APPEAL NO. 001938

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 May 18 and July 18, 2000, with a recess taken for further discovery by the respondent (claimant) (without objection from the appellant (carrier)). The record closed on July 18, 2000. The issues tried at the CCH and reported from the benefit review conference (BRC) were whether the claimant sustained a compensable injury in the course and scope of employment on _____, and whether the claimant had disability as a result of his compensable injury.

When the decision was written, it contained the following statement:

> Due to the evidence presented, the hearing officer found good cause to add the 3rd issue: What is the date of injury?

The addition of this issue allowed the hearing officer to reconcile the testimony by determining that the claimant actually was injured on _____, and was unable to work due to this injury from _____, through the date of the CCH. The hearing officer found that the claimant was injured when he jumped and hit a rail.

The carrier has appealed and argues, first, that the hearing officer erred by adding the issue of date of injury *sua sponte*. The carrier further points out that there is no evidence to support the hearing officer's findings as to how the injury occurred or that it occurred on _____ as opposed to _____. The claimant responds by contending that the hearing officers of the Texas Workers' Compensation Commission (Commission) are free to find any date of injury supported by the evidence, whether specifically in issue or not. The claimant further asserts that the hearing officer plainly did not believe the carrier's witnesses.

DECISION

Reversed and rendered.

We will summarize the evidence in greater detail than in the hearing officer's decision.

The claimant resided in Texas but, as part of his work, was picked up and taken home as part of a crew working on plugging a well in New Mexico. The well was owned by the customer of (employer). The unequivocal position of the claimant was that he was injured on Friday morning, _____, when he was working on the "floor" of the rig. He said that Mr. L, who was the operator on the rig that day, "came down fast" with the machine he was operating, and this caused tongs being maneuvered by Mr. H, who was also on the floor, to go "everywhere," side to side. The claimant said he had decided he had gotten hurt when he jumped aside and jerked to get away from the tongs. There was no testimony that the claimant hit anything and he expressly stated that he was not hit by the tongs.

The claimant said he reported the injury to Mr. L and asked Mr. L if he could take him, the claimant, home. This was denied and then the claimant said he told the supervisor, Mr. T, about his injury and asked to use the cell phone to call his wife to pick him up. Mr. T did not let the claimant use the cell phone, but offered to take the claimant home and did so after about one hour. The claimant said that Mr. T stopped at (tool company) to pick up some flanges. The claimant said that he worked about 2 and one-half total hours on _____ before going home.

The claimant said that he went to Dr. M, on Monday, February 21, 2000, and was taken off work. The claimant said that he did not believe (as of the first session of the CCH) that he would be able to return to work because his back still hurt and he was not certain how much he could lift. The claimant did not testify at the second session of the CCH two months later.

An intake sheet for Dr. M noted that the claimant was hurt on _____, when pipe was being thrown and the claimant ran to get out of the way and "he thinks he twisted his back" although a later report stated that he jerked away from the tongs. All of Dr. M's records show a _____, date of injury. Dr. M found muscle spasms and restricted range of motion in the lumbar area. He stated that there was the "possibility of a disc syndrome." Other than this, the diagnosis is not described in text.

It is worth observing that when the claimant testified, and was to comment on the carrier's position that he was not at work on _____, the following question and answer took place:

> CLAIMANT'S ATTORNEY: Now, we're not confused about the date on this claim– you know what day you went to work, you know what day you got hurt, and you know what happened on that day.
>
> CLAIMANT: Yes.

The claimant further testified that he did not know why the employer was claiming he had not been at work on _____.

Although neither party commented on it during closing argument, there was a fact brought out by Mr. L (explaining why he remembered the dates involved) and Mr. H in their depositions. Apparently, the claimant was in court on that Monday, _____, for a child support matter. Mr. H said that later that week the claimant expressed the desire to get another job that would pay less and thereby lessen his child support payments.

Mr. L stated that he was the brother-in-law of Mr. H and Mr. AH, who were brothers and members of the crew on Rig #2. Mr. L was a jack-of-all-trades who worked where the employer assigned him to work, and often drove a truck for the employer. He said that on Friday, _____, the claimant was not at work. Mr. L was working on Rig #2 that day. He said that he was mistaken and may have been caught in a language barrier when he had previously told the adjuster that he worked on Rig #1 on that day. (We note that at the

beginning of that statement, Mr. L cautioned the adjuster that he spoke English only a little bit.)

Mr. L said that on _____, he had picked up the claimant as part of the crew, and that on that day he drove the truck, and so did not take the claimant home that night. He was not sure who did. He said that Mr. H picked him up early the next morning at his house, along with Mr. AH. He said that the claimant was off and he heard something to the effect that the claimant was hurt and everyone knew this. (However, in his statement to the adjuster, he denied knowledge of an injury until the next week.) His recollection was that he worked the floor of the rig on that day, although a time ticket and the testimony of Mr. T indicated that he worked as the operator for Rig #2 on _____.

The co-owner of the employer, Mr. A, said he had gone by Rig #2 in mid morning of _____ and was told that the claimant had not "shown up." He said that when crew members were picked up, there was a strict policy against knocking on doors or honking horns if the worker was not ready to be picked up. Mr. A said that the first he heard of a work-related injury was on “Tuesday," when contacted by a doctor for the claimant about coverage. Mr. A agreed that workers' compensation was a considerable expense. He said that while there had been no injuries, his procedure would be that injuries should be reported when they happened. He also said that time tickets were completed each day that would record whether an injury did or did not happen on that day.

Mr. A said that he doubted that Mr. T, who was at the rig mid morning when Mr. A was there, could have left earlier to take the claimant home and then return because it was a three-hour round trip drive and he likely would not have returned. Mr. A said that the claimant could not have jumped off the floor of the rig to avoid the tongs because there was a safety rail around the floor.

In his deposition, Mr. H said that he was the driver for the crew, consisting of Mr. AH and Mr. L, the morning of _____. He said that only Mr. AH was with him when he pulled up to the claimant's house. He said that the claimant did not come out, and there was no light on as there often would be when they were expected. He said that they waited five to ten minutes, and then assumed that the claimant must have overslept and left. Mr. H next went to pick up Mr. L, and said that Mr. L had known the day before that he would be riding with them. They met Mr. T at a gas station, and told him that the claimant had not shown up. Mr. AH's testimony was basically the same except that he indicated that Mr. L was picked up due to a change in plans and because he would be needed on Rig #2 that day because of the claimant's absence. Mr. AH said that he contacted Mr. T on the cell phone and was directed to get Mr. L. Mr. AH said that Mr. L worked part of the day on the floor of the rig.

Mr. T testified that he and Mr. A were good friends. He said that he determined that Mr. L would work as his operator on the rig when the claimant did not "show up." He first found out about an injury claim the following Tuesday or Wednesday when asked by Mr. A what he knew of any injury. Mr. T denied that he had taken the claimant home on _____ or any other day. He said that the claimant did not work at all on the

_____. Mr. T said that the only time he went that week to the tool company to pick up rental equipment was on February 16, and no one was with him.

A time sheet for calculating the claimant's pay for the week of _____ showed that he worked 13 hours on the 13th (a Sunday), with 3 hours overtime; 11-1/2 hours on the 14th, with 1-1/2 hours overtime; did not work on the 15th; worked 14-1/2 hours on the 16th, with 4-1/2 hours overtime; and then worked 12 hours on the 17th, with 2 hours overtime. There is no work shown for the 18th. Mr. T identified daily work records as forms he fills out for billing the customer. While his Rig #2 crew for the 17th included the claimant, working 12 hours, and notes that there were no accidents, his sheets for the 18th (there are two, for different tasks) do not show the claimant on the crew, and the notation is made once more that there were no accidents.

At the outset, when the CCH started, the parties agreed to the issues reported from the BRC as they were stated. The issues were not amended or added to on the record at either session of the CCH. It was the claimant's unvarying position from the BRC and through both sessions of the CCH that he was injured on "Friday, _____" while working on a rig for employer. There is testimony in the record from all persons who were alleged to have worked on _____.

The carrier's consistent defense had been that the claimant was not present on _____ and could not have been injured, and there was no response to this defense from the claimant with any alternative dates of injury. Indeed, during closing argument, the claimant's attorney observed that the claimant simply could have picked an earlier date as the date of injury, but did not do so. The claimant's contention was that the witnesses for the employer had colluded to testify that the claimant had not been at work. Any alternative date of injury was not actually litigated or argued by the parties.

While we have stated that the date of injury does not constitute a "pleading" that would preclude finding another date of injury supported by the evidence, we disagree that the Appeals Panel has given hearing officers unrestricted authority to vary the alleged date of injury when there has been no express or actually litigated issue on the matter, especially when the date of the asserted injury is critical. The issue in this case was not whether the claimant was injured “on or about” _____. *See* Texas Workers' Compensation Commission Appeal No. 982861, decided January 20, 1999. In Texas Workers' Compensation Commission Appeal No. 001679, decided September 6, 2000, the Appeals Panel reversed and rendered such a determination by a hearing officer where the claimant's unvarying testimony was that she was injured on a specific date and where pertinent stipulations were made with reference to the claimed date of injury. The customary procedure for adding an issue is set out in Texas Workers' Compensation Commission Appeal No. 951661, decided November 20, 1995. While we do not agree with the carrier that in all cases an issue can only be added by a motion made 15 days before a CCH, we believe it is clear from Section 410.151(b) that the time for adding issues is before for good cause, or during, the CCH and that it is the parties, not the hearing officer, who initiates disputes. Texas Workers' Compensation Commission Appeal No. 92350, decided September 8, 1992.

There was no agreement here to add the issue of date of injury, so under Section 410.151(b)(2) it could only be added upon a finding of "good cause."

However, the *sua sponte* addition of the date of injury "issue" on a theory never advanced by the claimant, and consequently unknown to and unprepared for by the carrier, was inconsistent with the directive in Section 410.163(b) to preserve the rights of the parties and was an abuse of the hearing officer's discretion. We agree that the hearing officer abused his discretion in adding an issue on date of injury under the facts of this case, but do not find that fact alone to constitute reversible error.

Our basis for reversing in this case is that the finding that the claimant was injured on _____ is against the great weight and preponderance of the evidence. The unequivocal position and testimony of the claimant, who has been represented by an attorney throughout this case, was that he was injured on the 18th and immediately thereafter was unable to work. The claimant argued in final argument that the entire issue came down to credibility and that someone was "lying," and it was up to the hearing officer to determine if the claimant was, or was not, at work on _____.

The hearing officer found and agreed that the claimant did not work on _____. He then found:

**FINDINGS OF FACT**

6. Claimant has always alleged he was taken home by [Mr. T] and it was on the day [Mr. T] picked up some flanges at [the tool company].

7. [Mr. T] picked up flanges on _____.

8. Claimant's injury occurred on _____.

Moreover, the hearing officer finds that the action leading to the injury was that the claimant "twisted and hit the rail."

We agree that the occurrence of an injury and disability therefrom may be proven by the testimony of the claimant alone, if it is believed. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.- Houston [1st Dist.] 1987, no writ). But we are struck in this case by the extent to which finding a _____ date of injury is contradicted by much of the claimant's testimony. The hearing officer has apparently inferred from Mr. T's statement that he picked up flanges on the 16th and that the claimant was in some respect mistaken in his recollection and was really hurt on the 16th. (He has further inferred, apparently from Mr. A's lone testimony that there was a rail in the vicinity of the floor and that the claimant hit the rail.) Against these findings are:

1. Mr. T's statement that he picked up the flanges unaccompanied by anyone.

2. The claimant's consistent testimony that he was hurt on the 18th and was not confused about the date.

3. The time sheets showing that the claimant worked 14-1/2 hours on the 16th, and 12 hours on the 17th (the latter documented by two separate time records).

4. The claimant's testimony that he could not work after he was injured.

5. The medical records showing that the claimant has consistently claimed he was injured on _____; the lack of any records where the claimant asserted a _____ injury date.

6. The lack of any evidence or testimony that the claimant hit a rail and the claimant's testimony that he was injured by jerking.

The hearing officer's theory of the claimant's case leaves the rest of February 16 and 17, when the claimant was working long hours, essentially unexplained and unaccounted for in the course of the injury. An important causal connection between the injury and its affect on the claimant's ability to work would appear to be broken if the hearing officer "believes" the claimant's testimony that he rode with Mr. T to the tool company, yet apparently “disbelieves” his testimony that he was unable to work at all after he was injured. The claimant is unclear what consideration was given to evidence that the claimant may have wanted to quit his job due to a child support dispute.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We agree with the carrier that the great weight and preponderance of the evidence is against the determination of a _____ date of injury, and that the statement of the claimant that he rode with Mr. T to the tool company is no more than a mere scintilla in favor of that date in this record.

Based upon the hearing officer's finding that the claimant was not at work on _____, which was the only finding pertinent to the stated issues in this case, we reverse the determination that the claimant sustained a compensable injury on _____, with disability beginning therefrom on _____, and we render a decision that the claimant did not sustain a compensable injury. Because the claimant did not sustain a compensable injury, he cannot have disability.

Susan M. Kelley
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Tommy W. Lueders
Appeals Judge