APPEAL NO. 000510

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 10, 2000. The hearing officer determined that the appellant/cross-respondent (claimant) did not sustain a compensable injury in the form of an occupational disease on _____; that the claimant did not sustain a compensable injury as a result of a specific incident on _____; that the respondent/cross-appellant (self-insured) is relieved of liability because of the claimant=s failure to timely notify his employer of his injury; and that the claimant did not have disability. The claimant appeals, contending that these determinations are against the great weight and preponderance of the evidence. The self-insured replies that the decision is correct, supported by sufficient evidence, and should be affirmed, but appeals an evidentiary ruling of the hearing officer.

DECISION

Affirmed.

We address the evidentiary point first. The hearing officer admitted into evidence as Claimant=s Exhibit No. 5 an audiotape recording of a hearing between the claimant and the employer before the Texas Workforce Commission (TWC) in connection with the claimant's application for unemployment compensation. The self-insured objected to this evidence on the grounds that it was not timely exchanged. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 142.13(c)(1) (Rule 142.13(c)(1)) provides that documentary evidence is to be exchanged within 15 days of the benefit review conference (held on December 14, 1999). "Thereafter, parties shall exchange additional documentary evidence as it becomes available." Rule 142.13(c)(2). The TWC hearing was conducted on June 15, 1999. Upon self-insured=s objection to the admission into evidence of the audiotape, the claimant said he obtained the tape sometime after January 10, 2000, and mailed it return-receipt-requested shortly thereafter. Unfortunately, the claimant did not have the signed receipt. The self-insured=s representative asserted that the self-insured never received the audiotape. The hearing officer simply announced on the record that she believed the claimant and for this reason admitted the audiotape into evidence. She did not ask the claimant to explain what, if anything, he did to obtain the audiotape in the six months between the TWC hearing and January 10, 2000. Under these circumstances, we conclude that the hearing officer abused her discretion in admitting this audiotape into evidence. We will reverse a decision of a hearing officer on the basis of evidentiary error only if the error was reasonably calculated to and probably did produce an erroneous decision. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In this case, the audiotape essentially repeated the claimant's testimony at the CCH and matters contained in the decision of the hearing officer in the TWC proceeding, which was also in evidence. Thus, at most, the audiotape evidence was cumulative and we perceive no prejudice in its admission. In any case, because the carrier prevailed on all disputed issues, no further relief is available.

The claimant worked as a shelf stocker in a grocery store. His job also involved unloading trucks. He testified that on _____, while pulling on merchandise in a truck he felt a strain and pain in his neck and right shoulder as well as weakness and a knot on his left wrist. The knot was diagnosed as a ganglion cyst. No one witnessed the incident. The claimant said he immediately told his manager, Mr. J, and left work at 5:00 a.m., his usual quitting time. He then said he slept for a while and went to an emergency clinic of his choice about 2:00 that afternoon.

Clinic records reflect that he did not arrive until about 10:00 p.m. with complaints of right shoulder pain, formerly intermittent, now constant. The diagnosis was musculoskeletal shoulder/trapezius strain. The claimant said he told the clinic personnel about the ganglion cyst and cannot explain why it was not mentioned in the clinic records. The claimant did not again seek medical care until September 28, 1999, when he saw Dr. M. The complaints were radiating neck pain and a ganglion cyst. The claimant testified that this cyst developed on one day, _____. The assessment of Dr. M was neck pain with radiculopathy and right thumb pain. On December 28, 1999, Dr. M wrote that he was asked to address whether the claimant's "shoulder injury and left wrist injury were caused by employing [sic] a loaded pallet" and whether the wrist problem was "related to his shoulder pain." Dr. M answered with only a "yes" to each question without further explaining his reasons for this one word answer.

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, with the possible exception of the ganglion cyst, could be proved by his testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In this case, the injury issue was initially framed in terms of repetitive trauma. The claimant appeared to assert a single traumatic event as the cause of his injury. The hearing officer, without objection of the parties, considered this claim under both theories of liability and found that the claimant did not meet his burden of proof under either theory. In doing so, she gave more weight to the emergency clinic records rather than the reports of Dr. M some five months later. The claimant appeals this determination, asserting that the hearing officer did not give appropriate weight to Dr. M's opinion, quoted above, of causation. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. In determining what facts had been established and what weight to give Dr. M's opinions, she could consider the elapsed time between the injury and Dr. M's first examination of the claimant and the lack of an explanation of his one-word opinion on causation. 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 injury as claimed.

Section 409.001 generally requires an employee to give the employer notice of the injury within 30 days. Failure to do so without good cause relieves the carrier and employer of liability for the claim. Section 409.002. In this case, the claimant testified that he told Mr. J that he hurt himself while unloading the truck at work on _____. This clearly would meet the requirements for notice if the hearing officer believed the claimant was credible in this testimony.[1] Whether and, if so, when notice is given are questions of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994. In this case, the hearing officer generally did not consider the claimant credible and rejected his testimony that he gave notice to Mr. J on the day of the claimed injury. In the first paragraph of her discussion of the evidence, the hearing officer states that the claimant testified he reported the claimed injury to Mr. J. Unfortunately, near the end of her discussion she stated that she did not find the claimant's testimony persuasive that he reported the injury to a "Mr. B." The claimant challenges this statement as having no basis in the evidence. We agree, there was no "Mr. B" in any of the evidence. However, we consider the reference to "Mr. B" to be simply a mistake in the name used, and that in fact the hearing officer meant Mr. J. Ultimately, the hearing officer was not persuaded by the claimant's testimony that he gave his employer timely notice of his injury. Under our standard of review, we affirm this determination.

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:

Elaine M. Chaney
Appeals Judge

Dorian E. Ramirez

[1]We note that this same account appears in the TWC proceedings and in a prior recorded statement of the claimant.

Appeals Judge