APPEAL NO. 91131
FILED FEBRUARY 2, 1992

On November 19, 1991, a contested case hearing was held to determine whether appellant sustained an injury within the course and scope of his employment with respondent, a self-insured political subdivision. The hearing officer, found that appellant did not sustain a compensable injury and, therefore, denied appellant benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 et seq. (Vernon Supp. 1992) (1989 Act). With certain exceptions which do not apply to the issues presented on appeal, the provisions of the 1989 Act apply to employees of political subdivisions of this state through TEX. REV. CIV. STAT. ANN. art. 8309h (Vernon Supp. 1992). Appellant requests that we review the hearing officer's finding and grant him a second contested case hearing. In addition, appellant contends that the hearing officer erred in not considering the testimony of Ms. M. Respondent asserts that appellant has failed to perfect an adequate appeal, that the hearing officer's finding of no compensable injury is correct, and that Mrs. M's testimony was properly excluded.

DECISION

We affirm the hearing officer's decision to deny workers' compensation benefits to appellant.

At the hearing, appellant maintained that he sustained an injury to his back on either ________ or ________ while doing street repair work for respondent. Respondent urged that appellant hurt his back changing a tire on his personal vehicle during off duty hours.

Appellant had worked in respondent's street maintenance department since 1987. He testified that on Thursday, ________, he developed a muscle cramp or pulled muscle in the thigh of his left leg after working very hard doing pickax and shovel work. He said he was limping after work when he visited a friend, Mr. M, to show him his new truck. When he was leaving his friend's house that evening, he noticed that his truck had a flat tire. He stated that he and Mr. M lifted a 50-pound piece of concrete, moved it about seven feet, and placed it under his truck to rest the tire jack on. He said he did not hurt his legs or back when he helped lift and move the piece of concrete,
and that Mr. M and another person changed the tire.

Appellant was scheduled to be off work the next day, Friday, ________ through Monday, ________. Holiday was observed on Monday. When he arrived at work on ________, he said he told his street leader, who is second in command of the street crew, that he was in pain and asked the street leader to take it easy on him. He stated that the street leader told him to stay at work and that he and the street leader then told the crew chief, who supervised the crew, about his pain. Appellant testified that he had pain while working that morning and that around 1:00 p.m., the street leader told him he was lying and

faking about his pain. While shoveling asphalt about 15 minutes later, appellant said he felt and heard a pop in his hip. He stated that a shovelful of asphalt weighs about 50 pounds. Without direction from anyone, he said he walked away from his shoveling work and changed jobs with the flagman. He worked the flagman's job the remainder of the day.

According to appellant, he woke up in excruciating pain the next day and called the crew chief and told him he was going to see a doctor. He was examined by a doctor that same day. In June 1991, magnetic resonance imaging (MRI) revealed a herniated disc for which a laminectomy was performed the same month. Appellant opined that he had ruptured a disc in his back while shoveling asphalt at work on ________. He said he told his doctors about that incident.

Mr. M, the person who helped appellant change his truck tire, testified for appellant. He testified that he was a very good friend of appellant. He stated that appellant was limping when appellant arrived at his house and that appellant had said he had a little pain in his leg. He also stated that appellant did not hurt himself when he and appellant lifted a 60 or 70-pound concrete slab and moved it about six feet to a position under appellant's truck. He further testified that the truck on which the tire was changed was appellant's personal vehicle and that appellant did not assist in jacking up the truck. Respondent had fired this witness from his street maintenance job in 1989.

Appellant introduced into evidence the signed written statements of two co-workers. RR stated that appellant told the crew on ________ that he had a slight pain in his leg, that appellant wanted to go home but the street leader made him stay, and that after about 10 minutes of shoveling asphalt, appellant grabbed his back and said he was in pain. He further stated that the street leader told appellant he was faking and made appellant continue to shovel, but that appellant walked away. BR related in his statement that appellant told his crew chief that he was stiff and sore on ________ and that the street leader accused appellant of lying and faking and made him work.

GB, who was appellant's crew chief, testified for respondent. He testified that appellant walked "stiff-legged" the morning of ________. He further stated that appellant told him that morning that he had hurt himself over the Holiday Weekend when he put a large concrete block under his truck while changing a tire. This witness also stated that appellant did not indicate to him that he was injured on the job on ________ or ________.

Respondent's street maintenance superintendent, SP, also testified for respondent. He stated that appellant told him on ________ that he had hurt himself over the (holiday) Weekend when he moved a 100-pound rock in order to change a tire on his truck. This witness said that appellant told him that he wished he could tie it (his injury) to an on-the-job injury. This witness further stated that he first knew of appellant's claim on ________ when appellant told him that he had an on-the-job injury.

In addition to the testimony of the crew chief and the superintendent, respondent

introduced into evidence the sworn written statements of three of appellant's co-workers. These co-workers stated that appellant told the street repair crew on ________ that he had hurt himself over the Holiday Weekend when he moved a concrete block or heavy object under his truck to change a tire.

