APPEAL NO. 982048

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 28, 1998, a contested case hearing (CCH) was held. She determined that the appellant/cross-respondent (claimant) sustained an injury in the course and scope of his employment on _____; that claimant's injury was caused by a willful intention to attempt to injure himself; that respondent/cross-appellant (carrier) is relieved of liability; and that claimant did not have disability. Claimant appeals, contending that the hearing officer erred in determining that he willfully attempted to injure himself, that he made the arrangements for his initial doctor visit with "hospital" rather than "clinic", and that the search for employer's documentation, referred to as the "guest slips," was made on _____, rather than on April 6, 1998. Claimant also complains that the hearing officer abused her discretion in excluding certain exhibits. Carrier replied that the Appeals Panel should uphold the complained-of determinations and affirm the decision and order. Carrier filed a cross-appeal, contending that the hearing officer erred in determining that claimant sustained injuries by "falling down the carpeted stairs of unit #2802" and that claimant was unable to work at his preinjury wage for a certain period. Claimant did not respond to carrier's cross-appeal.

DECISION

We affirm.

Claimant first contends the hearing officer erred in determining that he did not sustain a compensable injury. He contends that the hearing officer erred in determining that he willfully attempted to injure himself by falling down stairs at work. The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Section 406.032(1)(B) provides that a carrier is not liable for compensation if the injury was caused by the "employee's willful attempt to injure himself." Whether a claimant made such a willful attempt is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93792, decided October 20, 1993.

Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that he was working as a leasing consultant for (employer) on _____. He said he had shown rental unit 2802 to Ms. T that day. He testified that

he had returned to that rental unit later that day to turn off some lights, that he had had complications from some dental work performed that week, that he had been taking medication the previous day for mouth pain, that he became dizzy, and that he fell down some stairs outside that rental unit. He said he injured his back, knee, shoulder, and neck, and that he went to the doctor. He said that his attorney referred him to Dr. C, from whom he received massage and other treatment. Claimant said that, before he fell, he had received employee counseling that morning from his supervisor regarding excessive absences.

Claimant's supervisor, Ms. VA said that claimant became angry after she counseled him about excessive absences, that she told him he had to be at work the next day or he would be fired, that claimant said there was no way he could come to work because his wife was having a baby shower, and that she thought he injured himself on purpose so that he could miss work the next day. Ms. VA said that claimant had previously joked that if he wanted to "get out of" work he would go outside and "slip and fall right now." Employer's assistant manager, Ms. C, testified that, a few months before, claimant had asked her husband, an attorney, how "people get away with falling down stairs" and how they can get "severance." She said her husband replied that people file lawsuits "all the time for things that [did not] really happen." When asked about this, claimant explained that the topic of lawsuits and injuries was being discussed at the time and that Ms. C's husband had brought up the subject.

A medical record from hospital, where claimant went after he was unable to obtain treatment at clinic, stated that claimant had an abrasion on his forehead with a small hematoma. Dr. C testified that he treated claimant for a suspected herniated disc, that he took claimant off work on April 6, 1998, that claimant had not been released to return to work, and that claimant's injuries were consistent with the fall that claimant described.

The hearing officer was the judge of the credibility of the witnesses and medical evidence. As the fact finder, she considered the issue of whether claimant willfully attempted to injure himself by falling down stairs at work and determined that claimant had done so. We will not substitute our judgment for hers in that regard because the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. Given our standard of review we will not overturn the hearing officer's decision. *Id*. Because of the hearing officer's determination in this regard, the hearing officer also determined that carrier was relieved of liability and that, therefore, there was no compensable injury.

Claimant contends the hearing officer erred in determining that he did not have disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Because there was no compensable injury, there can be no disability.

Claimant contends the hearing officer erred in determining that he made arrangements to go to hospital rather than to clinic. He also asserts that the hearing officer erred in determining that the search for the "guest slips" relating to the showing of the rental unit to Ms. T was made on _____, rather than on April 6, 1998. It appears that claimant first made arrangements to go to clinic rather than to hospital. The hearing officer had stated that claimant made the initial arrangements for treatment with hospital, although claimant did not go there until after he first went to clinic. It was not clear from the record exactly when the search of the guest slips was begun or completed. From Ms. C's testimony, the hearing officer could find that the employees looked the day of the fall to see what units claimant had shown. Even if the hearing officer erred in stating the wrong medical facility or in misstating the date of the search for the guest slips, we perceive no reversible error. We conclude that these are details of minor significance to the issues in this case and that this does not establish that the hearing officer failed to consider the evidence.

Claimant contends the hearing officer abused her discretion in excluding five exhibits. The hearing officer excluded the exhibits because claimant did not timely exchange them. Claimant asserts that the exhibits were crucial to his case, that he exchanged them as soon as he obtained them, and that he had good cause for failing to timely exchange the exhibits. He contends that the hearing officer erred in failing to find good cause. Our standard of review regarding the improper exclusion of evidence is stated in Texas Workers' Compensation Commission Appeal No. 971051, decided July 21, 1997.

Exhibit No. 6 is an April 5, 1998, request for sick pay signed by claimant, which stated that it was for the days he missed due to dental treatment and due to his "accident at work." Exhibit No. 7 is an undated off-work slip from claimant's dentist stating that claimant was excused from work until April 7, 1998, due to complications from dental surgery. When claimant was asked why he had not timely exchanged these documents, the reply was that carrier was not unfairly surprised by the documents and that carrier "must" have seen the documents before. Claimant also asserted that carrier must have already had the sick pay request because claimant gave it to employer.

The hearing officer found that claimant had undergone dental treatment on April 1, 1998, and admitted an off-work slip from a dentist stating that claimant had "intensive dental treatment" and that he was excused from work until _____. Claimant testified that he had not been feeling well and that he had had complications from his dental treatment. Therefore, this evidence was cumulative of other evidence that was admitted. Even if the hearing officer had erred in excluding these dental treatment-related exhibits, because it was cumulative evidence, we conclude that there was no reversible error. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App. -San Antonio 1981, no writ). We have reviewed the record and we conclude that the exclusion of these exhibits was not calculated to cause nor did it probably cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez, *supra.*

Exhibit Nos. 8 and 9 concerned whether claimant had shown the rental unit in question to Ms. T. Claimant said he did not timely exchange these documents because he did not know until the June 17, 1998, benefit review conference, that carrier's position was that claimant had never show the rental unit to Ms. T. Claimant asserted that it took time to investigate and find Ms. V, the "apartment finder" who referred Ms. T, and to find Ms. T, and obtain their affidavits. The affidavits of Ms. V and Ms. T were dated July 20, 1998, and July 22, 1998.

Claimant testified that he filled out employer's required documents regarding Ms. T when he showed her the rental unit where he fell. Mr. C, who worked in building maintenance for employer, said he was with claimant when he fell, that he went with claimant to turn off the lights in the unit, and that he heard claimant using the breaker box at the rental unit in question just before the fall. The hearing officer did not expressly state that she found that claimant had not shown the unit to Ms. T, although she noted that there were no supporting documents showing that claimant had shown the unit that day. The hearing officer stated that she observed claimant's demeanor during his testimony and that she found he was not credible. There was some dispute over whether claimant had a reason to be at unit 2802 and whether he had been turning off lights there just before he fell. Although the issue of whether claimant showed the apartment to Ms. T did concern claimant's credibility in general, the reason why claimant was near the rental unit in question was not a crucial fact. The hearing officer found that claimant did fall down the stairs near the unit in question. Even if the hearing officer did err in failing to find good cause for the late exchange of these exhibits, we conclude that the exclusion of these exhibits was not calculated to cause nor did it probably cause the rendition of an improper decision. Appeal No. 92241, *supra*.

Regarding Exhibit No. 10, this was a July 22, 1998, affidavit from one of employer's former employees. This affidavit concerns the credibility of claimant's supervisors, Ms. C and Ms. VA, and of claimant. Because claimant had worked with this employee and thus knew her name, we can conceive of no reason why he could not have obtained her affidavit at an earlier date so that it could have been timely exchanged. Therefore, we do not perceive that there was an abuse of discretion. Again, even if the hearing officer had erred in excluding this exhibit, we conclude that the exclusion of these exhibits was not calculated to cause nor did it probably cause the rendition of an improper decision. Appeal No. 92241.

Claimant contended that the hearing officer's rulings on the evidence showed that she was biased in carrier's favor. We have reviewed the record and we perceive no reversible error. The record does not reflect bias in carrier's favor.

In its cross-appeal, carrier contends the hearing officer erred in determining that claimant sustained injuries after "falling down the carpeted stairs of unit #2802" and that he was unable to work at his preinjury wage for a certain period of time. Carrier contends that

claimant did not sustain any injuries and that he was not unable to work. Claimant testified that he felt pain after falling and Mr. C testified that claimant had redness on his forehead after the fall. There was evidence from which the hearing officer could find that claimant did sustain injuries from a fall and that he was unable to work for a short period. The evidence carrier emphasizes was for the hearing officer to weigh in making these determinations. We will not substitute our judgment for hers because the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. Given our standard of review we will not overturn these determinations. *Id*.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR IN RESULT:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge