APPEAL NO. 950145

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 19, 1994, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues were:

1.Whether Claimant was injured within the course and scope of his employment on (date of injury),

2.Whether Claimant timely reported such alleged injury, or had good cause for failing to do so, and

3.Whether Claimant has experienced disability.

The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on (date of injury) (all dates are 1993 unless otherwise noted), that claimant had failed to timely report his alleged injury and did not have good cause for failing to do so and that since claimant did not sustain a compensable injury he did not, by definition, have disability.

Claimant in his appeal indicates disagreement with certain of the hearing officer's determinations, asserts that he is more credible than carrier's witnesses and objects to the hearing officer's denial of a subpoena to another employer to produce certain x-rays. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Claimant testified that he was employed as a "driller" with (employer) and that on (date of injury), claimant went up in the (d) to assist another worker when he injured his back working with a "drill collar." Claimant testified that he "was hurting pretty bad" and told his immediate supervisor, (CM), the tool pusher about his injury that day and called employer's drilling superintendent (Mr. H) on approximately October 26th. Claimant said that the injury was witnessed by several coworkers. Claimant testified the injury happened around 8:30 p.m. (claimant worked a 2:00 p.m. to 10:00 p.m. although some records show a 3:00 p.m. to 11:00 p.m. shift) and that he continued working the rest of his shift. Although claimant testified that the pain was so bad he could hardly stand up and had to walk sideways, claimant nonetheless continued working until October 27th when he was terminated, apparently for absenteeism. Claimant's version of events on (date of injury) is supported to some degree by coworkers (SB) and (JW) in written signed statements. SB stated claimant "hurt his back bad . . . around (date of injury) 1993 or after, . . . [and] complained about back to [CM] and was later fired." JW states ". . . around the middle of

Oct. of 93 . . . [claimant] went to pull back on a collar & he hurt his back. He couldn't hardly stand up."

After claimant was terminated by the employer he attempted to obtain work with two other drilling companies but was unable to pass the pre-employment physical examinations. Employer's district manager, (Mr. D), testified that claimant called him on December 1st and told him that he (claimant) had "hurt his back working (d) sometime in September 1993 on Rig # 39." Mr. D said that claimant had told him "that he went to take a physical and x-rays for another job and the x-ray showed his back was hurt." Mr. D said that he called CM, the tool pusher, to ask if claimant had reported an accident and that CM said no. Mr. D testified that CM had called back later that day and said that he (CM) had checked with the rest of the crew and that no one knew of an injury to claimant. It is undisputed that claimant did not seek medical attention until December 23rd, two days after he was involved in an automobile accident (MVA) on December 21st. Claimant was seen by (Dr. K), a friend of claimants'. Claimant said Dr. K did not keep good records and treated him as a family friend. Claimant testified that he, with the assistance of Dr. K, completed an Employee's Notice of Injury (TWCC-41) dated "1-31-94" which listed a date of injury of "(date of injury)" with lost time beginning "(date)" while "tripping pipe on rig floor(,) was working as floor hand." Meanwhile, Mr. D had prepared a memo which resulted in an Employer's First Report of Injury (TWCC-1) indicating claimant had claimed he hurt his back working for employer "sometime between July 1993 & September 1993." Other documents also indicate claimant may have initially reported a "July to September" date of injury. On cross-examination when asked whether he injured his back in the (d) or on the rig floor tripping pipe, claimant said he had gotten "mixed up" and that the tripping pipe incident had happened in July in an injury which had resolved itself. Claimant also admitted that he had been involved in a second MVA on March 6, 1994, and that he was making claims for both those accidents against the other party.

Carrier presents testimony from CM, who denied an accident had ever been reported to him and who stated that if claimant was in such pain that he could hardly stand and "walked sideways" he would surely have noticed it and reported it. Carrier presented documentation that claimant had signed a daily log sheet for (date of injury) stating the number of hours he had worked and that he had not received an injury that day. Claimant agreed he had signed the form, and drawn safety pay, but argued the form is signed routinely unless there was a serious "lost time" accident. CM and Mr. D deny that is the case. Carrier submitted seven brief written statements from other coworkers on the same and different shifts as claimant, all denying any knowledge of claimant's injury or any complaints.

The medical evidence is very sparse and none makes reference to a work-related injury of (date of injury). The hospital report of December 23rd, when claimant first sought care, only refers to right wrist and low back complaint with an impression of "Spondylosis with first degree sponydylothesis of L5. There is posterior subluxation of L4." A report

dated September 13, 1994, from Dr. K states he saw claimant on November 29th, discussed scoliosis of the spine, sciatica and limitations of motion but gives no history or commentary on the cause of claimant's problems. A May 23, 1994, note by Dr. K refers to "post traumatic lesions" but does not identify a specific cause or event. Other reports refer to degenerative disc disease; spondylolisthesis, and narrowing of lumbar spine interspace.

The hearing officer, in a fairly extensive summary of the testimony and discussion, comments on inconsistencies and contradictions in the testimony as follows:

> While it is not unusual for otherwise credible testimony to contain relatively minor inconsistencies, it appears that the evidence supporting Claimant's allegations contains inconsistencies which cannot fairly be classified as minor. In particular, it is noted that Claimant gave mutually exclusive versions of an injury which allegedly occurred on (date of injury), and that Claimant's explanation of the discrepancy in those injury reports is not persuasive. It is also noted that Claimant did not seek medical attention until two days after a motor vehicle accident of December of 1993, despite Claimant's allegation that after his injury of (date of injury), he was in such pain that he could not stand up straight.
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> Since it does not appear that the record contains the necessary preponderance of the credible evidence to support Claimant's allegations that he was injured within the course and scope of his employment on (date of injury), or that he timely reported such alleged injury, or, alternatively, had good cause for failing to make a timely report, a decision in favor of Carrier is appropriate with regard to these issues.

Claimant, in his appeal, maintains that he did report his injury to CM, points out some inconsistencies in CM's testimony, and argues that his testimony is more credible than the carrier's witnesses. The hearing officer in her discussion comments that she denied a subpoena duces tecum to claimant with reasons why. In his appeal claimant, for the first time as far as we can determine, raises the issue that he has been denied "due process of Law" by being denied the opportunity to present the pre-employment x-ray films of one of the firms with which he sought to obtain employment after October 1993.

The case turns on the credibility of the witnesses and as the hearing officer pointed out, it is the hearing officer that is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). Further, in a workers' compensation case the claimant has the burden of proving that the injury occurred in the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). That burden can be met by the claimant's testimony alone, if believed by the hearing officer. However, the claimant's testimony, as coming from an interested party, only raises an issue of fact for the trier of fact (Escamilla v. Liberty Mutual Insurance

Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ)) and the hearing officer, as the trier of fact has the responsibility to judge the credibility of the claimant and the other witnesses and the weight to be given to the testimony. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). In this case the hearing officer, as evidenced by her discussion, clearly did not find claimant's testimony and evidence credible. When presented with conflicting evidence, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). We find the hearing officer's decision to be supported by sufficient evidence.

Regarding the hearing officer's decision not to issue a subpoena, at the CCH, claimant, on occasion, stated he would obtain the records of the employers with which he had applied for employment. At some point (possibly at a pre-hearing conference) claimant in an undated hand written unsigned note requested a subpoena for "X-Rays from Texas Health Center [THC]." There was no indication on the face of the document identifying which x-rays, for what period, for what patient. The hearing officer in an order dated October 3, 1994, found no good cause to issue the subpoena and denied claimant's request. The hearing officer, in her discussion, gave the reasons for denying the request as follows:

> Claimant's request for a subpoena duces tecum is requesting actual x-ray films, and makes no indication that Claimant did not possess or could not obtain the reports of the x-rays in question, which reports would logically be considered every bit as useful as the actual films. Since Claimant possessed, and offered in evidence, reports of the pre-employment physical examination he took for Hercules Drilling, there can be no harm in the denial of the subpoena duces tecum for x-rays taken for Delta Drilling (x-rays for Delta were taken after those of Hercules).

The standard of review for a finding of no good cause, for refusing to issue the subpoena, is one of abuse of discretion. To obtain a reversal based on abuse of discretion due the exclusion of a piece of evidence, an appellant, claimant in this case, must show that the ruling was in error and that error was calculated to cause and probably did cause the rendition of an improper decision. Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989); Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). Reversible error does not usually occur in connection with evidentiary rulings unless the appellant can demonstrate the whole case turns on the particular evidence excluded, in this case "X-rays from [THC]." We find it difficult to detect error in failing to subpoena x-ray films (which in all probability no one at the CCH was qualified to interpret) when a prior x-ray report of the same portion of claimant's body was already in evidence. Consequently, we find no reversible error in the hearing officer's denial of a subpoena in the absence of any showing how it might be material to the issues in question.

Having affirmed the hearing officer's decision regarding no injury in the course and scope of employment, claimant, by definition, does not have disability (Section 401.011(16)).

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge