

APPEAL NO. 002442

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 September 21, 2000. With regard to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable (left ankle) injury on _____ (all dates are 2000 unless otherwise noted); that the claimant had disability from April 24 to the date of the CCH; and that the claimant had not made an election of remedies by seeking care at a Veterans Administration (VA) hospital.

The appellant (carrier) appeals, citing 21 "Points of Error" which can basically be lumped together as an appeal of the hearing officer's ruling excluding certain exhibits and refusal to allow those exhibits to be used in impeachment; appeal of factual determinations of whether the claimant sustained a compensable injury and had disability; and the determinations on the election-of-remedies issue. The carrier requests that we reverse the hearing officer's decision and "remand the matter for a new [CCH] on the merits under a different Hearing Officer." The appeals file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant was employed by (employer) as a stocker. The claimant testified that on _____, as he was climbing down a ladder, the ladder shifted, causing him to twist his ankle. The claimant testified that he immediately felt intense pain, that he was unable to walk (normally), and that he hobbled over to a telephone and called his supervisor. The claimant said that when he saw his supervisor and told him of the injury, the supervisor just said "okay" and walked away. (Reporting is not an issue.) Exactly what happened between _____ and April 24, when the claimant apparently first sought medical attention, is not clear. The claimant apparently took some time off, apparently worked some time "hobbling around" at light duty from a prior injury and, on April 24, again reported the injury. The claimant was apparently sent to see Dr. S on April 24, who diagnosed a left ankle sprain and returned the claimant to work with restrictions on "prolonged standing and/or walking longer than 15-20 min." and no climbing stairs or ladders. The claimant testified that Dr. S told him "don't worry about the screws."

Subsequent testimony and evidence indicated that the claimant had had a serious left ankle injury in 1994 which required surgery and the insertion of screws in his ankle. The claimant's left ankle condition between 1994 and October 1999 is in dispute, with the claimant testifying that he had not sought any medical care for his left ankle during that time. Testimony and other references indicated that the claimant also sustained a left ankle injury in October 1999 and another on November 15, 1999 (neither injury is directly at issue here), when a play gym at work fell against his left ankle. The claimant testified that he sought care for the November injury at the VA hospital and agrees that those injuries were not reported to the employer. The claimant also testified on cross-

examination that he was involved in a motor vehicle accident (MVA) in January, but that accident only involved his right shoulder, neck, and back.

Because the claimant was doubtful of Dr. S's assurances that the screws in his left ankle were unaffected, the claimant sought treatment with Dr. V, a chiropractor, who took the claimant off work on May 24. The claimant was referred to Dr. M, who recited a July 1999 left ankle injury as well as the _____ ladder incident and referenced the 1994 fracture with hardware. Dr. M's impression was traumatic arthritis and a suggestion that the claimant "may have to have the hardware [in the claimant's ankle] removed." In a report dated June 12, Dr. V notes the home gym incident of "November 1, 1999"; another home gym incident when the claimant went to the VA hospital; and Dr. M's report. Dr. V has an impression of left ankle sprain and left ankle hardware failure.

The heart of this case involves the exclusion of certain of the carrier's exhibits. The carrier offered Exhibits A through R; the claimant objected on the grounds of lack of timely exchange; the carrier represented that all the exhibits had been exchanged at the benefit review conference (BRC); and the hearing officer, after a spirited exchange, ruled that exhibits, to be timely exchanged, must be exchanged after the BRC, not at the BRC. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1) (Rule 142.13(c)(1)) was referenced. That rule provides that exchange of documentary evidence must be exchanged "no later than 15 days after the [BRC]." Eight of the carrier's exhibits were excluded because they were not exchanged after the BRC. Some of the carrier's exhibits were admitted because they were duplicates of the claimant's exhibits. The carrier appealed on the ground that the hearing officer abused her discretion in refusing to admit exhibits which the parties agreed were exchanged at the BRC because they were not exchanged after the BRC.

We agree with the carrier's contention that the hearing officer erred. Early on, the Appeals Panel has held that documents that are actually exchanged or made available to both parties at the BRC need not be re-exchanged within 15 days after the BRC. Texas Workers' Compensation Commission Appeal No. 941048, decided September 16, 1994, and, more recently, Texas Workers' Compensation Commission Appeal No. 992764, decided January 24, 2000; Appeal No. 941048, *supra*; and Texas Workers' Compensation Commission Appeal No. 000248, decided March 15, 2000. However, that being said, 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). See *also* Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). The hearing officer abused her discretion in excluding the proffered exhibits. Our review of the excluded exhibits indicates that two were Texas Workers' Compensation Commission (Commission) forms, an Employer's First Report of Injury or Illness (TWCC-1) and Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41), which were unlikely to cause an improper judgment to be rendered; three other exhibits were very brief

statements which refer to the claimant's MVA and lack of reporting (not an issue), which are either cumulative of the claimant's testimony or were regarding a matter not at issue. Another exhibit was an accident report regarding the November 1, 1999, injury and was unlikely to cause a different result. However, Carrier's Exhibit I contains medical records from the VA hospital showing treatment of both ankles and/or the left ankle in April through July 1997, which directly contradicts the claimant's testimony that he does not recall treatment for his left ankle between 1994 and November 1999. In that this whole case rests on the credibility of the claimant's testimony, we are reluctant to dismiss this contradictory report as harmless error. Consequently, we reverse the hearing officer's ruling that the carrier's exhibits were not timely exchanged and hold that they are to be admitted provided that they were, in fact, exchanged at the BRC. We remand the case for the hearing officer to admit the excluded exhibits if they had, in fact, been exchanged at the BRC and allow the parties to give additional oral and/or written argument. No additional evidentiary hearing is necessary; however, the hearing officer must determine if the exhibits were actually exchanged as represented.

Whether the claimant sustained a compensable injury is largely dependent on the claimant's credibility as a witness. We defer ruling on that issue pending the admission of the carrier's exhibits and additional argument.

Regarding the disability issue, we refer to the definition of disability in Section 401.011(16) because the carrier, in argument at the CCH, seemed to be inferring that because the claimant had the ability to drive and perform light duty he did not have disability. This is not a total-inability-to-work supplemental income benefits case and we note that a light-duty release to work does not necessarily end disability but may, in fact, be evidence that the claimant cannot obtain and retain employment at his preinjury wage. We defer ruling on disability pending the hearing officer's decision on whether the claimant sustained a compensable injury.

Regarding the election-of-remedies issue, the Appeals Panel has generally cited the Texas Supreme Court case of Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), as establishing the standard. In Bocanegra the court stated that the election-of-remedies doctrine may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of fact (3) which are so inconsistent as to (4) constitute manifest injustice. The carrier has the burden of proving an effective election of remedies, and whether an election has been made is generally a question of fact for the hearing officer to decide. In this case, there is no evidence that the claimant exercised an informed choice between two or more inconsistent remedies by initially seeking medical care at the VA hospital. The mere acceptance of other health benefits is normally not sufficient, in itself, to establish an election of remedies. Texas Workers' Compensation Commission Appeal No. 990022, decided February 19, 1999. Consequently, we affirm the hearing officer's decision on the election-of-remedies issue.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Susan M. Kelley
Appeals Judge