APPEAL NO. 040218
FILED MARCH 22, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on December 18, 2003. The hearing officer determined that the appellant (claimant) did not sustain a compensable mental trauma injury on or about _____; that the claimant did not have disability resulting from an injury sustained on or about _____; that the respondent (carrier) is relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001, and because good cause does not exist for the claimant's failure to timely notify his employer of the claimed injury; and that the carrier is relieved from liability under Section 409.004 because of the claimant's failure to timely file a claim for compensation with the Texas Workers' Compensation Commission (Commission) within one year of the date of the claimed injury as required by Section 409.003, and because good cause does not exist for the claimant's failure to timely file a claim with the Commission.

The claimant appealed the hearing officer's determinations based on sufficiency of the evidence and essentially makes the same arguments that he did at the CCH. Additionally, the claimant attached new evidence to his appeal, and asserted that the hearing officer erred in excluding the testimony of the claimant's doctor and that the hearing officer's decision and order was filed untimely. The carrier responds, urging affirmance.

DECISION

Affirmed.

NEW EVIDENCE

We first address the fact that the claimant attached to his appeal some documents that were not admitted at the CCH as evidence. Documents submitted for the first time on appeal are generally not considered, unless they constitute newly discovered evidence. *See generally* Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). Additionally, the claimant offered for the first time on appeal a copy of a green card dated November 20, 2003, to show that Dr. G's name was timely exchanged as a witness by certified mail. The copy of the green card reflects the name and address of the carrier, the name and signature of the person who signed for the certified mail, the date of delivery, and the article number. In determining whether new evidence submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it

would probably result in a different decision. *See* Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. Upon our review, the evidence does not show that the documents could not have been obtained prior to the hearing below. The evidence, therefore, does not meet the requirements for newly discovered evidence and will not be considered on appeal.

Additionally, the claimant for the first time on appeal raises an objection that the carrier did not answer interrogatories that were hand delivered to the carrier on December 5, 2003. Although, the claimant contends that the carrier returned the interrogatories unanswered to him on the date of the CCH and that the hearing officer "allowed these answers to be admitted late," we note that the claimant did not properly object to the incomplete interrogatories on the record, therefore he did not preserve error. We will not consider the claimant's objection for the first time on appeal.

EVIDENTIARY EVIDENCE

Next we address the claimant's evidentiary objections. We have held that to obtain reversal of a judgment based upon error in the admission or exclusion of evidence, the complaining party must show that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In this case, the hearing officer excluded the testimony of a psychiatrist, Dr. G, on the grounds that his name was untimely exchanged and she excluded Claimant's Exhibits Nos. 22, 23, and 24, on the grounds that these exhibits were not timely exchanged. We review the hearing officer's ruling on an abuse-of-discretion standard. Given the above standard of review, we find no abuse of discretion in the hearing officer's exclusion of the claimant's exhibits and the testimony of a witness whose name was untimely exchanged.

MENTAL TRAUMA INJURY

The claimant had the burden to prove that he sustained a compensable mental trauma injury. Section 408.006(b) provides that a mental or emotional injury that arises principally from a legitimate personnel action is not compensable under the 1989 Act. The disputed issue involved a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The claimant argues that he has severe depression as a result of an "illegitimate" personnel action, specifically that he was demoted to an entry-level position after failing a test. The Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) reflects that the claimed injury occurred on _____, "[a]fter years of mental abuse at work" and that the nature of the injury was "[c]hronic depression and severe grief, unable to concentrate, poor tolerance, poor energy level." The hearing officer commented in the Statement of the Evidence paragraph that the "[c]laimant testified that the claimed injury did not result from years of mental abuse at work or a demotion. According to [c]laimant, the claimed injury, severe depression, results from the manner

in which he was treated when called into the office about failing the test." Whether an activity or incident amounts to a specific traumatic event, which causes a subsequent mental condition, is a question of fact for the hearing officer to decide from all the evidence before him or her. Texas Workers' Compensation Commission Appeal No. 981423, decided August 10, 1998. The hearing officer found that the claimant failed to establish by a preponderance of the evidence that his mental or emotional condition, severe depression, results from a specific event, other than a legitimate personnel action, that occurred in the course and scope of his employment on _____. We note that the parties stipulated that the date of injury for the claimed injury was _____. We conclude that the hearing officer's determination is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

DISABILITY

Given our affirmance of the hearing officer's determination that the claimant did not sustain a compensable injury, we likewise affirm her determination that the claimant did not have disability. By definition, the existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16).

TIMELY NOTICE

The claimant had the burden to prove that he gave timely notice of injury to his employer pursuant to Section 409.001. Section 409.001(a) provides that an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the injury occurred. The hearing officer determined that the claimant failed to establish by a preponderance of the evidence that he notified the employer or any employee of the employer who holds a supervisory or management position of his claimed mental trauma injury within 30 days of _____, the date of the claimed injury. We conclude that the hearing officer's timely notice determination is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

TIMELY FILING

The claimant had the burden to prove that he filed his claim of injury within one year of the date of his injury pursuant to Section 409.003, or had good cause for not timely filing. Section 409.003 requires that a claimant file a claim for compensation with the Commission not later than one year after the date of injury. Pursuant to Section 409.004, failure to do so will relieve the carrier of liability. The test for good cause is that of ordinary prudence; that is, whether the employee has prosecuted his or her claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Company, 207 S.W.2d 370 (Tex. 1948). We review the hearing officer's determination of whether or

not good cause exists under an abuse-of-discretion standard. In view of the evidence presented, the hearing officer could find, as she did, that there was no good cause for the claimant's failure to file a claim within one year of the date of injury. We conclude that the hearing officer's timely filing determination is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain, *supra*.

OTHERS MATTERS

With regard to the claimant's assertion that the hearing officer's decision and order be "inadmissible" because the hearing officer failed to file her decision with the Division of Hearings within 10 days, as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.16(c) (Rule 142.16(c)), the Appeals Panel early on addressed that situation in Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992, citing the Texas Supreme Court case of Lewis v. Jacksonville Building and Loan Association, 540 S.W.2d 307 (Tex. 1976), which held that the hearing officer's time limits do not go to the essence of the merits and thus are not mandatory. We hold the claimant's appeal on this ground to be without merit.

The claimant asserts that his civil rights have been violated. We have previously stated that the Appeals Panel, as an administrative body, does not address constitutional issues. Texas Workers' Compensation Commission Appeal No. 91080, decided December 20, 1991.

The claimant asserts that the Statement of the Evidence paragraph is incorrect. A statement of evidence, if made, only needs to reasonably reflect the record. Our review of the record indicates that the Statement of the Evidence reasonably reflects the evidence in this case.

The claimant makes the same arguments on appeal as he did at the CCH, and the hearing officer considered his arguments in making her determination. We perceive no error.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge