APPEAL NO. 950440

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 31, 1995, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues were:

1.Whether Claimant suffered and (sic) injury in the form of an occupational disease on or about (date of injury).

2. Whether Claimant suffered any disability as the result of a compensable injury on (date of injury).

The hearing officer determined that claimant had not sustained a compensable injury in the course and scope of her employment between May 31 and June 13, 1994 (all dates are 1994 unless otherwise noted), and that consequently claimant, by definition did not have disability. Appellant, claimant, contends that the hearing officer erred in a number of areas and generally challenges the sufficiency of the evidence. Claimant requests that we reverse the hearing officer's decision and render a decision in her 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, a 22-year-old lady, whose previous work experience was as a cashier, was employed by, (employer), as a meat cutter working inside a large freezer trimming fat off meat. Claimant said she wore steel-toed rubber boots and a "steel" glove on her left hand. A few days after she started work on May 31st, claimant said she began to complain of pain and numbness in her left hand and left foot. Claimant testified that she notified her trainer and eventually was sent to see (Dr. C), the employer's physician for work injuries, on (date). Dr. C testified that claimant complained to him of numbness in one finger (either the little finger or the index finger) of her left hand and her left big toe. Dr. C testified that he examined the finger, hand and left foot, found no swelling or discoloration and no evidence of injury. (Claimant testified that her foot was "swollen and purple.") Dr. C stated that he thought the numbness might be due to the cold environment and suggested she be moved to work outside the freezer for a while. Dr. C gave claimant a release for light duty. Claimant said she returned to work on (date) but asked to leave early. Claimant only went to pick up her paycheck on June 10th. Claimant testified that she was unhappy with Dr. C's care and that she went to a hospital emergency room (ER). The date claimant went to the ER is not clear--only that it was after seeing Dr. C. No record from the ER is in evidence. On Monday, June 13th, claimant apparently went to work but was sent to see Dr. C for a release to work. Claimant said she saw Dr. C who gave her a release to work but claimant was subsequently terminated on that date. The employer's safety coordinator confirmed

claimant was terminated for absenteeism under a policy where a new employee is on 30-days probation and any unexcused absence is ground for termination.

On June 22nd claimant began to see a chiropractor, (Dr. V), who initially indicated that he believed claimant had carpal tunnel syndrome (CTS) in a report dated June 27th. Dr. V took claimant off work effective June 25th. Subsequently, in a report dated August 9th, Dr. V agreed "that a true [CTS] usually does not occur in this short of time interval." In a deposition by written questions, Dr. V opined that the cause of claimant's injuries was "use of unconditioned body parts for repetitive activity for long hours in extreme environmental conditions." The claimant's theory was that her job in the freezer caused her to suffer from frostbite and the repetitious nature of her job caused CTS. The hearing officer, in his discussion, stated:

> The medical evidence in this case does not support a conclusion that Claimant suffered an injury. At the most, she was uncomfortable in the cold work environment and overused her unconditioned arm muscles. The resulting pain was nothing more than pain, with no injury being established.

There was no medical evidence that claimant suffered from frostbite.

Claimant misunderstands the hearing officer's recitation of the stipulation that claimant was employed by employer on (date of injury), which only means that claimant was in the employment of the employer on (date of injury), which was the date of injury listed in the benefit review conference report. Claimant maintains she was injured on (date), which is the date that she was seen by Dr. C. The hearing officer makes no determination of a date of injury, rather he states that claimant did not sustain a compensable injury "between May 31 and June 13 [the date claimant saw Dr. C a second time and obtained a release to work]." We find no error in the hearing officer's recitation of the stipulations and the so-called date of injury. We do note, however, that it appears the hearing officer inadvertnelty stated May 9th instead of (date) in two determinations. This clerical mistake does not constitute reversible error in that the evidence and other portions of the decision clearly reflect the correct intended dates.

Claimant contends the hearing officer erred in not allowing (Dr. E), an associate of Dr. V, to testify. Claimant's attorney conceded that Dr. E was not identified or listed as a witness on a witness list exchanged with carrier or in response to carrier's written interrogatories. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1)(D) (Rule 142.13(c)(1)(D)) requires that the identity and location of any witness known to have knowledge of relevant facts be exchanged with the opposing party. Failure to disclose this information without good cause may result in the inability to use that testimony at the hearing. Section 410.161. Termination of claimant's attorney (claimant was represented at the CCH) does not constitute good cause and, in this case, was not even made known to the hearing officer. (Claimant was apparently represented by someone else in the

"terminated" attorney's office.) The hearing officer did not err in excluding the testimony of Dr. E.

Claimant, in her appeal, raises some evidence, new testimony and contentions specifically contrary to claimant's sworn testimony at the CCH. We will only note that we are limited in our review of the record developed at the CCH. Section 410.203(a)(1). Further, claimant has not shown that the information she now wishes us to consider was unknown or unavailable at the time of the CCH and that due diligence would not have brought such information to light. *See generally* Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983); Texas Workers' Compensation Commission Appeal No. 92092, decided April 27, 1992. As far as claimant's allegations that she does "not recall [Dr. V] ever seeing me," that statement and similar allegations are completely contrary to her sworn testimony at the CCH.

Whether claimant sustained an injury and the nature and extent of claimant's medical condition are factual determinations for the trier of fact, who is the hearing officer. By statute, the hearing officer is the sole judge of the weight and credibility of the evidence, Section 410.165(a), and it was in the province of the hearing officer to resolve any contradictions or inconsistencies in the evidence. St. Paul Fire & Marine Insurance Co. v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). 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). The claimant was an interested witness and the hearing officer was not required to believe her testimony that she suffered an injury on (date). Presley v. Royal Indemnity Insurance Co,., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). While the claimant may have felt pain and numbness in her left hand and foot in early June, that does not necessarily compel a finding that she sustained an injury, which is defined as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease." Section 401.011(26). We conclude that the hearing officer's decision is supported by sufficient evidence and that it 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).

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge