

APPEAL NO. 012152  
FILED OCTOBER 15, 2001

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 August 6, 2001. The hearing officer resolved the disputed issues by determining that the respondent (claimant) sustained a compensable injury on \_\_\_\_\_, and that he had disability as a result of the compensable injury beginning on March 21, 2001, and continuing through the date of the hearing. The appellant (self-insured) appealed asserting, sufficiency of the evidence and evidentiary error on the part of the hearing officer. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

**EVIDENTIARY POINT OF ERROR**

The self-insured asserts that the hearing officer abused his discretion by admitting into evidence certain portions of the claimant's treating doctor's records which had not been timely exchanged pursuant to Section 410.161. However, the claimant's treating doctor was present at the hearing and testified at length that an injury occurred and resulted in disability, without objection from the self-insured.

Our standard of review regarding the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in admitting evidence, an appellant must first show that the admission was in fact an abuse of discretion, and also that 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 if the hearing officer erred in admitting the challenged records, this was not reversible error as they were merely cumulative of the doctor's testimony. We do not agree, however, that the admission was an abuse of discretion in this case.

**COMPENSABLE INJURY ISSUE**

The hearing officer did not err in determining that the claimant sustained a compensable injury on \_\_\_\_\_. The claimant testified as to the mechanism of his injury. The claimant's treating doctor testified as to the nature of the claimant's injury, and the fact that the injury is consistent with the mechanism as described by the claimant. The self-insured challenges the credibility of the evidence. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer reviewed the evidence presented and determined that the claimant met his burden on the

issue of injury. Nothing in our review of the record indicates that the challenged determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, the hearing officer's determination that the claimant sustained a compensable injury on \_\_\_\_\_, is affirmed.

### **DISABILITY ISSUE**

Although we do not agree that the hearing officer erred by finding that the claimant had disability, we agree that four of the days that the claimant was incarcerated should be deducted from this time.

There is sufficient evidence to support the hearing officer's determination that the claimant had disability as a result of his compensable injury, through the claimant's testimony and evidence from his treating doctor. The hearing officer had the opportunity to weigh the evidence of a videotape and the claimant's explanation, and although different inferences could be drawn, this alone will not compel a reversal of the decision.

However, the claimant testified that he was incarcerated from July 14, 2001, through July 18, 2001. Disability is defined as the inability because of a compensable injury to obtain and retain employment at the preinjury wage. Section 401.011(16). The claimant's inability to obtain and retain employment from July 14, 2001, through July 18, 2001, was not because of his injury but rather because he was incarcerated. In Texas Workers' Compensation Commission Appeal No. 002599, decided December 13, 2000, we noted that disability is an economic concept and that if an injured employee becomes incarcerated, the actual loss of wages is attributable to such incarceration rather than the compensable injury. Texas Workers' Compensation Commission Appeal No. 92428, decided October 2, 1992; Texas Workers' Compensation Commission Appeal No. 92674, decided January 29, 1993. We, accordingly, reverse the hearing officer's determination on the period of the claimant's disability and render a new decision that the claimant had disability from March 21, 2001, through July 13, 2001, and from July 19, 2001, through the date of the CCH.

The hearing officer's decision and order on the injury issue are affirmed and the hearing officer's decision on the period of disability is reversed and a new decision is rendered, as noted.

The true corporate name of the insurance carrier is **UNION TANK CAR COMPANY** and the name and address of its registered agent for service of process is

**U.S. CORPORATE SERVICES  
800 BRAZOS STREET  
AUSTIN, TEXAS 78701.**

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge