APPEAL NO. 92309

This case returns for our consideration after having been remanded for appropriate reconstruction of the record below (inaudible tape recordings) pursuant to the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Texas Workers' Compensation Commission Appeal No. 92153 (Docket No. redacted) decided May 29, 1992. The hearing officer, (hearing officer), held the contested case hearing on March 3, 5, and 12, 1992, in (city), Texas, and determined that appellant was not injured on (date of injury) in the course and scope of her employment with (employer). The hearing was twice continued for reasons related to discovery disputes. In her request for review, appellant contends that the hearing officer erred in failing to strike respondent's defense to the compensability of her claim as a sanction for its having failed to answer interrogatories; erred in permitting the testimony of (Ms. R) since she had not been identified by respondent as a witness prior to the last session of the hearing on March 12th; erred in requiring corroboration of appellant's testimony; and erred in his determination that appellant was not injured in the course and scope of her employment. After our remand, the hearing officer obtained a court reporter's transcript of the hearing and adopted verbatim his previous Decision and Order. Appellant, now pro se, has again requested, in a brief writing, that we review the hearing officer's decision. Respondent, who did not file a response to appellant's earlier appeal, has filed a response attacking deficiencies in appellant's pro se request for review and supporting the hearing officer's decision. Neither party raised an issue on appeal concerning the record of the proceedings below. Upon remand, no further hearing was conducted nor was additional evidence considered by the hearing officer. Accordingly, under the particular circumstances of this remand, appellant's second request for review was unnecessary (as was the response thereto) and we need not address the alleged deficiencies in that request.

DECISION

Finding no reversible error and that the evidence was sufficient to support the challenged finding and conclusion, we affirm.

At the final session of the hearing on March 12th, appellant testified that on (date of injury), she was in the locker room at her place of employment changing from her boots into her shoes at the end of the shift, along with approximately six other employees. While bent over in the process of changing her footwear, she was pushed or bumped from behind by another employee and fell onto another employee seated on a bench. The latter employee then pushed appellant off of her whereupon appellant's foot slipped and twisted behind her and her leg jammed up against the bench. She said her right foot, ankle, leg, and lower back were hurt and that such injury has caused her to be off work since that date. Appellant testified that it was (C L) who bumped her from behind and that the employee upon whom she fell was named "(C)" or "(Ca)." She later identified this employee as (Ms. R). Appellant further testified that it was at the prior session on March 5th when she first provided the name of (Ms. R) as the employee against whom she fell. She also stated that the incident was witnessed by (Ms. M) and that (K W) was present and may have seen it.

(Ms. R) testified that while she couldn't recall whether she worked in (date) in that she left her employment after the fourth month of her pregnancy, she nevertheless recalled no incident in which appellant, whom she knew, fell onto her in the employer's locker room or bathroom.

The hearing officer allowed (Ms. M) to testify over appellant's objection grounded on respondent's untimely discovery response. (C L) and (K W) also testified but without objection. However, in his Decision and Order the hearing officer stated that he considered only the testimony of appellant and (Ms. R) in reaching his decision. In her request for review, appellant concurs in the hearing officer's disregarding of the testimony of other witnesses.

Appellant urged below that had the hearing officer excluded all evidence proffered by respondent because it was not timely provided to appellant, her testimony would be uncontroverted and would perforce carry the day. Since the hearing officer considered only appellant's evidence and the testimony of (Ms. R), however, it is only the latter's testimony that we need to address. If it was properly considered, the hearing officer had sufficient evidence to support his finding that appellant was not injured in the course and scope of her employment on (date of injury). Even without (Ms. R)' testimony, the hearing officer, as the trier of fact and the sole judge of the weight and credibility of the evidence, was free to disbelieve appellant's testimony and find against her. TEX. REV.CIV. STAT. ANN. article 8308-6.34(e) (Vernon Supp. 1992) (1989 Act).

At the hearing on March 3, 1992, appellant moved for "sanctions" against respondent for having failed to answer interrogatories which were sent to both respondent and its adjuster on February 10, 1992 pursuant to Tex. W.C. Comm'n., 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13). The motion acknowledged that respondent had provided lists of witnesses and exhibits, but argued that such lists were incomplete and would presumably identify only such witnesses and exhibits as were favorable to respondent. Appellant's motion requested the specific sanctions of "striking the defense to compensability of this injury and/or excluding the testimony in any form of witnesses not identified by the carrier in answer to claimant's interrogatories." Respondent asserted, in effect, that through the administrative inadvertence of its adjuster the interrogatories never got into the file received by its counsel on February 20th and that counsel had not seen the interrogatories prior to the hearing. The hearing officer then propounded each interrogatory question to respondent's counsel who answered them and asserted that respondent's letters to appellant, dated February 24 and 25, 1992, had identified all persons known by respondent to have relevant information as well as all relevant documents, and that Rule 142.13 does not require duplication of discovery. Appellant argued that respondent's witness letter had provided only the names of such persons and employer's address, rather than the individuals' addresses and phone numbers, and thus hampered her ability to investigate. Appellant further argued that even if respondent's letters be treated as interrogatory answers, they were not timely, and that lack of prejudice to appellant is not the equivalent of a showing of good cause for an untimely exchange of evidence. The hearing officer

granted respondent a continuance to investigate whether a showing of good cause could be made for not answering the interrogatories.

The hearing reconvened on March 5th and the hearing officer articulated as interim issues the existence of good cause for respondent's not having exchanged the information on witnesses and documents not later than 15 days after the January 14, 1992 benefit review conference (BRC), and for having failed to answer the interrogatories. Rule 142.13(c) requires the parties to exchange, no later than 15 days after the BRC, certain information including any witness statements, the identity and location of any witness known to have knowledge of relevant facts, and documents which a party intends to offer into evidence. That rule goes on to require the parties to exchange additional documentary evidence as it becomes available, and to bring all documentary evidence not previously exchanged to the hearing where the hearing officer shall make a determination whether good cause exists for a party to introduce such information or documents into evidence. Rule 142.13(d) provides that the interrogatories framed in Rule 142.19 may be used by the parties to elicit information. They are to be presented no later than 20 days before the hearing and answered no later than five days after receipt. However, Rule 142.13(b) provides that the parties shall exchange documentary evidence in their possession not previously exchanged, as required by Rule 142.13(c), before requesting additional information by interrogatory, and that "[a]dditional discovery shall be limited to evidence not exchanged, or not readily derived from evidence exchanged." *And see* Article 8308-6.33(c) which provides that "[s]uch discovery [depositions and interrogatories] shall not seek information which may readily be derived from the documentary evidence described in Subsection (d) of this section, and the answers need not duplicate such information." Rule 142.13 does not explicitly provide for "sanctions," as such, for noncompliance with its provisions, although the good cause determination provision obviously implies the power of the hearing officer to exclude from evidence unexchanged information and documents absent a showing of good cause. Article 8308-6.33(e), however, provides that a party who fails to disclose information or documents at the time required by that statute may not introduce such evidence absent a showing of good cause for such nondisclosure. Appellant cites no authority in support of her request that the hearing officer strike respondent's defense as a sanction and we find no error in his not having done so.

Respondent contended it had good cause for not exchanging witness and documents information 15 days after the BRC because that period had expired before it received the BRC report on February 7th and was able to then ascertain whether a contested case hearing would be necessary, and because its counsel didn't get the file until February 20th. Apparently respondent was not represented by counsel at the BRC. According to the claims adjuster's testimony, it took from February 7th to February 18th to get the file copied and forwarded to counsel. Its good cause showing for not answering the interrogatories amounted to administrative inadvertence. The hearing officer stated he found good cause for respondent's failure to timely respond to discovery and offered appellant a continuance to interview the witnesses on respondent's list. Appellant then asked the hearing officer to require respondent to answer the interrogatories and to provide the names of all persons in the locker room, not just witnesses favorable to respondent.

Respondent agreed to answer the interrogatories as soon as possible and to provide addresses for any additional witnesses appellant might discover in interviewing the witnesses on respondent's list. The hearing was again continued.

At the outset of the hearing on March 12th, the hearing officer announced that he had reversed his previous determination on the existence of good cause and ruled that respondent had not shown good cause for failing to exchange the required information not later than 15 days after the BRC. No mention of the interrogatory answers was then or later made by the hearing officer or the parties and the record doesn't indicate whether they were ever answered. The hearing officer said he would rule on the admissibility of the evidence as it was offered. As previously mentioned, he permitted, over appellant's objection, the testimony of (Ms. M) and her prior written statement, as well as the testimony of several other witnesses, but considered only the testimony of appellant and (Ms. R) in reaching his decision. The hearing officer found good cause for respondent's not having exchanged the name of (Ms. R) not later than 15 days after the BRC because respondent did not learn her identity until appellant disclosed her first name at the previous session. Appellant argued that respondent hadn't shown good cause regarding (Ms. R) because it could have discovered she was in the locker room and learned her identity had it done a more thorough investigation.

We are satisfied that the hearing officer did not abuse his discretion in finding good cause for respondent's not having disclosed the identity of (Ms. R) not later than 15 days after the BRC and in permitting her to testify. Respondent insisted through counsel, and without challenge, that it did not learn that (Ms. R) was in the locker room at the time appellant claimed she was injured until appellant disclosed her name on March 5th. The hearing officer's discretion should not be set aside except when arbitrary or an abuse of discretion. The appropriate test for the existence of good cause is that of ordinary prudence. *See* Texas Workers' Compensation Commission Appeal No. 91009 (Docket No. redacted) decided September 4, 1991.

Finally, we do not agree with appellant's belief that she "was put to an improper and unfair burden of showing `corroboration' by the hearing officer." The hearing officer, after reciting appellant's testimony in his Decision and Order, observed that she "offered no corroboration for her statement that an accident occurred or that she received injuries in that accident. I pointed out to Claimant's attorney that Claimant has the burden of proving that she suffered a compensable injury but no further evidence or explanation was forthcoming." The hearing officer was correct that appellant had the burden to prove by a preponderance of the evidence that she sustained a compensable injury. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). An accident does not have to be witnessed and her testimony alone could establish the occurrence of an injury. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). The hearing officer's comments do not indicate his misperception of appellant's burden of proof but rather his concern, as the fact finder, with the weight and credibility of her evidence, and her understanding of her burden of proof. He stated at the outset of the hearing that "[t]he burden is on the Claimant to prove by a preponderance of the evidence that the relief that

she seeks is allowable under the applicable statutes and rules." The hearing officer could believe all, part, or none of appellant's testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

We are satisfied that no reversible error was committed by the hearing officer and that his decision was not so against 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, 662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex.1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge