APPEAL NO. 020881
FILED MAY 28, 2002

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 October 23, 2001. The hearing officer determined that (1) the compensable injury of the respondent (claimant) extended to a partial tear of the anterior cruciate ligament and internal derangement of the right knee; (2) the claimant's employer did not make bona fide offers of employment (BFOE) to the claimant on April 25 and May 18, 2001; and (3) the claimant had disability from April 26 through August 23, 2001. The appellant (carrier) appealed these determinations on sufficiency grounds. The carrier also complains that the hearing officer erred in excluding a videotape and related surveillance report and in admitting the records of Dr. K. The claimant responded that the Appeals Panel should affirm the hearing officer's decision and order. By our decision in Texas Workers' Compensation Commission Appeal No. 012877, decided January 11, 2002, we remanded the case to the hearing officer for reconstruction of the record, as Claimant's Exhibit No. 5 was missing from the record. The missing exhibit was provided to the hearing officer, and she added it to the record without holding an additional CCH. She issued virtually the same decision as before, and the carrier's appeal is on the same bases as before. The claimant again urges affirmance.

DECISION

Affirmed.

The carrier contends that the hearing officer erred in admitting Claimant's Exhibit No. 1 in evidence, and in excluding Carrier's Exhibit No. 7 from evidence. In order to show reversible error based upon the admission or exclusion of evidence, it must be shown not only that the evidentiary ruling was in error, but also that the error was reasonably calculated to cause and probably did cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 91003, decided August 14, 1991. We conclude that the carrier has not shown that error, if any, in the admission of Claimant's Exhibit No. 1 or the exclusion of Carrier's Exhibit No. 7, constitutes reversible error.

The objection to Claimant's Exhibit No. 1 was that Dr. K was "not available" on four occasions when the carrier attempted to serve him with a subpoena, in order to compel him to answer written questions on deposition, and that because the carrier was unable to ask its questions prior to the CCH, it was fundamentally unfair that Dr. K's documentary evidence be admitted. The carrier presented evidence that four attempts were made to serve Dr. K on October 18, 2001, between 12:30 P.M. and 7:30 P.M. The claimant pointed out that there were two benefit review conferences (BRC) held prior to the CCH, that the carrier was well aware of Dr. K and the medical evidence, and that the carrier could and should have been more diligent in trying to contact Dr. K. It was not error to admit Claimant's Exhibit No. 1.

As to Carrier's Exhibit No. 7, a videotape and surveillance report, the claimant objected because no copy of the videotape was exchanged, even though most of it was reviewed by all parties at the first BRC. The surveillance report itself was timely exchanged, but the claimant's objection was that the report is based on the videotape and since the videotape was not exchanged, the report should not be admitted into evidence. The hearing officer sustained the objections to both the videotape and the report. While the report should have been admitted because it was timely exchanged, we view the exclusion of the evidence as harmless, as it would not have changed the hearing officer's decision. It is clear from her decision that this case turned on the medical records.

The hearing officer did not err in making her extent-of-injury and disability determinations. The issues of extent of injury and disability involved questions of fact for the hearing officer to resolve. The evidence was conflicting, consisting of medical reports from the claimant's treating doctor and from the carrier's peer review doctor. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer did not err in determining that the employer did not make a BFOE on either of the dates at issue. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6(c) (Rule 129.6(c)) provides, in relevant part, that an offer of modified duty shall be in writing and include a copy of the Work Status Report (TWCC-73) on which the offer is based. We have said that all of the information required by Rule 129.6(c) shall be present, and that Rule 129.6 "contains no exceptions for failing to strictly comply with its requirements." Texas Workers' Compensation Commission Appeal No. 010110-S, decided February 28, 2001. The employer's offer of light duty in this case did not include all of the information required by Rule 129.6(c). Based on this information, the hearing officer could determine that the employer did not make a BFOE to the claimant on either April 25 or May 18, 2001. The hearing officer's determination on this issue is supported by sufficient evidence.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING** and the name and address of its registered agent for service of process is

CT CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Michael B. McShane
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge