

APPEAL NO. 041194
FILED JULY 6, 2004

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 27, 2004. The hearing officer determined that the respondent (claimant) sustained a compensable (low back) injury on _____, that the claimant had disability from September 26, 2003, through the date of the CCH, and that the appellant (carrier) is not relieved of liability pursuant to Section 409.002 because the claimant gave timely notice of his injury to the employer.

The carrier appeals, contending that the hearing officer committed reversible error in failing to grant the carrier's motion for continuance, that the hearing officer incorrectly determined that the claimant had sustained a compensable lumbar spine injury, and that the claimant had disability. The claimant responded that the hearing officer had not erred and urged affirmance.

DECISION

Affirmed.

First addressing the carrier's principal point that the hearing officer erred in failing to grant its motion for a continuance, the carrier asserts that the hearing officer granted a Subpoena Duces Tecum on A Motion for Reconsideration for the "Claimant's family physician's" records some 17 days prior to the CCH and that the carrier did not have adequate time to obtain the records prior to the CCH. The carrier alleges that it has been deprived of the "opportunity to obtain all of the medical records related to the Claimant's prior lumbar condition." The carrier, in its request for review, does not identify the family physician (although we infer it is Dr. F). The claimant's response seems to indicate that the carrier is seeking records of a 1973 (Claimant's Exhibit No. 3) spinal surgery (of "more than 20 years ago"). Section 410.155 states in pertinent part that the Texas Workers' Compensation Commission (Commission) may grant a continuance of a scheduled hearing "only if the Commission determines that there is good cause for the continuance." The movant has the burden of establishing good cause, and a hearing officer's ruling will be overturned only for an abuse of discretion; that is, when the hearing officer acts without reference to any guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 931034, decided December 27, 1993. We distinguish Texas Workers' Compensation Commission Appeal No. 022821, decided December 23, 2002, on the facts. In this case the issue was "Did the Claimant sustain a compensable injury on _____?" The hearing officer concluded that the claimant had sustained a compensable lumbar spine injury on _____. That determination answered the issue. Extent of injury and whether the compensable injury included an aggravation or herniation at L4-5 and L5-S1 were not issues before the hearing officer and we consider them surplusage. The hearing officer did not make a

finding regarding lack of good cause in denying the carrier's motion for continuance. We do not consider the hearing officer's inquiry whether the claimant was receiving income benefits tantamount to a finding that there was no good cause for the continuance because the claimant was not receiving benefits. Nor do we consider the hearing officer's comment that "the Appeals Panel can tell [the Hearing Officer] if [he] was wrong" to have any relevance to the matter.

Basically what this case involves, and indeed the crux of the case, is the credibility of the testimony and the evidence and who to believe. Did the claimant injure his back picking up a box of lettuce and falling, or did he not? Did the claimed event occur on January 21 or January 23, 2003, or not at all? Did the claimant and/or his wife report the claimed injury to "George" the assistant manager, a few days after the claimed injury or not. The question of disability is dependent on a finding of a compensable injury and timely notice, determinations which are solely within the province of the hearing officer to resolve. Section 410.165(a).

We hold that the hearing officer should have limited his determination to whether the claimant sustained a compensable injury (and to what general body part) and that the hearing officer should have addressed the carrier's Motion for Continuance and made a finding regarding good cause or the lack thereof. However, we cannot say that the hearing officer abused his discretion in denying the carrier's Motion for Continuance in view of the relevance that 20 or 30 year old medical records may have on a case which, in our view, turns on questions of fact on what evidence to believe or disbelieve.

We have reviewed the complained-of determinations and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We hold that the hearing officer's determinations are supported by the evidence, are not erroneous as a matter of law, and are not 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, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **TRUCK INSURANCE EXCHANGE** and the name and address of its registered agent for service of process is

**FRED WERKENTHIN WITH JACKSON WALKER, L.L. P.
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AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Margaret L. Turner
Appeals Judge