

APPEAL NO. 010015

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 December 13, 2000. With regard to the only issue before her, the hearing officer determined that the respondent (claimant) had disability from August 10, 2000 (all dates are 2000 unless otherwise noted), continuing through the date of the CCH.

The appellant (carrier) appeals on two grounds: (1) that the hearing officer improperly excluded three of the carrier's exhibits that they were not timely exchanged; and (2) that the hearing officer's decision on disability was incorrect. The claimant responded, urging affirmance.

DECISION

Affirmed.

The claimant was employed by a temporary employment agency and assigned to work as a machine operator. The claimant testified that on _____ he fell in some oil against a machine and injured the right side of his body. The parties stipulated that the claimant sustained a compensable injury on _____. It is undisputed; that the claimant reported his injury on _____ and told the employer's manager that he was sore; that the claimant called in on August 10 and said he could not work because of his injury; and that the claimant came to the employer's office on August 11. There is disputed testimony whether the claimant was drinking on August 11; however, this is not an intoxication case. The claimant was referred to Dr. N for treatment of his compensable injury and the employer called Dr. N requesting an alcohol Breathalyzer test, which apparently turned out positive.

Dr. N saw the claimant on August 11, diagnosed a right groin strain and lumbar and right sacroiliac strain and right wrist strain and released the claimant to "return to work activities with accommodation." This report was made available to the employer, who did not make, or discuss, the possibility of light work or work with accommodation with the claimant because at that time on August 11, the employer believed that it had grounds to terminate the claimant for violation of the employer's drug abuse policy for drinking on company property. The claimant was unable to come in on August 14 and when he came in on August 15 he was terminated because he had tested positive on the Breathalyzer on August 11. The claimant subsequently changed treating doctors to Dr. B, who has taken the claimant off work altogether on September 27 pending shoulder surgery.

Three exhibits offered by the carrier (two brief handwritten statements and the Breathalyzer test result) were excluded by the hearing officer on grounds of lack of timely exchange. The exhibits were mailed on the 14th day after the benefit review conference and were not actually received by the claimant until some days later because of a mix up in the mail. The hearing officer ruled that "exchanged" "meant received." To obtain

reversal of a judgment based on 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 *a/so Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In this case, while we do not necessarily agree with the hearing officer's ruling, even if there had been an abuse of discretion, the excluded statements either do not challenge the other evidence or pertain to the claimant's perceived drinking on the premises two days after his injury and, consequently, probably did not cause rendition of an improper judgment.

On the issue of disability, Dr. N clearly released the claimant to some kind of modified duty and although the employer witnesses testified that such unspecified light duty was available it was equally clearly not offered or even mentioned to the claimant because the claimant was to be terminated for cause. The claimant testified that he was unable to return to his preinjury job because of his injury. The employer's actions did not conform to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6) of a bona fide offer of employment. Whether the claimant had disability as defined in Section 401.011(16) or whether the claimant's unemployment was due to his termination for cause, were factual determinations for the hearing officer to resolve. *Garza v. Commercial Insurance Company of Newark, New Jersey*, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

The hearing officer's decision is supported by the evidence, namely the medical reports and the claimant's testimony, and is not contrary to the great weight and preponderance of the evidence. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge