APPEAL NO. 950142

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The hearing officer, (hearing officer), convened a contested case hearing (CCH) on September 16, 1994, and reconvened it and closed the record on October 26, 1994, to consider the sole disputed issue reported from the benefit review conference (BRC), namely, whether the respondent (claimant) timely reported his injury to the employer or had good cause for not doing so, and to consider an issue added by the hearing officer at the request of the claimant, namely, what is the date of the injury. Based on certain factual findings, three of which are challenged for insufficiency of the evidence by the appellant (carrier), the hearing officer concluded that claimant's date of injury was (date of injury), and that he reported his injury on or before the 30th day after that date. In addition to challenging the dispositive findings and conclusions for insufficient evidence, the carrier asserts that the hearing officer erred in failing to specify the good cause basis for allowing the additional issue, erred in denying carrier a continuance of the September 16th hearing, erred in admitting certain irrelevant testimony, and erred in failing to timely issue a decision and order under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.16(c) (Rule 142.16(c)). Alleging bias by the hearing officer against the carrier which resulted in "a pattern of irreparable harm," the carrier seeks reversal and a different hearing officer if a remand is ordered. The claimant's response maintains that the evidence is sufficient to support the challenged findings and conclusions and that the hearing officer did not commit reversible procedural or evidentiary errors.

DECISION

Affirmed.

On September 16, 1994, the hearing officer convened the CCH. In addition to the claimant and his attorney there were present three witnesses for the claimant, namely, (Mr. EK) and (Mr. MW), who had been subpoenaed, and (Ms. SN). The carrier's attorney appeared by telephone and moved for a continuance asserting that he was presently involved in a court-ordered mediation, that he had just received from the employer by fax on the preceding afternoon a copy of the Texas Workers' Compensation Commission's (Commission) order setting the CCH for September 16th, that the order was not mailed by the Commission until September 14th, and that Rule 142.6 requires 10 days' notice for an expedited CCH. However, Rule 142.6(c)(3), which requires written notice of a CCH not later than 10 days before the hearing, refers to Rule 142.6(b) providing for the setting of CCHs without a prior BRC. Rule 142.10(d) requiring the hearing officer to rule on requests for continuances does not establish a time limit for rescheduling a continued CCH. The carrier further argued that it was necessary to cross-examine the three claimant witnesses then present. Claimant opposed the motion indicating that the witnesses had traveled from another city and that the carrier had a duty to keep apprised of the status of the CCH setting. The hearing officer denied the motion but indicated the Commission would provide the carrier with a copy of the tape-recorded record prior to the reconvening of the CCH and further advised that if after reviewing the record the carrier

felt it necessary to cross-examine these witnesses the Commission would, if necessary, issue subpoenas at its expense.

Ms. SN testified that she had worked for (employer) from October 11, 1993, to July 18, 1994, as a purchasing and transportation assistant, that she knew claimant, that at the end, not the middle, of (month year), claimant told her on several occasions in her office he had hurt his knee on the truck he drove for the employer and was waiting for her and his supervisor, (Mr. DF), to "talk to them." She said that on an occasion in (month year), she saw Mr. DF go out the back door to avoid talking to the claimant but that claimant followed Mr. DF to talk about his accident. Ms. SN also testified that Mr. DF did not like claimant, often spoke ill of him, as did another employee,(Ms. NB), and in her opinion was "biased" against claimant.

Mr. EK, a former production supervisor for employer, who had known claimant for approximately 15 years and who had preceded Mr. DF as claimant's supervisor, testified that claimant was a "top notch" driver who had never had any problems with his employment and that the relationship between Mr. DF, now the production supervisor, and claimant was "not too good." He, too, felt Mr. DF was "biased" against claimant.

Mr. MW a retired former production manager for employer for nearly 40 years, testified that claimant, who had driven for employer for about 14 years, was the best driver the employer ever had, having driven over one million miles without a chargeable accident, that claimant kept his own records which were usually correct when in conflict with employer's records, that the relationship between Mr. DF and claimant was "not good at all," and that Mr. DF did not like claimant. He said Mr. DF was often in his office to "gripe" about claimant but that the complaints had no merit. He also stated that claimant was fired after the accident.

On October 26, 1993, the hearing officer reconvened the hearing. Citing Rule 142.13(c), the carrier moved to strike the testimony of Ms. SN contending claimant had no good cause for not having timely identified Ms. SN as a person having knowledge of relevant information. The motion was granted. The carrier then moved to strike the testimony of Mr. EK and of Mr. MW on relevance grounds. Claimant maintained that their testimony regarding the "bias" of claimant's supervisor, Mr. DF, was relevant because claimant's credibility was involved. The hearing officer denied these motions and we find no error in these rulings. Not only is conformity to the rules of evidence not necessary in a CCH (Section 410.165(a)) but a claimant's credibility is always relevant. *See e.g.* Texas Workers' Compensation Commission Appeal No. 931004, decided December 14, 1993. Similarly reviewing for abuse of discretion, we find no merit in the hearing officer's denial of the continuance. Not only did the hearing officer strike the testimony of Ms. SN but both Mr. EK and Mr. MW were present and cross-examined by the carrier at the October 26th hearing and the carrier indicated it had transcribed the tape-recorded record of the September 16th hearing received on October 11, 1994.

The hearing officer introduced the May 10, 1994, report of the BRC held on April 26, 1994; she also took official notice of the record of the September 16th CCH, of claimant's July 30, 1994, request to add the date of injury issue, the carrier's August 22, 1994, opposition, and the hearing officer's August 25, 1994, order adding the date of injury issue. Claimant based his request for the issue on the grounds that new evidence had been discovered showing the actual date of his injury to have been on or about (date of injury), not on (date), as he had previously asserted, that the new evidence was discovered through claimant's Texas Employment Commission (TEC) benefits appeal hearing at which the claimant was able to show the date of injury to be on or about (date of injury), that date being the last time claimant drove a truck for employer to (City A), Texas, that this new evidence was in the custody and control of the employer and was not made available to claimant before the TEC hearing, and that resolution of the timely notice of injury issue necessarily depended on establishing the actual date of the injury. The claimant's request asserted that this information constituted good cause for adding the issue. The carrier did not dispute the good cause grounds asserted by claimant but simply took the position that claimant should have raised the issue at the BRC and that adding the issue at the CCH would "work severe and irreparable harm" on the carrier. The nature of such harm was not specified. The hearing officer's August 25th order recited that good cause appeared for adding the issue and the Decision and Order states that good cause was found. The carrier's appeal asserts error in the hearing officer's failure to articulate the good cause she found. We find no merit in this appealed issue under the circumstances of this case. When the issues to be resolved were reviewed by the hearing officer with the parties at the CCH the carrier did not complain of any shortcoming in the order adding the issue nor request the hearing officer to articulate the good cause basis she had found. Section 410.151(b) provides that an issue not raised at a BRC may not be considered at the CCH unless the parties consent or the Commission determines that good cause existed for not raising the issue at the BRC. *And see* Rule 142.7. As noted, the BRC was held on April 26, 1994, and the BRC report gave no indication that claimant was aware of evidence that called into question the (date) date of injury he had asserted. There was no evidence as to the date of the TEC hearing. However, the carrier did not dispute claimant's contention regarding the new evidence adduced at that hearing nor did the carrier assert that claimant's request otherwise failed to meet the requirements of Rule 142.7(e). With the record in this posture, we can imply a finding that the hearing officer found good cause in the undisputed assertions contained in claimant's request for the issue. *Compare* Texas Workers' Compensation Commission Appeal No. 94416, decided May 24, 1994, where the absence of information in the record on the good cause necessitated remand. *And see* Texas Workers' Compensation Commission Appeal No. 941153, decided October 13, 1994, where the Appeals Panel determined that the additional issue was tried by consent.

