APPEAL NO. 951076

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in _____, Texas, on June 8, 1995, before (hearing officer), to decide whether the claimant was injured in the course and scope of her employment on or about _____, and whether she had disability. The claimant has appealed the hearing officer's decision that claimant was not injured in the course and scope of her employment and that therefore she did not have disability. In her appeal the claimant points to evidence supporting her position, and contends that the hearing officer unwittingly engrafted upon the injury claim a standard used for repetitive trauma injuries; she also disputes, as against the great weight of the evidence, the finding that the cause of claimant's herniated disk cannot be determined from the evidence presented. As to the issue of disability, the claimant complains on appeal of evidence from a private investigator, which was admitted over claimant's objection. The carrier in response points to Appeals Panel decisions which it contends support the hearing officer's decision.

DECISION

Affirmed.

The claimant operated a computerized PBX machine for (employer), a job which required her to wear a headset and sit facing a screen. She said her job duties also included filing and providing FAX service to hotel guests. (Carrier's witness, employer's personnel assistant, concurred with claimant's description of her job duties.) On the alleged day of injury[1] she was sitting facing her machine while sorting registration cards which she held in her lap. When someone came up behind her to ask her a question about a FAX, she said she turned her head and felt an "electrical shock" in her face. This symptom persisted for approximately a week, during which time she developed cramps and numbness in her arm, and awoke on one occasion with her arms drawn up to her shoulders. She called her doctor, Dr. Z, who she had been seeing for a prior lumbar injury, and he recommended she have a cervical spine MRI which showed a moderate sized central and right posterolateral disk herniation at C5-6. On November 17th Dr. Z wrote in a specific and subsequent medical report that he had explained the MRI results and treatment options to the claimant, who continued to have persistent neck pain and headaches (she said she had had migraines in the past but not of this severity). Medical records show the claimant saw Dr. Z again on November 21st and December 5th. On December 9th, he reported that claimant said she injured her neck at work when she turned her head rapidly to the left.

[1]Claimant initially believed the injury occurred on (alleged date of injury) but later stated it actually occurred on _____. The decision and order continues to refer to the alleged date of injury as occurring on or about (alleged date of injury), and neither party has complained of this.

Other medical records in evidence show that the claimant underwent physical therapy and that she went to an emergency room due to pain and headaches. On January 10, 1995, Dr. Z wrote "To whom it may concern" that claimant suffered a cervical injury at work on October 26, 1994, and that she had had a previous injury to the lumbar area. On February 2, 1995, Dr. Z wrote that the claimant has "no previous pre-existing cervical pain" and that the described head movement could cause a herniated disk. He also wrote "[n]o information from patient about new date of injury until lately." On February 16th Dr. Z wrote the carrier that the incident at work caused the herniation.

At the carrier's request the claimant was also seen by Dr. P, who wrote on May 4, 1995, that the only solution to the claimant's pain was surgery consisting of anterior cervical fusion with removal of the disk herniation. On May 31st Dr. P wrote the carrier, apparently in response to questions, that he believed, based upon the history, medical records, and examination, that claimant's herniated disk was related to an alleged injury of on or about (alleged date of injury). Dr. P also wrote that without surgery claimant would not be able to return to work. Dr. Z had previously taken claimant off work, although he acknowledged that she continued to work at a second job.

In addition to her job with employer, which ended with her termination in December 1994, the claimant also worked as the manager of an apartment complex. After the injury, however, she said she was able to work at that job only one day a week, and that she ceased this work entirely on February 28, 1995. After that date, she said, her husband (who had previously been the apartment maintenance man) took over the job of manager; she said her two teenaged daughters also helped out.

Admitted into evidence over the claimant's objection was a report from a private investigator who on May 25, 1995, represented himself to claimant as an individual inquiring about an apartment; he wrote that the claimant identified herself as the manager and told him that there were no vacancies. He also wrote that he spoke to two other persons (including claimant's mother) who said claimant was the apartment manager and her husband the maintenance man.

As noted earlier, claimant had had a previous injury to her lumbar spine, for which she had a laminectomy. Carrier introduced into evidence past medical records, one dated January 10, 1988, one which was undated, and one (an emergency room report) dated May 22, 1994, which said claimant was experiencing neck pain.

In her appeal the claimant complains of the following findings of fact:

FINDINGS OF FACT

4. The evidence presented does not preponderate to establish that the herniated disk in the claimant's neck was caused by her action of

twisting her neck on or about (alleged injury date), while sitting in her work station.

5. The claimant's activities which furthered the employer's business constituted nothing which was not inherent in daily life or in employment generally.

6. The cause of the herniated disk in the claimant's neck cannot be determined from the evidence presented.

7. The claimant's inability to obtain or retain employment is not the result of any injury which occurred while furthering the business interests of the employer.

The claimant points out that the hearing officer in her discussion of the evidence stated that claimant was a credible witness and that "both [Drs. Z and P] agree that the herniated disk was caused by the incident of (alleged injury date);" she states that Findings of Fact Nos. 4 and 6 are thus against the great weight of the evidence. The claimant further argues that Finding of Fact No. 5 is based upon a standard used to test the compensability of repetitive trauma claims, while this case involved an injury sustained by a single traumatic incident which occurred while the claimant was performing the duties of her employment. Finally, the claimant says the evidence shows she was terminated from her employment due to cervical pain, which also caused her to have to discontinue her second job. She argues that the investigative report should have been excluded from evidence.

While there appears to have been no argument advanced that claimant's injury was one of repetitive trauma, nevertheless there are cases of injury on the job in which an issue is raised as to whether the risk presented is personal to the claimant, or idiopathic. Texas Workers' Compensation Commission Appeal No. 941056, decided September 21, 1994, involved a claimant whose back injury occurred when he sneezed while operating a forklift. Following a lengthy and thorough discussion of case law and Appeals Panel decisions, the panel reversed and rendered a decision that the claimant had not suffered a compensable injury, stating:

> there was no evidence that any instrumentality of the employer was involved, or that the employment exposed claimant to any particular hazard or otherwise made any contribution to claimant's back injury. Claimant did not contend that his apparently spontaneous sneeze was caused by any factor in his work environment. Nor did he contend that he fell from the forklift or was jarred by the forklift or that he struck his back or any other body part on the forklift when he sneezed. All the evidence established was that claimant simply sneezed at the workplace and the sneeze resulted in his back injury.

Notwithstanding the above, the Appeals Panel distinguished a case similar to the instant one, Hanover Insurance Company v. Johnson, 397 S.W.2d 904 (Tex. Civ. App.-Waco 1965, writ ref'd n.r.e.), a case in which the employee, who was squatting while painting a tank, turned around when someone spoke to him, injuring his back. The court reasoned, "It is held that strains, sprains, wrenches and twists due to unexpected, undesigned or fortuitous events, even where there is no overexertion, and the employee is predisposed to such a lesion, are compensable. In our opinion the reason for plaintiff's turning and the turn were incidents of his employment." [Citations omitted.]

In our opinion, the facts of the instant case, unlike the circumstances of Appeal No. 941056, *supra*, do contain a nexus between the claimant's employment and the alleged neck injury in that she was required by her employment to sit facing a screen, to sort registration cards, and to respond to inquiries concerning Faxes. We consequently cannot agree with the hearing officer's Finding of Fact No. 5.

However, because we are required to affirm a hearing officer's decision on any grounds supported by the evidence, Daylin v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied), we will examine the record to determine whether Findings of Fact No. 4, 6, and 7 are sufficiently supported. According to the statement of evidence, the basis for these findings is apparently the fact that past medical reports (from her prior back injuries) reflect neck and shoulder pain which was never diagnosed, and treatment for migraine headaches which continued after (alleged injury date). The evidence also indicates, as the carrier pointed out, that the claimant did not link her neck pain to the incident at work until December 9, 1994, after three prior visits to Dr. Z.

The 1989 Act provides that it is the hearing officer who is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). As such, the hearing officer may resolve 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), and is privileged to believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). This applies equally to medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Thus, despite evidence to the contrary, the hearing officer could have inferred, based upon the evidence, that the claimant's herniated disk arose over time or from an incident other than that described by the claimant. As an appellate body, we may not substitute our judgment for that of the hearing officer if his or her determination is supported by some evidence of probative value and is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). This is equally true where, as in this record, the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Based upon these standards, and

the evidence before us, we decline to reverse the hearing officer's decision.

As to the evidentiary argument, the hearing officer originally excluded this report based upon the fact that it had not been exchanged prior to the hearing. (The carrier's attorney stated that the report, dated May 31, 1995, was received June 6th, but had not been sent to the claimant prior to the June 8th hearing.) However, the hearing officer changed her mind and found good cause to admit the document based upon the fact that the carrier had, on June 2nd, sent a letter to the claimant indicating that Steve Mercer (Mr. M), the investigator who signed the report, and two other persons were additional persons with knowledge of relevant facts, although carrier's attorney stated that the letter did not explain that these individuals worked with a private investigation company.

Section 410.160 provides that within the time prescribed by Commission rule, the parties shall exchange, among other things, "the identity and location of any witness known to the parties to have knowledge of relevant facts" and "all photographs or other documents that a party intends to offer into evidence at the hearing." Section 410.161 provides that a party who fails to disclose information known to the parties or documents that are in the party's possession, custody, or control at the time disclosure is required may not introduce the evidence at any subsequent proceeding before the Commission or in court unless good cause is shown for not having disclosed the information or documents under those sections. Rule 142.13 [Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.13] provides that the information contained in Section 410.160 must be exchanged by the parties no later than 15 days after the benefit review conference; the rule further provides that the parties shall exchange "additional documentary evidence as it becomes available."

The standard of review of evidentiary rulings by a hearing officer is abuse of discretion. Texas Workers' Compensation Commission Appeal No. 93580, decided August 26, 1993. In determining whether there was an abuse of discretion, we look to see if the hearing officer acted without reference to any guiding rules or principles. Morrow v. HEB, 714 S.W.2d 297 (Tex. 1986). Under the rule cited above, we do not believe that an exchange of one of the items listed under Section 410.160 can suffice as good cause for failure to exchange another. The statutory provision sets forth separate categories of evidentiary items, each of which requires its own good cause determination in order to be deemed admissible if not timely exchanged. The hearing officer in this case, after questioning the carrier's attorney, found no good cause for its failure to exchange; that ruling, following consideration of the prudency of the carrier's actions with regard to the document, was appropriate and should have stood. Nevertheless, to obtain reversal based upon an error in admitting evidence, a party must first show that the admission was in fact error, and that such error was reasonably calculated to cause and probably did cause rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ). While admission of this document could have had bearing upon claimant's general credibility, the hearing officer stated that she found the claimant to

be credible. The only other issue the report could bear upon would be that of disability, in that it could be read as refuting the claimant's testimony that the pain from her neck injury was so great that she could not work, including at her second job as an apartment manager. However, the 1989 Act requires that a finding of compensable injury is a prerequisite to a finding of disability. Section 410.011(16). Having affirmed the hearing officer's decision as to the issue of injury, we necessarily affirm her decision that the claimant did not suffer disability. Thus, the admission of this report is harmless error.

The hearing officer's decision and order are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge