APPEAL NO. 001648

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 14, 2000. The hearing officer determined that: (1) appellant (claimant) did not sustain a compensable occupational disease injury; (2) claimant did not have disability; (3) the date of injury was _____; and (4) claimant timely reported his injury. Claimant appeals the determinations regarding injury and disability on sufficiency grounds. Claimant also complains that the hearing officer abused his discretion in admitting the testimony of a witness when the name of the witness was not timely exchanged. Respondent (carrier) responds that the Appeals Panel should affirm the hearing officer's decision. The determinations regarding date of injury and timely notice were not appealed.

DECISION

We affirm.

Claimant contends that the hearing officer erred in determining that he did not sustain a compensable occupational disease injury. Claimant asserts that the hearing officer should have believed the evidence from claimant. The applicable law in this regard is discussed or set forth in Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ); Section 401.011(26); and Section 401.011(34). To establish that he has an occupational disease, the claimant's evidence must show a causal connection between the employment and the disease. Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. Whether the necessary causation exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94266, decided April 19, 1994. The Appeals Panel's applicable standard of appellate review is set forth in Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that he worked building crates for employer. He said his shoulder began to hurt around the end of _____ or the first of _____. He testified that his pain began at work, that he told Mr. R about it, and Mr. R made an appointment for him with Dr. I. Claimant said he uses staple guns and nail guns to work and that Dr. I told him he had a rotator cuff injury from repetitive trauma. There was evidence that claimant had a new fence and new fish pond, and claimant said he helped build the fence. He said he did not dig the fish pond because it was an above-ground pond. Claimant said that, other than what his doctor told him, he has no opinion regarding how he hurt his shoulder.

The hearing officer determined that: (1) claimant sustained an injury to his shoulder that is of "undetermined origin"; (2) Dr. I's testimony regarding the cause of claimant's shoulder injury was not persuasive because she did not ask about his other activities; and (3) claimant did not meet his burden of proof.

In this case, the hearing officer weighed the evidence before him and made his fact findings based on that evidence. There was medical evidence from Dr. I that claimant had a work-related, repetitive trauma injury. However, the hearing officer could decide to believe all, none, or any part of the evidence. He decided what weight to give to the evidence, including the medical evidence. Texas Employers Insurance Association v. CamposAfter reviewing briefs and the record, we conclude that the hearing officer's, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.* Because claimant did not sustain a compensable injury, he did not have disability.

Claimant contends the hearing officer abused his discretion in admitting the testimony of Mr. L, who works for employer in shipping and receiving. Claimant asserts that carrier did not timely exchange the name of Mr. L as a witness known to have knowledge of the relevant facts. Section 410.161 provides, in part, that a party who fails to disclose information known to the party at the time disclosure is required may not introduce the evidence at any subsequent proceeding before the Commission unless good cause is shown for not having timely disclosed the information. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1)(D) (Rule 142.13(c)(1)(D)) requires that no later than 15 days after the benefit review conference (BRC), the parties shall exchange the identity and location of any witness known to have knowledge of relevant facts. 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).

Even assuming, without deciding, that there was an abuse of discretion in the admission of this testimony, we conclude that there was no reversible error. Mr. L testified that claimant was putting in a pond and a fence, but this evidence was cumulative of other testimony in this regard. Mr. L said claimant did not know why his shoulder was hurting; but claimant testified to this at the hearing. Mr. L said claimant did not talk to him about what caused his shoulder pain. We conclude that the admission of this evidence was not reasonably calculated to cause nor did it probably cause the rendition of an improper decision and order in this case. Appeal No. 92241, *supra*; Texas Workers' Compensation Commission Appeal No. 961457, decided September 4, 1996.

Claimant contends that the carrier should not have been permitted to assert that claimant injured his shoulder at home because it did not state this in its TWCC-21. However, even if carrier had been limited to the defenses stated in its TWCC-21, we note that carrier stated that the injury did not happen in the course and scope of employment. We perceive no error.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/ Judge