APPEAL NO. 021220
FILED JULY 3, 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 April 2, 2002. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable repetitive trauma injury; that the date of injury was _____; that the claimant timely notified the appellant (self-insured) of his injury; and that the claimant had disability from November 5, 2001, through April 2, 2002. The self-insured appealed and the claimant responded.

DECISION

The hearing officer's decision is affirmed.

The claimant claimed that he sustained a repetitive trauma injury from performing his work activities in the self-insured's parks department. The claimant had the burden to prove that he sustained a repetitive trauma injury as defined by Section 401.011(36), that he timely notified the self-insured of his injury under Section 409.001(a), and that he had disability as defined by Section 401.011(16). Conflicting evidence was presented on the disputed issues. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer's determinations are supported by the claimant's testimony and by the reports of the treating doctor. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

In Finding of Fact No. 11, the hearing officer uses the term "potential work-related claim" in referring to what and when notice was given to the self-insured, and the self-insured contends that is not notice of an injury. We note that there is evidence in the form of the claimant's testimony and the testimony of a coworker that the claimant informed his supervisor on _____, that his doctor had told him on that day that he had sustained a work-related injury. The supervisor denied such notice. Section 401.011(34) provides that an occupational disease includes a repetitive trauma injury. Section 409.001(a) provides that for an occupational disease, notice of an injury must be given to the employer not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment, and Section 408.007 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. Given the definition of the date of injury for an occupational disease and the notice provision for an occupational disease, we cannot conclude that the hearing officer's finding amounts to an erroneous statement of the law as contended by the self-insured.

The self-insured contends that the hearing officer impermissibly exceeded his role as a hearing officer and interjected himself in the CCH proceedings, which resulted in his failure to perform his duty as a hearing officer under Section 410.163, and that that led to one witness departing from the CCH and taking another witness with her, who was to be called as a witness for the self-insured, and also led to a decision by the self-insured not to call the self-insured's peer review doctor, whose reports were in evidence. The witness whom the self-insured states left the CCH had already given her testimony, and both parties said they had no further questions for her. If that witness did in fact take another potential witness with her when she left, there is no indication in the record that the self-insured asked the potential witness to stay at the CCH to provide testimony, nor does the self-insured indicate what the substance of such testimony would have been had the self-insured asked that person to testify. The record reflects that the hearing officer would have allowed the self-insured to call the peer review doctor to testify by telephone and that the self-insured declined to do so. As previously noted, the peer review doctor's written reports were in evidence. While we agree that the hearing officer probably did too much of the talking at the CCH, we cannot conclude that reversible error has been shown.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

TK
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Roy L. Warren
Appeals Judge

Dissenting Opinion:

I respectfully dissent. I would remand this case for a rehearing by another hearing officer because of what I regard as a fundamentally unfair interjection of the hearing officer into the carrier's presentation of its evidence.

While a hearing officer has a duty under the 1989 Act to fully develop the facts required for the determinations to be made, Section 410.163(b), that statute also requires the hearing officer to ensure the preservation of the rights of the parties. The hearing officer must not depart from his or her role as an unbiased, impartial fact finder and must not become or appear to become an advocate or proponent for either party. This may appear to be a fine line at times, but it is one that must be observed to have a dispute resolution system that is and appears to be absolutely fair, impartial, and just. When that line is crossed, we have taken appropriate action at the appeals level. *See* Texas Workers' Compensation Commission Appeal No. 960417, decided April 17, 1996. As we stated in Texas Workers' Compensation Commission Appeal No. 941146, decided October 7, 1994, "we caution that a hearing officer must not only be a fair and impartial decision-maker, but should strive to avoid any situation which could give the appearance of impartiality." A hearing officer interjecting himself or herself into extensive examination or cross-examination of witnesses unnecessarily or in an apparent advocacy role should be strictly avoided. A review of the record reflects this hearing officer crossed that line. He so berated the carrier's attorney for requesting the telephone testimony of an expert witness whose report was already in evidence that when he finally offered to put the call through, the attorney decided not to go through with the call. The hearing officer's conduct could not have had any but a most chilling effect on the wisdom of the carrier's going forward with testimony from that witness. Further, the hearing officer engaged in what amounted to an argument with a witness which, at a minimum, compromised the appearance of impartiality required of all hearing officers and left the witness obviously shaken. That witness quickly left the hearing room taking with her another witness the carrier had intended to call. If the antagonism the hearing officer demonstrated towards the carrier on the record during these proceedings did not manifest bias on his part, it most certainly gave that appearance and may well have been reflected in his decision. To insure a fair and impartial hearing for the parties, I would reverse the decision of the hearing officer and remand this case for a new hearing conducted by another hearing officer.

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Philip F. O'Neill
Appeals Judge