

APPEAL NO. 000657

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 10, 2000. The hearing officer found that the respondent (claimant) sustained an injury to his neck and upper back while involved in a motor vehicle accident (MVA) which occurred in the course and scope of his employment on _____, and that he was unable to "obtain or [sic] retain" employment at wages equivalent to his preinjury wage beginning on September 16, 1999, and continuing through October 12, 1999, and beginning on January 1, 2000, and continuing through the date of the hearing. The appellant (carrier) has requested our review, asserting the insufficiency of the evidence to support these findings and further asserting error in the hearing officer=s exclusion of two carrier exhibits from evidence for failure of the carrier to timely exchange them. Claimant=s response contends that the evidence is sufficient to support the challenged factual findings and the dispositive legal conclusions and that the disputed evidentiary rulings were correct.

DECISION

Affirmed.

Claimant testified that on _____, while working for the employer as a cable puller on a job site at a state school, the supervisor, Mr. BE, told him and coworker Mr. P to go to the school=s canteen and purchase breakfast for the crew; that they were not on break at this time; that he and Mr. P then got into Mr. P=s pick-up truck with money from the crew; that while talking to each other in the truck cab, Mr. P backed into a parked vehicle on claimant=s side which he did not see; and that claimant=s head struck the rear of the passenger seat and rear window. Claimant said that after reporting the MVA they proceeded to purchase the crew=s breakfast and that in 15 to 20 minutes he felt pain in his neck and upper back; that he reported the accident to Mr. BE; and that he then went to an emergency room where he was treated. He indicated that he subsequently commenced treatment with Dr. M who took him off work. He further stated that on October 29, 1999, he went to work for a supermarket picking up trash but had to stop this work sometime after Christmas 1999 and before January 2000 because of his neck pain and the difficulty he was having lifting with his right arm which had begun to hurt later in September 1999. Claimant said he began treating with Dr. L, his current treating doctor, on February 24, 2000, and that Dr. L has had him off work since that date.

Mr. P=s testimony essentially corroborated claimant=s testimony concerning being asked by Mr. BE to go get breakfast for their crew. However, he further stated that he was not injured in the MVA, that he did not see claimant=s head strike the back of the seat and window, that claimant has made a claim against his, Mr. P=s, insurance carrier, and that in his opinion, claimant was not injured in the MVA.

Dr. M's records reflect that on September 16, 1999, he diagnosed acute cervical sprain, cervicgia, and myotonia and took claimant off work until further notice, and that on October 12, 1999, he returned claimant to his regular field of work. Dr. L's report of February 24, 2000, states that, based on his evaluation, claimant's neck pain, headaches, right shoulder pain, and numbness and tingling in the right hand significantly impair claimant's ability to work; that all of this is directly related to the MVA; and that claimant should be off work for two weeks for intense chiropractic treatment.

The carrier offered into evidence the transcript of an interview of Mr. BE recorded on February 15, 2000, by Mr. S of Veracity Research Company (carrier's agent), representing the carrier, stating his version of what transpired on the morning of the MVA, and a letter dated February 15, 2000, from two officers of the employer, Mr. F and Mr. JE, about their knowledge of what transpired and about conversations with claimant concerning, among other things, his filing a claim against the automobile insurance carrier vis-a-vis the workers=compensation carrier. Claimant objected to the admission of both exhibits on the ground that the carrier had not timely exchanged the documents with him. Claimant pointed out that the benefit review conference (BRC) was held on January 26, 2000; that witnesses' statements are required to be exchanged within 15 days of the BRC by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 142.13(c) (Rule 142.13(c)); that the documents in question were not generated until February 15, 2000; and that, according to fax data on the exhibits, they were apparently not transmitted to the carrier until February 29, 2000. It was not disputed that the carrier exchanged the documents with claimant on March 1, 2000. The hearing officer determined that the documents were not timely exchanged pursuant to Rule 142.13(c) and that good cause did not exist to admit them into evidence despite their late exchange. The hearing officer noted that not only were the documents not generated until February 15, 2000, but that, although obtained on February 15th, they were not transmitted by the carrier's agent until February 29th.

Evidentiary rulings by the hearing officer are generally viewed as discretionary and are reviewed for abuse of discretion. Texas Workers=Compensation Commission Appeal No. 941414, decided December 6, 1994. In determining whether the ruling was an abuse of discretion we look to see if the hearing officer acted without reference to any guiding rules or principles. Appeal No. 941414, *supra*; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). Our review of the record does not persuade us that the hearing officer abused her discretion in finding that the questioned documents were not timely exchanged and that good cause did not exist to otherwise admit them into evidence. The hearing officer could and did consider not only the time between the January 26, 2000, BRC and the February 15, 2000, date of the documents, but also the absence of explanation for the delay between February 15th and their transmission on February 29th. However, even were we to find error in the questioned rulings, to obtain a reversal based on such error the carrier must first show that not only was the exclusion of the documents error but that the error was reasonably calculated to cause and probably did cause the rendition of an improper decision. Hernandez v. Hernandez, 611

S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). No such showing was made by the carrier.

Claimant's principle theory on injury in the course and scope of employment was the "special mission" exception to the transportation rule (Section 401.011(12)(A)(iii)). In the alternative, claimant argued the "access doctrine." While the hearing officer does not indicate what theory she relied on, her discussion of the evidence would indicate she had the special mission exception in mind. As claimant notes in his response to the carrier's appeal, the carrier does not argue any particular basis for error on the course and scope issue but instead devotes most of its discussion to the disability evidence and the challenged evidentiary rulings.

Claimant had the burden to prove that he sustained the claimed injury and that he had disability as that term is defined in Section 401.011(16). Texas Workers= Compensation Commission Appeal No. 94248, decided April 12, 1994. The Appeals Panel has stated that in workers=compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers= Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge