APPEAL NO. 950305

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq*. (1989 Act). On January 12, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) was injured compensably on (date of injury), that she gave notice to her employer timely, and that she had disability since March 30, 1994, through the date of hearing. Appellant (carrier) asserts that claimant did not prove an injury took place, that timely notice to a supervisor was not shown, and that since there was no compensable injury there can be no disability. Carrier adds that its Exhibit No. 1 was excluded from evidence in error. Claimant replies that the decision should be upheld.

DECISION

We affirm.

Claimant testified that she worked for (employer) on (date of injury), a Sunday, when she hurt her back when handling bags of garbage. She added that she could not walk normally on her right foot for a period of time after hurting her back. She did not obtain medical help until March 30, 1994, she testified, because she could not afford it. On (date of injury), claimant stated that she told a supervisor, (FV), whose last name is (FV). There is no statement in evidence from FV, and he did not testify. In November 1993, claimant quit her job with employer.

While carrier disputed that an injury occurred, the defining issue in this hearing was whether claimant gave adequate notice. Carrier contended that no notice was given and if notice was given to FV, he was not a supervisor. Carrier presented evidence from other persons in supervisory positions who indicated they received no notice of injury from claimant until the time of her March 1994 hearing with the Texas Employment Commission.

(MV) testified that she is a supervisor and worked on (date of injury). She is not sure whether claimant worked that day. She added that supervisors were rotated on the weekends, that FV was a supervisor at that time, but she could not remember whether FV worked that weekend or not. She said that she was the only supervisor on (date of injury). Claimant did not report an injury to her, and she did not recall claimant ever having a work injury.

(JN) testified that she is project manager for employer. She agreed with other testimony that she first heard of an alleged work injury in March 1994 in a hearing before the Texas Employment Commission. She stated that FV was working on (date of injury). She added that she was not sure FV was a supervisor at that time because "I had just made some changes in personnel." She later testified that a sign in sheet dated later in September indicated that FV was a supervisor at that time. At that point in cross-examination, JN responded to the following question as shown:

Q.Okay. Okay. And you have testified previously that [FV] was her immediate supervisor. That's correct?

A.Yes, ma'am.

Carrier's appeal addresses its Exhibit No. 1 which was not admitted. Carrier's exhibits were considered prior to any testimony, and Exhibit No. 1 was not admitted because it was not found to have been timely exchanged. Claimant objected to Carrier Exhibits Nos. 1, 3, 4, and 5 as not timely exchanged. Carrier then offered an explanation as to possible good cause for Exhibits Nos. 4 and 5. Exhibit No. 1 (a sign in list for (date of injury)) was thereafter discussed as having been received by the attorney for carrier from the adjustor (apparently for carrier) on January 10th (two days before the hearing). The hearing officer correctly excluded Carrier Exhibit No. 1. Thereafter, a question of translation occurred while claimant's counsel was questioning claimant; claimant's response apparently mentioned being "told to sign a paper that said she had not had an injury" according to the objection to the translation made at the time by carrier's counsel. The hearing officer pointed out that counsel for carrier could cross-examine claimant on the point when the time came. On appeal, carrier states that this translation could have provided good cause for admission of Carrier Exhibit No. 1 had he been able to "cure this problem" of translation. However, on cross-examination carrier elicited from claimant that the sign in sheet contained a space for stating whether the person saw an accident or not. Claimant stated that she initialed the document because she was told to (apparently stating that she did not see an accident). Carrier, however, never re-urged admission of Carrier Exhibit No. 1 or stated that claimant's testimony in any way showed good cause for admitting Carrier Exhibit No. 1. Without urging good cause based on any point other than that initially raised (concerning when an adjustor provided the document), good cause for admission of a document related somehow to a question of translation will not be considered for the first time on appeal when not raised below. *See* Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991. We note that even if the hearing officer erred in excluding this document, claimant testified on cross-examination as to having initialed it indicating that no accident had been seen. The document then was cumulative of what claimant testified concerning her initials thereon, and its exclusion probably did not cause an improper decision. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ).

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. While he could have believed that claimant was not injured when she saw no doctor for over six months after the alleged injury, he did not have to give that fact controlling weight. While the testimony from other employees varied about who was the supervisor on the date of injury, there was sufficient testimony that FV was working then and that he was a supervisor, so that it may have been inferred that he was a supervisor on that day. Claimant was steadfast in saying that she told FV of her injury at the time. As stated earlier, no evidence from FV was presented. In these circumstances the hearing officer, as fact finder, could choose to believe the testimony of claimant both as to having

hurt her back on (date of injury), and as having reported it that day to a supervisor, FV. The evidence sufficiently supported the findings of fact that claimant was injured in the course and scope of employment and gave timely notice thereof to the employer.

The only point raised on appeal by carrier as to disability is based on the compensability of the injury. Therefore we affirm the determination as to disability beginning on March 30, 1994, based on the testimony of claimant. While the hearing officer notes that "testimony and evidence" was presented that claimant's physician took her off work on March 30, 1994, no medical record provides such evidence, although later medical records do address work status. In addition, while not raised on appeal, the transcript indicates the hearing officer stated that the carrier had the burden of proof as to the issue of whether claimant reported an injury in 30 days; with no objection raised at the time to such a clearly erroneous statement, we can only surmise that the transcription was inaccurate.

Finding that the decision and order of the hearing officer set forth at the end of the opinion are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge