APPEAL NO. 021961
FILED SEPTEMBER 3, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). After two continuances were granted, a contested case hearing was ultimately held on July 2, 2002. The hearing officer resolved the disputed issues by determining that the appellant (claimant) did not sustain a compensable injury on _____, or on (alleged date of injury), and that he did not have disability. On appeal, the claimant does not take issue with these determinations specifically. Rather, the claimant contends that the hearing officer abused his discretion, did not provide a fair and unbiased hearing, improperly made a finding that the claimant did not have good cause for not notifying the (City) local office that he was running late on the April 30, 2002, scheduled hearing date, and erred in refusing to add an additional issue requested by the claimant during the hearing. The respondent (carrier) argues that the hearing officer did not abuse his discretion or commit reversible error, and urges affirmance of the decision and order.

DECISION

Affirmed.

We initially address the claimant's allegation that the hearing officer abused his discretion by refusing to add a "Downs issue," which the claimant requested during the hearing. We believe that when referring to a "Downs issue," the claimant is referring to Continental Casualty Company v. Downs, (Case No. 00-1309), and intended that the hearing officer consider whether the carrier waived its right to contest compensability of the _____, claimed injury by failing to meet the seven-day deadline to begin paying benefits or to give written notice of its refusal to pay benefits of claimant's claimed injury, pursuant to Section 409.021(a). The hearing officer denied the request to add the additional issue.

Section 410.151(b) provides, in part, that an issue not raised at a benefit review conference (BRC) may not be considered unless the parties consent or, if the issue was not raised, the Texas Workers' Compensation Commission (Commission) determines that good cause exists for not requesting the issue at the BRC. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) provides that additional issues may be added by a party responding to the BRC report no later than 20 days after receiving it, by unanimous consent in writing no later than 10 days before the hearing, and on the request of a party if the hearing officer finds good cause. The issue of whether the carrier timely disputed the claimed injury was not raised by the claimant at any time prior to the July 2, 2001, hearing. We perceive no abuse of discretion on the part of the hearing officer denying the motion to add the additional issue. Downer v. Aquamarine Operations, Inc., 701 S.W.2d 238 (Tex. 1985), Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

Furthermore, we cannot agree with the claimant that the basis for the hearing officer's denial of the request to add the issue was "feigned ignorance" of the Downs case. There is no evidence in the record to substantiate this assertion and it is clear that the denial was based upon noncompliance with the applicable rules. It is noted that the Commission is not implementing the Downs decision until the motion for rehearing process has been exhausted. See TWCC Advisory No. 2002-08 (June 17, 2002), and Texas Workers' Compensation Commission Appeal No. 021635, decided July 31, 2002. We decline the claimant's request on appeal that we consider whether "the TWCC [is] in contempt of the Texas Supreme Court by failing and refusing to follow and apply the Down's case," as the question is inappropriately directed to the Appeals Panel.

The claimant makes several points on appeal relating to the April 30, 2002, scheduled hearing. The record reflects that the claimant was not present at the scheduled time for the hearing and did not contact the Commission's local office to give an explanation for his absence. The record from the August 30 proceeding indicates that counsel for the claimant instructed the hearing officer that the claimant had been in contact with her office and advised that he was running late. The hearing officer waited approximately 30 minutes for the claimant to arrive, but when he did not, released the court reporter and counsel for the carrier. Shortly thereafter, the claimant apparently arrived. The hearing officer continued the hearing and rescheduled it for July 2, 2002, at which time the claimant testified that he had to arrange transportation on April 30, 2002, and did not call the Commission office because he thought he would arrive on time. The hearing officer determined that the claimant did not have good cause for failing to notify the (City 1) local office on April 30, 2002, that he was running late. As there is no indication that the hearing officer "acted without reference to any guiding rules and principles," we cannot agree that his good cause finding was an abuse of discretion. Morrow, *supra*.

Nor do we agree with the claimant that hearing officer *added* the issue of good cause. Section 410.156(b) and Rule 142.11 provide that failure to attend a hearing without good cause, "as determined by the hearing officer," is a Class C administrative violation, punishable by a fine not to exceed $1,000.00. In the present case, the hearing officer did not impose a fine or even indicate that he was referring the matter to the Compliance and Practices Division with a recommendation for a fine. In any event, the hearing officer was well within his province in making a determination as to whether the claimant had good cause for his absence from the scheduled proceedings on April 30, 2002.

As for the claimant's allegations that the hearing officer participated in two instances of *ex parte* contact with the carrier and "interrogated" the claimant off the record on April 30, 2002, we have been provided with no evidence to substantiate these allegations and note that the carrier emphatically denies any *ex parte* communication. We decline to give further consideration to these assertions. Whether the claimant sustained a compensable injury and had disability were factual questions for the hearing officer to resolve. 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)). Nothing in our review of the record indicates 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 decision and order of the hearing officer are affirmed.

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

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge