APPEAL NO. 950397

On January 6, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The appellant (carrier) appeals the hearing officer's decision that the respondent (claimant) sustained a compensable occupational disease on (date of injury), and had disability from July 5, 1994, to November 9, 1994. The claimant requests affirmance.

DECISION

Affirmed.

The claimant testified that she worked as a classification clerk for the employer, the (employer), from June 1990 to January 1994, and that she began working as a security officer for the employer in January 1994. She testified that her job duties as a classification clerk required her to use a computer from three to four hours at a time to input inmate information, and that she typed cards, prepared weekly reports, wrote receipts, and performed other clerical duties. She testified she started having "symptoms" in June or July of 1993. The claimant went to (Dr. R), an obstetrician, in November 1993 and she was found to be pregnant. In a report dated June 29, 1994, Dr. R stated that the claimant was diagnosed with carpal tunnel syndrome (CTS) on November 23, 1993. In April 1994 Dr. R reported that "due to complications with her pregnancy she will not be able to continue working until after delivery of her child." On June 7, 1994, Dr. R reported that "the claimant is suffering from severe [CTS] and cannot function on the job because of this." On June 13, 1994, the claimant gave birth. On (date of injury), the claimant filed a written notice of injury with the employer in which she stated that she had CTS and that her doctor told her the CTS was from working on computers. On June 29, 1994, Dr. R reported that the claimant's CTS appeared approximately the "first of the year quite early in her pregnancy and has steadily gotten worse." In a written statement a coworker stated to the effect that the claimant told her that her doctor had said that the swelling and tingling in her hands was due to her pregnancy, and in an investigative report, a safety officer for the employer concluded that Dr. R implies in his reports that the claimant's CTS is related to her pregnancy.

The claimant said she went to (Dr. Z) on July 5, 1994. An EMG and nerve conduction studies done on July 20, 1994, demonstrated that the claimant has bilateral CTS. Dr. Z reported on August 9, 1994, that the claimant had been under her care since July 5, 1994, and that the claimant would not be able to return to work until further notice. On several medical forms Dr. Z noted that the claimant's injury is not work related. However, in her report of September 19, 1994, Dr. Z stated that the claimant has CTS and that "[a]t this time, it is not recommended that [claimant] return to work where she does repetitive wrist motions until she has corrective surgery."

On September 21, 1994, the Texas Workers' Compensation Commission (Commission) ordered the claimant to attend an examination by (Dr. B) to determine if her condition is work related. Dr. B examined the claimant on September 27, 1994, diagnosed bilateral CTS, and stated "[a]s per EMG with carpal tunnel problems in my opinion attributable to work related activities, though aggravated by recent pregnancy." The claimant testified that after seeing Dr. B she was seen by (Dr. E) at the request of the carrier and that he reported that her condition was not work related.

The carrier disagrees with the hearing officer's determination that on (date of injury), the claimant sustained a compensable occupational disease (bilateral CTS) injury while in the course and scope of her employment with her employer. The carrier asserts that the evidence demonstrates that the claimant's CTS was caused by her pregnancy.

The claimant has the burden to prove that she was injured in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). It has been held that the mere fact that a claimant has a pre-existing condition which enhances or aggravates the injury complained of does not in itself defeat the right to recover under the workers' compensation statutes, and that the carrier must show that the prior injury is the sole cause of the present incapacity. Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977). The hearing officer is the trier of fact in a contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer can believe all, part, or none of the testimony of any witness, and resolves conflicts in the evidence, including the medical evidence, and determines what facts have been established. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084, *supra*. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084, *supra*. Although there is conflicting evidence, the testimony of the claimant along with Dr. B's opinion provides sufficient evidence to support the hearing officer's decision. We conclude that the hearing officer's decision is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 931179, decided February 11, 1994.

The carrier contends that the hearing officer committed reversible error in not admitting into evidence a medical report of Dr. E dated December 22, 1994, which is addressed to the carrier with a copy to the claimant. Dr. E states in the report that he examined the claimant at the request of the carrier on December 21, 1994, that he is unable to ascribe her CTS to her work-related activities, and that she probably developed her CTS as a result of her pregnancy. The claimant objected to the report because the carrier had

not exchanged it with her prior to the hearing. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(b) (Rule 142.13(b)) provides that parties shall exchange documentary evidence in their possession not previously exchanged, as described in Subsection (c), before requesting additional discovery by interrogatory or deposition. Rule 142.13(c) provides in pertinent part that no later than 15 days after the benefit review conference the parties shall exchange, among other things, all medical reports, that thereafter parties shall exchange additional documentary evidence as it becomes available, and that the hearing officer shall make a determination whether good cause exists for a party who had not previously exchanged such information or documents to introduce such evidence at the hearing. The carrier acknowledges that it received Dr. E's report on January 2, 1995, but did not exchange it with the claimant until Friday, January 6, 1995, the day of the hearing. However, the claimant testified that Dr. E mailed her a copy of the report and that she received it on "Monday," which we take to mean Monday, January 2, 1995, the same day the carrier said it received the report from Dr. E.

In Texas Workers' Compensation Commission Appeal No. 91058, decided December 6, 1991, we stated that "lack of surprise is not a basis, in and of itself, to excuse, nor does it equate to good cause for failing to comply with exchange requirements." We have described good cause as "that degree of diligence as an ordinarily prudent person would have exercised under the same or similar circumstances." Texas Workers' Compensation Commission Appeal No. 91009, decided September 4, 1991. In Texas Workers' Compensation Commission Appeal No. 91088, decided January 15, 1992, we noted that "[t]he statutory provisions directing exchange of information state that a party must disclose information in its possession or control," and that Rule 142.13 "was not intended to require a reverse exchange of documents obtained as part of the opposing party's "disclosure." In Texas Workers' Compensation Commission Appeal No. 93629, decided September 13, 1993, the claimant failed to exchange documents and the hearing officer admitted the documents over objection because the claimant was not represented and because the carrier had copies of the documents. We reversed and remanded for clarification of the record on matters relating to evidence admitted and stated "[w]e have stated before that it is error for a hearing officer to admit evidence that was not exchanged as required without a finding of good cause." In Texas Workers' Compensation Commission Appeal No. 94062, decided March 1, 1994, we stated that "[w]e believe that Section 410.160 and applicable rules make clear that each party must disclose to the other the evidence it intends to bring forward at the hearing."

In our opinion, error, if any, on the part of the hearing officer in excluding Dr. E's report did not amount to reversible error. It has been held that to obtain reversal of a judgment based upon error of the trial court in admission or exclusion of evidence, the appellant must first show that the trial court's determination was in fact error, and second, that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. Civ. App.-San Antonio 1981, no writ). In the instant case, the claimant testified that Dr. E had examined her at the request of the carrier and that he had reported that her condition was not work related. Thus, the hearing

officer had before her the substance of Dr. E's opinion and there is no reason to believe that the hearing officer did not credit the claimant's testimony on this matter inasmuch as such testimony was adverse to the claimant's interests. Despite having been informed by the claimant of Dr. E's opinion and having Dr. Z's notations that the injury is not work related, the hearing officer found for the claimant on the issue of a compensable injury. The claimant's testimony and Dr. B's opinion support that determination. Consequently, we cannot conclude that the exclusion of Dr. E's report was reasonably calculated to cause and probably did cause rendition of an improper judgment. We also observe that Dr. E's report reflects that the claimant started to experience numbness in her hands in June 1993, which would have been before the onset of her pregnancy (she gave birth in June 1994) and thus would actually be supportive of the claimant's claim.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge