she began to notice neck pain. Claimant said that she told Dr. S, her treating doctor, about the bruise on her buttock and the low

back and neck pain, but he "wasn't concerned about it" and continued to focus on her fractured ankle. Ms. H confirmed that claimant started complaining of neck pain when she stopped taking the pain medication and that it was claimant's hope and expectation that the neck and back symptoms would resolve after her leg cast was removed. At some point, claimant was prescribed a "walker." A progress note dated June 10th notes that claimant "is walking with a walker," that claimant "had a re-injury where she got confused and sat down where there wasn't a chair" and that the "pain started up about a week after that." Carrier contends that it is this "re-injury" that caused claimant's cervical and lumbar condition. (Carrier's burden to prove sole cause of an intervening event was not discussed.) Claimant testified that she never fell and only on one occasion lost her balance but caught herself on the walker. Claimant testified that she "didn't fall or hit anything."

In a progress note dated July 1st, Dr. S notes that the cast was being removed that day, that claimant was complaining of neck and back pain as a secondary complaint and continued to focus on the ankle. Notes dated July 6th and August 4th deal only with the ankle. A September 10th note asks for x-rays of the cervical and lumbar spine. X-rays of October 22nd were essentially normal. In a report dated November 8th, Dr. S comments:

> [Claimant] tells me that she did complain when she first went to [the hospital] about her butt and back. I have asked for medical records so that we can have further documentation of this.
>
> There is no question in my mind that [claimant] started complaining of headaches and backaches on 07/01/99.
>
> It is not unusual for someone, when they have an obvious injury such as a fracture, to focus on that. It is only when the fracture becomes less symptomatic that they notice other aches and pains.
>
> She does relate she has been having headaches, neck and back pain since her fall.
>
> I do believe that her complaints are consistent with an injury that she sustained on the job. In order to fall hard enough to break your ankle as seriously as she did, this was obviously a fairly significant fall.

The hearing officer, in her discussion of the evidence, comments on the extent-of-injury issue, stating:

> Claimant bore the burden of proving by a preponderance of the credible evidence that her on-the-job injury of _____ extended to and included her . . . cervical and lumbar injuries, in addition to the left ankle injury which Carrier previously has accepted as being compensable. In view of the mechanism and apparent severity of Claimant's fall, it is not only plausible that her lumbar and cervical injuries are natural results of that fall, but it would be surprising if Claimant had not injured at least her low back, and probably her neck as well, as the result of falling in the manner she described with sufficient force as to break her ankle.

Carrier disputes findings which incorporate the hearing officer's comments, contending that "no evidence" supports claimant's testimony, and none of the medical records contain any reference to back pain, referring to hospital and early medical records prior to July 1st. Carrier also contends that claimant "suffered an intervening fall," that the fall "is clearly documented in the medical records" and this is when claimant's back pain started. We disagree that there is "no evidence" supporting claimant's testimony, noting Ms. H's testimony and that note that the "intervening fall" is disputed by claimant. In any event, these points were made to the hearing officer and Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer obviously believed claimant's version of events rather than the inferences carrier raises. We conclude the hearing officer's decision to be supported by sufficient evidence.

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). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge