APPEAL NO. 001090

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 13, 2000, with the record closing on April 20, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable low back injury on __________, and had disability from August 16, 1999. The appellant (carrier) appeals, contending that the hearing officer made numerous prejudicial errors in the admission of the claimant's evidence and that the decision is otherwise against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Reversed and remanded on both issues because of prejudicial error in the admission of evidence.

The claimant testified that on __________, he was asked by a coworker to move a drill press, which he estimated to weigh over 60 pounds. In the process, he said, he felt discomfort in his back. He worked the rest of his shift that day; he worked at his part-time job selling shoes that same day and the next two days, including eight hours on the following Saturday. On Monday, August 16, 1999, he said he told his supervisor that he could not work that day due to back pain, but did not attribute the pain to an incident at work. He saw Dr. RC, in (state), on August 16, 1999. According to the claimant, Dr. RC told him the problem was not serious and he should recover in a week with therapy. When he did not recover as expected, the claimant reported the injury on August 23, 1999, to his employer and asked about workers' compensation coverage. The position of the carrier was that the claimant did not injure himself as claimed, but could have done so at his part-time job; that he did not have the money to pay his $200.00 yearly deductible on his employer-provided health insurance; and that he only sought workers' compensation coverage as a way to pay his medical bills. An MRI on March 16, 1999, disclosed herniation at L5-S1 without impingement.

The resolution of this case depended in large measure on the claimant's credibility. Thus, evidence bolstering or detracting from that credibility was of some significance. The benefit review conference (BRC) was held on January 25, 2000. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)) provides that parties shall exchange documents and the identity of witnesses no later that 15 days after the BRC; that is, by February 9, 2000, and thereafter as the information "becomes available." Failure to do so will result in the exclusion of such evidence absent a finding of good cause. Section 410.161. We review evidentiary rulings of hearing officers under an abuse of discretion standard; that is, whether the ruling was made without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. The appropriate guiding rule or principle in the determination of the existence of good cause is whether the party seeking the admission of the untimely

exchanged evidence acted with due diligence in both obtaining the evidence and providing it to the other party once it was obtained. Texas Workers' Compensation Commission Appeal No. 991637, decided September 15, 1999; Texas Workers' Compensation Commission Appeal No. 001070, decided June 29, 2000. We will reverse a decision of a hearing officer because of an error in the admission of the evidence only if the error was reasonably calculated to, and probably did, result in the issuance of a wrong decision. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

In the case now under consideration, the carrier objected to numerous documents offered by the claimant as well as the testimony of two witnesses called by the claimant. Among the documents objected to were:

(1) A one-paragraph April 10, 2000, letter of Dr. B, in which he recapitulates his treatment of the claimant beginning on August 23, 1999, and provides no information that is not in other documents already in the record.

The hearing officer admitted this document simply by saying it was dated April 10, 2000, and therefore could not have been timely exchanged. This was an abuse of discretion because the hearing officer failed to read the document before he admitted it to determine if it contained new information and failed to inquire of the claimant what due diligence he might have used to obtain the information sooner. Because the information in this document essentially restates a prior report of Dr. B concerning the August 23, 1999, visit, and was cumulative of other evidence already admitted, we do not find this error to be reversible.

(2) A one-page "HISTORY OF ACCIDENT INJURY" prepared by Dr. B on October 25, 1999.

The hearing officer again failed to apply the recognized good cause/due diligence standard, but instead noted that the claimant was originally assisted by an ombudsman and then hired Attorney M.[1] The hearing officer then stated that when a new attorney is hired there is time for additional discovery and that when Attorney M "got into gear, he was timely enough." That an attorney was later hired does not excuse a late exchange or create good cause for a late exchange. The claimant is responsible for the exchange. Ignorance of the law is no excuse. Texas Workers' Compensation Commission Appeal No. 972624, decided February 4, 1998. The erroneous admission was not prejudicial for the reason stated above.[2]

[1] The claimant later engaged his present attorney.

[2] We also believe it worth observing that the hearing officer excluded four pages of Dr. B's records for lack of timely exchange. We have serious reservations about the consistency of this ruling to exclude with his rulings to admit.

(3) A one paragraph written statement of the shoe store manager where the claimant worked part-time, and which said that the claimant did not hurt himself at the shoe store.

The hearing officer did not consider the fact that the statement was dated October 22, 1999, but again simply admitted it on the erroneous theory that hiring a new counsel excuses the failure to timely exchange. We are unwilling to conclude that this erroneous admission was not prejudicial because critical to the case was whether the claimant injured himself at his full-time job, as claimed, or at the shoe store, as the carrier speculated could have happened. This evidence was relevant to credibility and should not have been admitted.

(4) A one-page statement of the claimant's father, dated April 4, 2000, in which the father states that the claimant had not helped him as a bricklayer since November 1997; an April 3, 2000, statement of the shoe store assistant manager in which he states that the claimant did not lift anything heavy in this job (the claimant's last day of work there was August 14, 1999); and an undated statement of a shoe store coworker who said that the claimant did not do "hard work" there.

The hearing officer admitted these statements on the "good cause" grounds that the information could only come into evidence as statements because these people were not identified as witnesses and that "since it's a statement" the authors did not have to be listed as witnesses. We find this rationale erroneous and conclude that the admission of these statements was reversible error for the reason listed in item (3) above. Whether or not the authors' names were also tendered as witnesses, no good cause was offered for the failure to exchange.

The carrier also objected to the testimony of the coworker who asked the claimant to move the drill press, and the testimony of another friend and coworker that he "recalled" the claimant moving the drill press on the date of the claimed injury. The identity of these witnesses was not exchanged until two days after the 15-day limit for exchange of information. Refusing to perform a good cause/due diligence analysis, the hearing officer admitted the testimony on the basis of "no harm, no foul." What exactly he meant by this is unclear, but it is obvious that it is not the proper standard for determining good cause. Because this evidence went directly to bolstering the claimant's credibility, we cannot conclude that its admission was not reversible error.

Because of reversible error in the admission of a substantial portion of the claimant's evidence, we have no choice but to reverse and remand this case for further consideration based solely on the admissible evidence. Such evidence does <u>not</u> include the documents and testimony discussed above.

One final point requires comment. The hearing officer took official notice of "DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 27th Edition." He then stated in his decision and order:

> From the cited medical source in Official Notice, this showed sciatic scoliosis, or perhaps myopathic scoliosis. These two types of the several types of scoliosis are not natural or caused by poor posture. They are caused by trauma and/or pain to the lumbar spine area. This scoliosis does not support the Carrier's contention that ordinary scoliosis caused the low back pain. It was actually the reverse.

The only evidence on which this statement could be premised was DORLAND's, the comment of Dr. RC that x-rays showed scoliosis, and the transcribed statement of the claimant that Dr. RC told him his spine was "crooked" because of what he lifted at work. We expressly disapprove of this technique of weaving a web of causation by applying dictionary definitions to a one-word diagnosis of a doctor and find that the determination reached in this statement is against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

Pending resolution of this remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Dorian E. Ramirez
Appeals Judge

Judy L. Stephens
Appeals Judge