Respondent also introduced into evidence several medical records and reports relating to appellant's examination and treatment. The doctor who examined appellant on ________ reported that appellant told her that approximately one week before he had pulled the back of his left leg while replacing a tire on his vehicle. There is no mention of an injury from overexertion at work or from shoveling asphalt at work. Dr. C, who examined appellant on June 17th and who performed a laminectomy on appellant's herniated disc on June 27th, reported that appellant told him on June 17th that his back and left leg pain were related to moving a heavy piece of concrete to try to jack up his truck. Although the doctor's report reflected that appellant told the doctor that he worked for respondent repairing streets, there was no mention in the report of an injury from overexertion or accident at work. In contrast, Dr. C's July 4th hospital dismissal summary revealed that appellant told him upon admission to the hospital on June 27th that before Holiday he was "working as a laborer for the [respondent] as a street repairman and was moving heavy concrete and hurt his back." However, appellant acknowledged on cross-examination that he moved the heavy concrete while off work.

Also in evidence was appellant's written report of accident to respondent which he completed on June 24, 1991. In this report appellant gave the date of injury as ________ and stated that he was stiff and sore and had pain in his back and left leg at the end of the work day. He noted that his injury resulted from doing more work than was required for the size of his crew, digging out street sections with hand tools, and putting out more hot mix than required by respondent's guidelines. Although the report was completed after ________, the date he allegedly felt and heard a pop in his hip while shoveling asphalt, he made no mention of that incident in the report.

Under the 1989 Act, the hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). The evidence in this case is conflicting. On one hand, appellant testified that he sustained his herniated disc shoveling asphalt at work. On the other hand, there is evidence that he engaged in an activity while off work which could have caused his injury, and that he told his supervisors, co-workers, and doctors that this off-duty activity caused his pain. As the trier of fact, the hearing officer had the responsibility to resolve these conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Weighing the evidence in support of as well as against the finding that appellant did not sustain a compensable injury on either ________, or ________, we cannot say that such finding was so contrary to the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We find that the hearing officer did not abuse her discretion in excluding from evidence the testimony of Ms. Ma, who is the wife of the man who helped appellant change his tire. Appellant's attorney acknowledged at the hearing that he had not, prior to the hearing, identified Mrs. M as a witness known to have knowledge of relevant facts. In attempting to establish good cause for failing to disclose the identity of this witness, appellant's attorney represented that he was familiar with the Commission's discovery rules but had relied on the Commission's letter transmitting the benefit review officer's report which, in his view, did not indicate that the identity of such a witness had to be disclosed. Even if appellant's argument concerning reliance on the Commission's letter, rather than the Commission's rules, had any merit, it would fail for the reason that the letter itself specifically references "rules regarding subpoenas and discovery in Chapter 142 of the Texas Workers' Compensation Rules that may be useful in preparation for the hearing." Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13) provides, in part, that no later than 15 days after the benefit review conference, parties shall exchange with one another . . . . the identity and location of any witness known to have knowledge of relevant facts. Rule 142.13(c)(1)(D). Appellant did not follow this rule in regard to the identification of Mrs. M and did not exchange the identity of Ms. Ma in any manner with respondent at any time prior to the hearing. We cannot fault the hearing officer for failing to find that good cause existed for not having disclosed the identity of this witness and for excluding the testimony of this witness under the circumstances presented in this case. Article 8308-6.33(e). Furthermore, the hearing officer permitted appellant to preserve the testimony of Ms. Ma by a Bill of Exceptions. We find that her testimony was cumulative of that given by her husband. Thus, any error in the exclusion of her testimony would not present reversible error. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394, 396 (Tex. 1989).

Having disposed of appellant's contentions, we now turn to respondent's contention concerning the adequacy of appellant's request for review. Respondent argues that appellant's request for review fails to comply with Article 8308-6.41(b) which provides, "A request for appeal or a response must clearly and concisely rebut or support the decision of the hearing officer on each issue on which review is sought." Respondent urges that this requirement is analogous to the situation where a challenging party in state appellate court fails to cite authority in support of a point of error and is held to have waived error on that point. *See*, Cissne v. Robertson, 782 S.W.2d 912, 923 (Tex. App.-Dallas 1989, writ denied). However, in applying Article 8308-6.41(b) to the request for review under consideration, we are mindful of the general rule that where pleadings are required in administrative proceedings, their validity should not be tested by the technical niceties of pleadings and practice required in court trials. Thacker v. Texas Alcoholic Beverage Commission, 474 S.W.2d 258 (Tex. Civ. App.-San Antonio 1971, no writ). While this appeals body does look to the appellate courts of this state for precedent and procedural guidance, we are not bound by the technical rules essential for appellate judicial practice. Judging appellant's request for review as a whole, we find that it is not so deficient as to render it inadequate for the purpose of perfecting an appeal to this panel. We have,

therefore, considered the request and made our decisions on the issues presented as reflected herein.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

____
Stark O. Sanders, Jr.
Chief Appeals Judge

____
Joe Sebesta
Appeals Judge