As for the failure of the hearing officer to file her decision in 10 days as provided for in Rule 142.16(c), the Appeals Panel has previously held that such time limits are not

mandatory. Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992.

As for the merits of the disputed issues, claimant testified that on (date of injury), he was loading employer's truck with feed products and while on the steel truck ladder he dropped a screen he was holding. To avoid being cut by the screen he jerked his legs aside and struck his knee on the ladder. That claimant sustained a compensable injury to his knee was not in dispute. He indicated that at first he thought he had only bruised the knee but that it was later drained twice, an MRI revealed a tear, and he will require arthroscopic surgery. Claimant further testified that on the first and second days following his injury he told Mr. DF about the injury in the office, that he asked Mr. DF to accompany him to the loading dock so he could show him how it happened, and that Mr. DF responded he did not have the time. Claimant also testified that he told (Mr. JW) about his injury at that time and that Mr. JW was considered a supervisor in the absence of Mr. DF. Claimant said that by (prior date of injury), his knee was so swollen he could hardly walk, that he again told Mr. DF about the injury, and that Mr. DF then wrote a report. Claimant said that he and Mr. DF consulted a driver schedule sheet in an effort to identify the injury date, that he recalled the injury as having occurred on a day he drove the truck to City A, Texas, and that although the sheet showed his truck scheduled for City A on both (date) and (date of injury), he thought it was the earlier date. However, claimant further testified that later at the TEC hearing he saw certain employer dispatch forms not previously available to him which indicated that his (date) run was to (City B), Texas, and he recalled driving there and then being redirected from there to City A. With this information claimant said he was able to establish that (date of injury) was in fact the date he was injured so he changed the asserted date of injury accordingly.

Mr. DF testified that claimant did not report the knee injury to him prior to (prior date of injury), but did so on that date. Mr. DF acknowledged that claimant said it happened the last time he went to City A. Mr. DF also said that when he and claimant were looking at the schedule sheet trying to identify the injury date, he pointed out that claimant went to City A on (date of injury) but claimant said that was not the run and that they then went back to the (date) run. Claimant said he did not know why they picked the (date) run. Mr. DF denied being biased against claimant. On March 11, 1994, Mr. DF gave claimant a written reprimand for not immediately reporting his accident.

Mr. EK and Mr. MW both testified that they had no personal knowledge of claimant's injury in that they were not in the employ of the employer at the time of the accident. They both also essentially reiterated their prior testimony to the effect that in their opinions Mr. DF disliked claimant. Ms. NB testified that she handled the workers' compensation claims for employer, that on (prior date of injury) claimant and Mr. DF came to her with information on the claim and indicated that the date of injury was (date). She also said that claimant worked for several days in February 1994 after being taken off work for two weeks by his doctor with a diagnosis of internal derangement of his knee and that

the employer gave him a written reprimand for being late in reporting the injury. The point of this testimony had to do with inconsistencies in claimant's testimony. She denied claimant's assertions that the employer instructed its employees to avoid contacts with claimant and his attorney.

The carrier does not challenge the factual finding that (date of injury) was the last date in (month year) that claimant was scheduled to make a delivery to City A. The carrier does dispute findings that claimant's injury occurred on the last date in (month) that he was scheduled to make a delivery to City A and that claimant reported his injury to his immediate supervisor on the first and second days following his injury. Carrier further disputes the legal conclusions that the injury date is (date of injury), that claimant's sustained an injury in the course and scope of his employment on that date, and that he reported his injury on or before the 30th day after his injury date. Section 409.001 requires that an employee notify the employer of an injury not later than the 30th day after the date the injury occurs.

The two disputed issues presented the hearing officer with questions of fact to resolve. It is clear that the hearing officer found claimant's testimony to be credible. The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility it is to be given. Section 410.165)(a). It is for the hearing officer to resolve the conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We will not disturb the challenged findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 150 Tex. 632, 244 S.W.2d 660 (1951). We do not find them to be so in this case.

Finding no reversible error and the evidence sufficient to support the challenged findings and conclusions, the decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge