APPEAL NO. 001524

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 June 2, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, and had disability from November 28, 1999, through February 1, 2000.

The appellant (carrier) appealed, arguing that the evidence was "clear" that the claimant had been asked by her employer to go only to a grocery store to pick up certain enumerated items, not "sweets," and not at all to the donut shop where a motor vehicle accident (MVA) occurred. The carrier argues that claimant was injured while undertaking a personal mission and was outside the course and scope of employment. The carrier argues that the claimant failed to prove a dual purpose to her travel toward the donut shop and that she should have been able to obtain "sweets" at the grocery store that she was leaving. Departing from the record, the carrier argues what did and did not occur at the benefit review conference (BRC) in support of its appeal. The carrier argues that the hearing officer applied the wrong legal standard, and that there could not be a dual purpose to the trip to the donut shop because the claimant could have obtained the items at another location. The appeals file does not contain a response from the claimant.

DECISION

We affirm the hearing officer's decision.

The issue involved injuries that the claimant sustained in an MVA that left her with some impaired memory due to a serious head injury. The claimant was employed as an office manager for (employer), a used car dealership. Her supervisor was Mr. R. Both claimant and Mr. R testified that claimant, on nearly a daily basis, was asked to run errands, which not infrequently involved trips to the store to pick up food items and other supplies for the office, as well as personal items for her supervisor. She said that on _____, Mr. R asked her to go to the store in the mid-morning. She said that he had a list for her, and one item he asked her to pick up was some prescription medication at the pharmacy at H.E.B., a grocery store. The claimant and Mr. R both recalled that as she was about to leave, Mr. R asked her to pick up some "sweets." The claimant was seven months pregnant at the time.

The claimant's recollection of what occurred thereafter was spotty. She said that, in fact, her memories of the day had begun to return on a delayed basis, it was about a month before she had more full recollection. She recalled getting items at the grocery store. The MVA occurred across the street from the grocery store, and claimant said from the pictures in the newspaper, it appeared that she had been turning into a donut shop across the highway. She had concluded she was heading there for the "sweets," as she would have had to turn a different direction outside of the grocery store to return directly to work and her husband told her later that her groceries did not contain anything sweet.

The claimant sustained a head injury and she was hospitalized for five days. Mr. R said that he contacted the insurance company on December 1, 1999, and spoke to the adjuster. While he was under the impression that his conversation must have been taped, there were no transcripts of any interview put into evidence.

The adjuster, Ms. C, testified and it appeared that she had no independent recollection of her conversation with Mr. R, as she was refreshing her recollection from diary notes. The notes had not been exchanged and the attorney for the carrier stated that this was because they were covered by the "work product" privilege. The hearing officer, upon objection from the claimant, precluded further testimony from notes not exchanged. Before this, however, Ms. C read that Mr. R had stated that he was unsure whether claimant had been going to the donut shop for him or herself. He also stated that he had sent her out to pick up a prescription, cleaning supplies, soft drinks, and food items.

Mr. R testified that the claimant had been to the donut shop in the past to pick up bakery items. He said that it was up to her whether to go there or get "sweets" from the grocery store. Mr. R paid claimant an additional $15.00 per week for running errands.

X-rays in evidence show that the claimant had a subdural hematoma on December 1, 1999. The claimant said she was in intensive care for five days. The claimant had been interviewed, and taped, by an investigator for the carrier when she was home on December 9, 1999. She testified that at the time this statement was taken, she did not have full recollection of events of the day of the accident and was speculating for some of the statements made. In fact, in her recorded statement, the claimant said that the last thing she remembered was walking into the grocery store. She did not recall getting and paying for the groceries but "I guess I must have." She further guessed that her pregnancy must have kicked in after she got the groceries and she was going across to the donut shop to get "pigs in a blanket." The next day, the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) stating that the claimant was not injured within the course and scope of her employment.

The claimant said that when she ran her daily errands, she took money from petty cash that she thought she would need. At the end of her trip, she would turn in her receipts and the change left over. Although Mr. R's relationship to the employer was not explained, it may be inferred that he was at least a part owner because he said that "he" had continued to pay the claimant's wages while she was off work. The claimant was once again working for the employer at the time of the CCH. Mr. R said that he felt about claimant as he would a daughter.

While Mr. R was asked what he did or did not say at the BRC, he could not recall specifics other than being requested to pull some receipts showing food purchases. Mr. R made clear that he felt claimant was injured while performing an errand for the employer.

The claimant and Mr. R were presented with a stack of daily logs from the employer and asked to go through and identify specific receipts indicating purchases of sweets. The claimant noted, and Mr. R agreed, that the logs presented were not a complete history of the transactions for the two-month period prior to the MVA. Mr. R said that when the carrier's attorney asked him at the BRC to produce receipts showing food purchases by the claimant, he had instructed a replacement office worker to pull a sample of daily logs. It is apparent that on many of those slips, such as are legible, that purchases were made at the grocery store and other food or convenience stores. There are also various notations made showing that money was taken out of "petty cash" in smaller amounts, with no purpose being specifically described.

There is sufficient evidence to support the hearing officer's determination that the claimant was injured while running an errand as directed by her supervisor, within the course and scope of her employment. Although the carrier argues that because "sweets" were obtainable at the grocery store, the trip to the donut shop right across the street was necessarily purely personal, we do not agree. We know of no case law or Appeals Panel decisions confining one sent on a mission to a single source for purchase of requested food. The hearing officer could conclude that the reason for going to the grocery store would be to obtain the prescription specifically located there as well as items not available at the donut shop, and that the donut shop was considered a better source for "sweets" than the grocery store. (This presupposes that the claimant was actually headed into the donut shop at the time of the MVA.) The hearing officer was not required to give great, or any, weight to a statement taken from the claimant during a time of impaired recollection and mental status, and there was otherwise no evidence that claimant had deviated from her assigned errand such that she could no longer be considered to be within the course and scope of her employment. There was no evidence that the trip would have been made at all unless the claimant had been asked to run the errand for Mr. R. The hearing officer has correctly applied Section 401.011(12)(B) concerning travel by an employee, even if a personal purpose to claimant's travel had been shown.

While the attorney for the carrier argues in the appeal at length about what was said, or not said, at the BRC, this does not constitute "evidence." We observe that the 1989 Act provides that the BRC is a non-adversarial, informal proceeding. Section 410.021. It is not subject to rules of evidence or procedure. Section 410.027. Testimony is not taken, although a benefit review officer (BRO) may ask questions to supplement or clarify information in a claims file. Section 410.026(c). The only writing that is generated in a BRC is a report of the BRO, Section 410.031, unless an agreement is also reached, Section 410.029. The Appeals Panel has held that the report of a BRC is not evidence of the substance of a BRC. Thus, while questions about what was or was not said at a BRC are frequently solicited at a CCH, they are of marginal relevance in determining the issue before the hearing officer.

The hearing officer, as sole judge of the weight and credibility of the evidence, should not be reversed absent a great weight and preponderance of evidence against the decision. We cannot agree that this is the case here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge