APPEAL NO. 012409
FILED NOVEMBER 19, 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 September 10, 2001. He determined that the appellant (claimant) did not sustain an injury on _____; that he did not give timely notice of his injury to his employer within 30 days; and that he did not have good cause for late notice, and did not have disability.

The claimant appeals, complaining that his testimony may have been misunderstood because he is not always articulate. He recites some facts that favor his claim of injury. He further complains of the exclusion of two of his records. The respondent (carrier) responded that the decision should be affirmed.

DECISION

We affirm the hearing officer's decision.

EXCLUSION OF TWO CLAIMANT EXHIBITS

Under these facts, we cannot agree that the hearing officer erred by excluding Claimant's Exhibit No. 8 from evidence, consisting of a sheet of paper on which five previous coworkers affirmed that they had not received copies of an employee handbook. The claimant had been represented at the benefit review conference (BRC) and said his attorney did not consider this an important fact. The claimant, however, decided that it would be important and then prepared a statement for various previous coworkers to sign to this effect. He testified that it took some time to track down these gentlemen (as he had not worked for the employer since January 15, 2001), and evidence was presented to show that the document was exchanged a few days prior to the CCH. The hearing officer's determination that there was no good cause for the late exchange was that the claimant knew at the BRC that he and coworkers had not received such manuals, that it was of "no consequence" that such statements were not reduced to writing within 15 days after the BRC, that he failed to inform the carrier within 15 days that he intended to seek such statements, and that he did not act as a reasonably prudent person.

We cannot necessarily agree that it was of "no consequence" whether the statements were reduced to writing in 15 days. Texas Workers' Compensation Commission Appeal No. 93921, decided November 30, 1993; Texas Workers' Compensation Commission Appeal No. 960513, decided April 26, 1996; and Texas Workers' Compensation Commission Appeal No. 980198, decided March 13, 1998, all state that a party is "not required to create evidence within 15 days of the BRC in order to exchange it." Those cases also point out, however, that a belated investigation of the facts coupled with a failure to disclose known information, while the party develops those facts further, may result in evidence excluded. When cases acknowledge a lack of due diligence in developing evidence prior to a BRC, they generally note, as in Texas Workers'

Compensation Commission Appeal No. 960993, decided July 11, 1996, that the evidence showed a particular issue or possible defense for a protracted amount of time that was only acted upon at the last minute, such as medical evidence of causation of a heart attack for six months prior to obtaining an expert's report on the question. In this case, although different inferences could be drawn, the fact that an attorney may not feel information is important to develop further will not necessarily constitute good cause for a late exchange if a reevaluation is later made.

Claimant's Exhibit No. 9 consisted of annotated (by the claimant and his wife) versions of transcribed interviews with the adjuster. Although this exhibit is clearly more in the way of argument than evidence, the hearing officer did not err in excluding these documents based upon late exchange.

OCCURRENCE OF INJURY, DISABILITY, AND NOTICE TO EMPLOYER

The hearing officer's decision on notice, disability, and occurrence of an injury has support in the record and is not so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust.

The evidence was directly conflicting as to when the accident happened and whether the claimant notified a person in a supervisory capacity that he had been hurt. Likewise, the period of disability was the subject of conflicting evidence. The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Service Lloyds Insurance Co. v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas 1993, no writ); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). A trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ).

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). An appeals-level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

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.). That is not the case here, and we affirm the decision and order.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Michael B. McShane
Appeals Judge