

APPEAL NO. 001667

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 21, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, and that he had disability from February 6, 2000, through the date of the CCH. The appellant (carrier) appeals these determinations, contending error in an evidentiary ruling and that the determinations are against the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed.

We address the evidentiary objection first. The claimant's attorney exchanged the name of the claimant's brother as a witness. The claimant's attorney failed to disclose pursuant to a request from the carrier the existence or text of a prior written statement of the brother on the grounds of attorney work product. At the CCH, the first disclosure of this statement was made. The carrier made a motion to the hearing officer not to allow the brother to testify on the grounds that the prior written statement had not been disclosed prior to the CCH. The hearing officer allowed the brother's testimony. In its appeal, the carrier argues that this was an abuse of discretion and that the testimony was prejudicial and should not have been allowed as a sanction for the refusal to disclose the statement or even admit to its existence. We are aware of no rule of the Texas Workers' Compensation Commission that authorizes the application of an exclusionary rule to a witness' testimony as a sanction for not disclosing a prior written statement, even though Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1)(C) and (D) (Rule 142.13(c)(1)(C) and (D)) required that the statement be disclosed and exchanged. See Texas Workers' Compensation Commission Appeal No. 990697, decided May 17, 1999; and Texas Workers' Compensation Commission Appeal No. 982829, decided January 15, 1999. In this case, the brother testified to a limited set of facts consistent with his prior statement and was cross-examined by the carrier. Under these circumstances, even were we to find error in the hearing officer's decision to allow the testimony, we perceive no prejudicial error in this determination. Our action should not be in any way construed to endorse or approve of the conduct of the attorney in refusing to admit to the existence of this statement or to disclose it to the other party as required by rules of discovery.

The decision and order of the hearing officer contains an extensive recitation of the evidence, which need not be repeated in its entirety here. The claimant worked as a tire technician at an automotive service facility. He testified that between 3:30 p.m. and 3:45 p.m. he was rotating tires on a red truck. As he pulled on a tire, he said, he felt low back pain. He left work early that day and said he tried to report the injury the next morning, a Sunday, by calling his supervisor, Mr. H, at work. A salesman answered the phone and refused to give the claimant Mr. H's home phone number. The claimant said he then called

Mr. H the following morning, a Monday, and reported the incident to him. He was later diagnosed with a lumbar strain pending further medical testing. According to the claimant, he has been unable to work since this incident because he cannot do the required lifting. Other medical records reflect duty excuses from February 14, 2000.

The claimant's brother testified that he was at the workshop on Sunday and the salesman told him the claimant had called to say he hurt his back. The brother took the claimant to an emergency room on February 8, 2000. Mr. H testified that the claimant called him on Monday morning only to ask if he had medical coverage. Mr. H said he told him "no" because the claimant had not yet returned the forms needed to initiate coverage. Numerous other witnesses and documentary evidence were introduced dealing with the various times the claimant said the accident occurred (ranging between 3:30 and 4:45 p.m.); reflecting that no red truck was invoiced for work on the date of injury; reflecting when the claimant was at work on the date of the claimed injury; reflecting that the claimant did or did not tell a coworker that he hurt himself; and generally raising questions about the credibility of all the evidence.

The claimant had the burden of proving he sustained a compensable injury and had disability as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). These issues presented questions of fact for the hearing officer to decide and both could be proved by the testimony of the claimant alone if deemed credible by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer found the claimant credible in the face of evidence that seemed to challenge his credibility. The carrier in its appeal again refers to the contradictions in the evidence and urges that the claimant failed to meet his burden of proof. 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 decline to substitute our opinion of the credibility of the evidence for that of the hearing officer.

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

Susan M. Kelley
Appeals Judge