APPEAL NO. 000476

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 February 2, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that the claimant timely reported the claimed injury; and that the claimant did not have disability. The claimant appeals the adverse determinations, asserting error in the admission of evidence and that the determinations of no compensable injury and no disability are against the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as a maintenance mechanic. He testified that on _____, he twisted his lower back while pulling on a wrench. He continued working that day and when he woke up the next day he felt extreme pain in his low back. He went to an emergency room (ER) on July 1, 1999, with a complaint of lower back and leg pain since the previous Sunday. Records of this visit reflect a prior history of lumbar strain. An MRI showed lumbar degeneration and herniation. The claimant also stated that on June 9, 1999, he had gone to another ER with complaints of hip and gluteal pain. Records of this visit reflect a diagnosis of lumbar strain. According to the claimant, he had been helping a relative clear land and this caused his symptoms for which he sought treatment on June 9, 1999. He said he received an injection which resolved his symptoms. He also said that he made a mistake in listing the date of injury on an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) as June 8, 1999, and could only speculate that this date came from his ER treatment records. He signed this TWCC-41 on September 13, 1999, and amended it on December 14, 1999, to reflect a date of injury of _____. It was his position that his current lumbar condition was caused by the incident at work on _____, and had nothing to do with his prior land-clearing activities or a two to three-year history of "weak lumbars."

Early in the CCH, the claimant's attorney announced that he objected to all evidence of the carrier not timely exchanged. Later, when the carrier moved to introduce documentary evidence, the claimant expressly objected only to Carrier's Exhibits Nos. 5, 6, 7, and 12. The hearing officer found good cause and admitted these exhibits. In his appeal, the claimant cites error in the admission of these documents as well as Carrier's Exhibits Nos. 10 and 11.

Section 410.161 provides that a party may not introduce evidence not timely disclosed unless good cause is shown for the failure to timely disclose. Tex. W.C. Comm'n,

28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)) states that parties are to exchange documentary evidence, including the identity and location of witnesses, not later than 15 days after the benefit review conference (BRC) (held on December 15, 1999) and "[t]hereafter, parties shall exchange additional documentary evidence as it becomes available." Rule 142.13(c)(2). We review evidentiary rulings of a hearing officer on an abuse of discretion standard, *see* Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992, and erroneous evidentiary rulings are subject to reversal and remand on appeal only if the error was prejudicial; that is, only if the error was reasonably calculated to and probably did cause a wrong decision. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Carrier's Exhibit No. 5 is an employer's accident report. According to the representations of the carrier's counsel, this document did not exist at the time of the BRC and was produced only because at the BRC the claimant's counsel asked for a report. The report was then prepared and received by the carrier's counsel on January 18, 1999, who said he faxed a copy to the claimant's counsel the same day. The report itself is a one-page form with date of injury of _____, and the comment that the claimant would provide, (apparently he never did), a written statement. We find no abuse of discretion in the hearing officer's determination that this report was exchanged as it became available. In any case, given the paucity of information in the report and the claimant's testimony, we perceive no prejudicial error even if the report was erroneously admitted.

Carrier's Exhibit No. 6 is simply a termination notice with an attached listing of days absent, based on job abandonment on a day not specified. The notice is dated July 29, 1999. The hearing officer found no disability because there was no compensable injury, and also that the claimant was unable to work from June 27, 1999, through the date of the CCH. This is consistent with the claimant's testimony and we find no conceivable prejudicial error in the admission of this document.

Carrier's Exhibit No. 7 is simply a certificate of the claimant's group health coverage, which according to the document ended on _____, presumably the date of termination. We find no prejudicial error in its admission.

Carrier's Exhibit No. 10 is a Supplemental Report of Injury (TWCC-6) prepared by the employer on December 15, 1999. It contains a date of injury of _____, and adds that the date of resignation was July 29, 1999. Because the initial Employer's First Report of Injury or Illness (TWCC-1) was not in evidence, it is not clear what this report is supplementing. Given the paucity of information in this document, we find its admission not prejudicial.

Carrier's Exhibit No. 11 is the carrier's response to the BRC report in which it requests that because the claimant claimed a different date of injury or a new injury on _____, instead of or in addition to the original date of injury of _____, the matter should be returned to the benefit review officer. At the CCH, the claimant specifically

denied the need for a continuance to resolve the matter and time was spent explaining the use of two different dates of injury in this claim. This was clearly a matter calling for resolution and the admission of Carrier's Exhibit No. 11, which raised the issue of the two dates and in no way could be considered prejudicial to the claimant.

Carrier's Exhibit No. 12 consists of a series of Dispute Resolution Information System notes pertaining to this claim. The carrier represented that it requested these documents from the Texas Workers' Compensation Commission (Commission) on January 5, 2000, and received them on January 31, 2000. The carrier then faxed them on February 1, 2000, to the claimant's counsel. The notes deal primarily with the claimant's interaction with the Commission. Having reviewed them, we perceive no prejudicial error in their admission into evidence.

The claimant also objected to the testimony of Ms. D, the employer's workers' compensation representative; of Mr. R, the immediate supervisor; and of Mr. H, a supervisor, on the basis that their names were not timely exchanged. The carrier conceded as much. The hearing officer found that the carrier in regard to these witnesses acted reasonably in the late exchange.

The substance of Ms. D's testimony was that she first learned on July 22, 1999, that the claimant was claiming a work-related injury and that he wrote on the copy of the report of the June 9, 1999, emergency room visit which he gave her that the "date of accident" was _____. The finding of a timely report of injury has not been appealed. The claimant as late as the September 13, 1999, TWCC-41 was still listing a date of injury of _____. We find no prejudicial error in the admission of this testimony.

The substance of Mr. R's testimony that the claimant had been complaining about his low back and hip since he worked for the employer and never said anything about an injury at work until later was contained in a written memo of July 15, 1999, and admitted without objection. Under these circumstances we find no error in his testimony. Similarly, the testimony of Mr. H that the clamant denied any injury at work is essentially repeated in a written statement of Mr. H on July 15, 1999, and admitted without objection. We find no prejudicial error in this testimony.

The claimant had the burden of proving he sustained a compensable injury as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so was a question of fact for the hearing officer to decide and could be proved by the claimant's testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In his discussion of the evidence, the hearing officer recognized that the claimant had a serious back condition and commented that "[a] fair interpretation of the evidence indicates that the Claimant does not know where or when he injured his lower back." In reaching the conclusion that the claimant did not establish a compensable injury, the hearing officer was obviously troubled by the fact that the claimant spent some number of days clearing land

and gave two different dates for the day of injury, the earliest being fairly close in time to the claimant's land-clearing activities. On appeal, the claimant stresses that he explained the discrepancy in the dates; was forthcoming about his land-clearing activities; that the pain associated with the first ER visit had resolved before the incident at work on _____; and that given the serious condition of his lumbar spine, he could not have engaged in land-clearing activities in this condition. The claimant also asserts that Finding of Fact No. 3 that there was "no objective evidence indicating that the Claimant injured his lower back on _____, while working for the Employer" is a mischaracterization of the evidence. We do not believe that this finding intended to state that there was no objective evidence of an injury. Clearly there was and the hearing officer so acknowledged. Rather, we construe this finding to be that the only connection between the claimant's activities at work and the claimed injury was the claimant's assertion of this and that the hearing officer simply did not find this evidence persuasive. The evidence in this case was clearly subject to varying inferences. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the 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 find the evidence sufficient to support the determination that the claimant did not sustain a compensable low back injury on _____.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

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

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Elaine M. Chaney
Appeals Judge