APPEAL NO. 043000
FILED JANUARY 12, 2005

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 July 1, 2004. In Texas Workers' Compensation Commission Appeal No. 041943, decided September 27, 2004, the Appeals Panel remanded the case back for reconstruction of the record and for the hearing officer to "make a determination regarding whether her determinations with regard to compensability and disability would have been different if the statement of (Ms. I) had been admitted and considered." Another CCH was held on October 19, 2004. The hearing officer on remand determined that the appellant (claimant) did not sustain a compensable injury; that she did not have disability; and that the respondent (carrier) is relieved of liability for compensation because the claimant willfully intended and attempted to injure herself. The claimant appeals, contending that the hearing officer abused her discretion in excluding an exhibit (Ms. I's statement) on the basis of untimely exchange and no good cause shown. Inferentially, the claimant appeals the hearing officer's other determinations on the basis that admission of the excluded statement would have changed the hearing officer's decision had it been admitted. The carrier responds, urging affirmance.

DECISION

Affirmed.

First, the hearing officer misstates what the Appeals Panel requested in Appeal No. 041943, *supra*. The hearing officer states that she was requested "to consider the written statement of [Ms. I] offered by the claimant as Exhibit No. 12." In fact the Appeals Panel requested that the hearing officer "make a determination regarding whether her determinations with regard to compensability and disability would have been different if the statement of [Ms. I] had been admitted and considered." The claimant questions whether the hearing officer had "an impermissible bias" and requests that we remand the case "before another hearing officer." Without commenting on the propriety of the request to the hearing officer in Appeal No. 041943, we merely note that Section 410.203(c) precludes a remand more than once. Since we have already used our remand for reconstruction of the record we cannot remand another time for the hearing officer to address the request posed in Appeal No. 041943.

Our standard of review regarding the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal

No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

In this case the claimant, a direct care worker at a substance abuse rehabilitation facility, alleges two falls on _____. The alleged injury was reported and the carrier denied liability on January 20, 2004. A benefit review conference (BRC) was held on May 24, 2004, at which time, according to the claimant's appeal and the carrier's response, apparently the existence of the potential witness was discussed. There was a dispute whether the potential witnesses' name and present location could be disclosed based on the employer's confidentiality policy. Nonetheless, the claimant "through unofficial channels" was able to ascertain the location and telephone number of the potential witness. When that occurred is unknown, however, the claimant and her attorney did contact the potential witness on June 10, 2004, and obtained a verbal waiver of confidentiality. The witnesses' statement was taken via tape recording on June 11, 2004, and was transcribed and exchanged on June 18, 2004.

The claimant asserts that the hearing officer erred in excluding Claimant's Exhibit No. 12, the witnesses' transcribed statement, which the hearing officer excluded on the basis of "No good cause was found to admit the document as the claimant did not use due diligence to obtain the statement after the witness was located." The claimant argues that a "determination of good cause is not necessary unless the hearing officer first determines that the evidence was not known to the party or was a document that was not in the party's possession, control, or custody." Section 410.160 provides that the parties shall exchange all medical reports, expert witness reports, medical records, and witness statements within the time prescribed by Texas Workers' Compensation Commission (Commission) rule. Section 410.161 provides that a party who fails to disclose such information or documents at the time disclosure is required may not introduce the evidence at any subsequent proceeding unless good cause is shown for not having timely disclosed the information or documents. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)) provides that the parties shall exchange with each other medical reports and records, witness statements, and other documents intended to be offered into evidence no later than 15 days after the BRC and thereafter exchange additional documentary evidence as it becomes available. Given that the claimant did not show an attempt to obtain and exchange the statement within the time period prescribed by Rule 142.13(c) we cannot agree that the claimant was not required to make a showing of good cause in order to obtain its admission or that the hearing officer abused her discretion in ruling no good cause had been established for failing to timely exchange the statement. *See* Texas Workers' Compensation Commission Appeal No. 030675, decided April 28, 2003, for a similar result. Apparently the potential witness was discussed at the BRC on May 24, 2004, and there was no showing that the witness could not have been "unofficially" contacted, a waiver of the confidentiality obtained and an exchange made with the carrier within 15 days of the BRC.

Whether the claimant fell as she alleges, had disability as a result of those falls and whether the second fall was an attempt to injure herself and claim an injury were factual determinations for the hearing officer to resolve. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer could believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Fairly clearly the hearing officer did not find the claimant's version persuasive.

The hearing officer's decision and order are affirmed.

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

**RUSSELL OLIVER, PRESIDENT**
**221 WEST 6TH STREET, SUITE 300**
**AUSTIN, TEXAS 78701-3403**.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge