APPEAL NO. 92382

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing was held on April 28 and June 23, 1992 in (city), Texas, with (hearing officer) presiding. The two disputed issues were whether respondent (claimant below) sustained an injury in the course and scope of employment, and if so, the date the injury occurred; and, assuming he had been injured and had not notified his employer within 30 days of the injury, whether respondent had good cause for failing to notify his employer of the injury within 30 days. The hearing officer determined that respondent was injured in the course and scope of his employment on (date of injury), and that he had good cause for not reporting such injury to his employer within 30 days thereafter because he thought the injury was trivial. In its request for review, appellant asserts the hearing officer erred in the following particulars: in becoming an advocate for respondent; in admitting respondent's medical and pay records over objection based on failure to exchange; in limiting appellant's cross-examination of respondent; in concluding that respondent had good cause for his failure to report the injury to employer within 30 days; and, in concluding that respondent was injured in the course and scope of his employment on (date of injury). No response was filed by respondent.

DECISION

Finding that error in the admission of respondent's exhibits does not constitute reversible error; that there is sufficient evidence to support the hearing officer's findings, conclusion, and decision; and, that her findings, conclusions, and decision are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust, we affirm her decision awarding workers' compensation benefits to respondent.

At the hearing on April 28th, the hearing officer ascertained that respondent was appearing without representation but would be assisted by his daughter, Gilda Alfaro. Respondent stated he had not been able to obtain the services of an attorney. There was no evidence of record that respondent's daughter was a representative as defined by Article 8308-1.03(40) and Tex. W.C. Comm'n, TEX. ADMIN. CODE § 150.3 (Rule 150.3). Because respondent had not received the Benefit Review Conference report and statement of disputed issues, the hearing was continued to June 23, 1992, after the parties agreed to the framing of the two disputed issues and to five stipulations. The hearing officer advised respondent at both sessions that she could not advocate for him.

We can lay to rest at the outset the first appealed issue. Our review of the questions and answers asked of respondent by the hearing officer satisfies us that she did not abandon her impartial role and become an advocate for the respondent who was unrepresented and unfamiliar with the dispute resolution process. Article 8308-6.34(b) provides that the hearing officer "shall ensure the preservation of the rights of the parties and the full development of facts required for the determinations to be made." *And see* Rule 142.2(12) which authorizes a hearing officer to examine parties and witnesses.

We can also briefly dispose of the third appealed issue to the effect that the hearing officer erred in limiting appellant's cross-examination of respondent regarding his knowledge of workers' compensation claim procedures and his wife's workers' compensation claim. Article 8308-6.34(e) vests in the hearing officer the sole responsibility for judging the materiality and relevance of the evidence. We have examined the portions of the record cited by appellant and note that while the hearing officer, upon respondent's objection to questions about his wife's claim, asked him some questions about his knowledge of claims procedures, she did not rule that appellant could not pursue his line of questioning. However, appellant, for whatever reason, did not pursue its line of questioning and we find no abuse of discretion on the part of the hearing officer.

Respondent was the sole witness at the hearing and an unsigned transcription of a telephone interview he gave to appellant on January 9, 1992 was admitted without objection. According to respondent's testimony and interview, he had been a meat cutter for 38 years and had been employed by (employer) for 12 years. He normally came on duty at 3:00 p.m. and worked until 9:00 p.m., although the number of days and hours he worked varied and had been decreasing for the past three months of his employment. At the beginning of his shifts, respondent would frequently have to lift and sort out various boxes of meat weighing from fifty to ninety pounds for up to one hour before performing other duties. On December 20, 1991, respondent was informed by the store director, (Mr. P), in the presence of his supervisor, (Mr. H), that he was laid off due to a reduction in force. He then expressed concern about who was going to pay for medical care for his hurt shoulder and told (Mr. P) he had hurt his shoulder some time in the past two or three months but wasn't sure of the date. The parties stipulated that respondent was terminated on December 20th because employer had no work; and, that on December 20th, respondent reported an injury to his shoulder to employer, and later, told his employer he sustained his injury on approximately (date of injury).

According to the unsigned transcript of appellant's telephone interview of (Mr. P), respondent, after being advised of his layoff, said he had hurt his shoulder two or three months earlier; that he wasn't sure just how he had hurt it but was sure he had been doing something in the market he normally did; and, that he didn't mention it because he didn't think it important. He expressed concern over insurance coverage to get his shoulder injury treated, asked if he could make an appointment with a doctor, and was advised his health insurance would probably take care of it. According to (Mr. P's) interview, respondent returned to the store on December 30th advising that the doctor's office told him he needed a workers' compensation form, and he then gave (Mr. P) a more specific time for his injury, namely, the week of (date of injury). Respondent testified his injury date was "approximately" (date of injury) and that this was as close as he could come to stating a date of injury. He was present on December 30th when (Mr. P) filled out the Employer's First Report of Injury or Illness (TWCC-1) which stated that during the week of (date of injury), respondent hurt his left shoulder and alleged he was stacking boxed beef in the meat cooler and pulled something in his left shoulder. In the transcript of his January 9th interview,

respondent stated his injury occurred sometime during the week of (date of injury) at around 6:00 p.m. He said he was in the meat cooler where boxes of meat have to be shifted around to obtain particular items; that he pulled one of the boxes and "this happened with my left shoulder and it hurt . . . probably I jerked it or something but it hurts up here;" that he just kept on working because he didn't think that much about it and felt it would go away; and, that the pain didn't go away but kept getting worse. He testified it was his practice not to take sick leave when ill or hurting, but rather to keep on working because he needed the hours and didn't want to risk his job. The injury descriptions in the TWCC-1 and in respondent's interview transcript seem to suggest that respondent suffered a discrete, specific injury by pulling on a meat box in the cooler sometime during the week of (date of injury), as distinguished from his having suffered a repetitive trauma injury which first manifested itself during that week. His testimony, on the other hand, was more equivocal and imprecise as to a specific injury event; and at one point, respondent said he did not first notice his shoulder pain when moving a particular box, but that it started hurting, and he felt sharp pain when picking boxes up. His testimony suggested that he experienced left shoulder pain for some time, that he became more aware of it during week of (date of injury), and that the pain was more acute when lifting boxes. While respondent did not articulate at the hearing whether he was asserting he had sustained a repetitive trauma injury vis-a-vis a specific injury, his testimony certainly suggests such. He did deny any off the job activity to which his injury could be attributed. The question of his injury as being one of repetitive trauma is pertinent since the hearing officer found that he "developed pain and trauma in his left shoulder as a result of his repetitive activities with boxes of meat," and that respondent "knew or should have known that he was injured and that the injury was related to his employment on (date of injury)."

At the time of his January 9th interview, respondent had not yet seen a doctor although he had tried to get an appointment with (Dr. Wi) who had previously treated his injured right shoulder. Respondent introduced the records of three visits he made to the (Clinic) on January 13, January 23, and February 20, 1992. The January 13th record reflected respondent's complaint of left shoulder pain for one and one-half months, "0 trauma," and a diagnosis of "mild L. shoulder impingement/bursitis," for which heat, exercises and medication were prescribed. On the January 23rd visit, x-rays were taken, tenderness and mild crepitus were found over the bicipital groove, a diagnosis of left bicipital tendinitis was made, and heat and physical therapy were prescribed. On his February 20th visit, the record indicates his pain and range of motion limitation continued. The diagnosis of mild left shoulder impingement/bursitis was continued, and respondent was referred to (Dr. W), an orthopedic surgeon. Respondent testified he told the doctors he picked up and moved around heavy things at work, and the February 20th record states "works as butcher & has constant aggravation."

(Dr. W) wrote the referring doctor a letter on March 25, 1992 stating that while respondent has pain of the A-C joint, he has good motion and strength in his shoulder. The letter goes on to state that respondent's "major problem is arthritis of the A-C joint," and "[t]his is typically the result of lifting and carrying of heavy objects and overhead activities."

The letter concluded that if respondent remained active, he would require surgery at some future date. Respondent testified that (Dr. W) asked him what kind of work he did and respondent told him. He said that (Dr. W) told him that after lifting so many items, respondent developed "a joint condition like arthritis."

Respondent also testified that at some time after completing his therapy he found a job with (employer) to Market doing the same kind of work. Sometime in April 1992, while at home, he slipped and fell tearing his left rotator cuff. (Dr. Wi), who had treated appellant's right shoulder injury sustained six years earlier while working for employer, operated on the torn rotator cuff five or six weeks before the June 23rd hearing. Respondent did not contend he incurred the rotator cuff injury working for employer.

Appellant objected to the admission of respondent's medical records, as well as to his (month year) paycheck stubs, because they had not previously been exchanged. Appellant further objected to (Dr. W's) letter since he had not been earlier identified as a person with knowledge of relevant facts. Appellant introduced a document entitled "Carrier's Statement of Position on Disputed Issue and Designation of Documents and Witnesses" which reflected it was served on respondent by certified mail, and which stated, among other things, that appellant would object to the introduction of any medical reports since none had yet been exchanged. Respondent conceded he had not previously exchanged the documents. After hearing appellant's objections, the hearing officer summarily overruled appellant's objections and admitted the exhibits without any questions to or colloquy with respondent concerning the existence of good cause for not having previously exchanged the documents. Article 8308-6.33(d) provides that within a time to be prescribed by the Texas Workers' Compensation Commission (Commission), the parties shall exchange all medical reports and records, and a party who fails to do so may not introduce such evidence unless good cause is shown for not having disclosed such documents. Rule 142.13(c) requires the parties to exchange medical reports and records no later than 15 days after the benefit review conference, and thereafter, as such become available. The parties are to bring previously unexchanged documents to the hearing where the hearing officer "shall make a determination whether good cause exists for a party not having previously exchanged such information or documents to introduce such evidence at the hearing."

The burden of establishing good cause is on the party offering the evidence. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394, 395 (Tex. 1989). Respondent offered no explanation whatsoever for his failure to exchange nor was he asked. This record is utterly devoid of the good cause showing required by the statute and the rule and the hearing officer simply failed to make the determination. Thus, admission of respondent's exhibits was error. The Texas Supreme Court has held that "[t]o obtain reversal of a judgment based upon error of the trial court in admission or exclusion of evidence, the following must be shown: (1) that the trial court did in fact commit error; and (2) that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment." Gee, *supra* at 396. The court went on to note it would not ordinarily find reversible error "where the

evidence in question is cumulative and not controlling on a material issue dispositive of the case." Gee, *supra* at 396. In Texas Workers' Compensation Commission Appeal No. 91064 (Docket No. redacted) decided December 12, 1991, where the hearing officer erroneously failed to determine the existence of good cause for not timely exchanging a medical report, we considered "whether the error in admission of the medical report was reasonably calculated to cause and probably did cause the rendition of an improper decision." We found the evidence sufficient without the medical report to support the hearing officer's conclusion and thus its erroneous admission not to constitute reversible error. *See also* Texas Workers' Compensation Commission Appeal No. 91062 (Docket No. redacted) decided December 9, 1991; Texas Workers' Compensation Commission Appeal No. 92068 (Docket No. redacted) decided April 6, 1992; and Texas Workers' Compensation Commission Appeal No. 92073 (Docket No. redacted) decided April 6, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 92077 (Docket No. redacted) decided April 13, 1992.

Turning to the appealed issue concerning the sufficiency of the evidence to support the conclusion that respondent sustained an injury in the course and scope of his employment, we look to the findings of fact in support of such conclusion. The sole factual finding concerning the existence of an injury was Finding of Fact 6 which stated: "The Claimant developed pain and trauma in his left shoulder as a result of his repetitive activities with the boxes of meat." Disregarding the erroneously admitted medical records, we look to the sufficiency of the remaining evidence to support that finding. Respondent had the burden of proving by a preponderance of the evidence that an injury occurred within the course and scope of his employment. 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 to be compensable and a claimant's testimony alone can establish the occurrence of an injury. Gee, *supra* at 397. We have previously observed that issues of injury may be established by the testimony of a claimant and that such testimony may suffice to connect an event to a condition. Texas Workers' Compensation Commission Appeal No. 91083 (Docket No. redacted) decided January 6, 1992; Texas Workers' Compensation Commission Appeal No. 92069 (Docket No. redacted) decided April 1, 1992. The testimony of a claimant may also be sufficient to establish causation. Page v. Texas Employers' Ins. Assn., 544 S.W.2d 452- 455-456 (Tex. Civ. App.-Dallas 1976, aff'd, 533 S.W.2d 98 (Tex. 1977)).

Respondent testified, in essence, to the following matters: that he developed pain in his left shoulder which he attributed to the lifting, stacking, and jerking around of boxes of meat weighing from 50 to 90 pounds which he frequently did alone for up to an hour; that the pain was sharper when lifting the boxes and got progressively worse towards the end of 1991; that he tried to ignore the pain hoping it would go away and that he just kept on working out of, as he put it, "dumb loyalty;" that he told the doctors at (Clinic), which he visited in January and February 1992, that he had hurt his left shoulder and was picking up heavy things at work; that those doctors took x-rays, gave him medicine, sent him to therapy for about one month, and told him he had tendinitis or bursitis; that he later asked to be referred

to a doctor specializing in joints and was referred to (Dr. W), a surgeon; that (Dr. W) examined his shoulder, his x-rays, and inquired as to the nature of his work; that (Dr. W) prescribed medication, told him he had a joint condition like arthritis that was probably caused by his lifting and picking things up, and advised that he might later require surgery. This testimony was corroborated in part by the content of the TWCC-1 and the telephone interviews of respondent and (Mr. P). There was no controverting evidence, medical or otherwise. We find this evidence sufficient to support the hearing officer's finding and conclusion that respondent sustained a repetitive trauma injury to his left shoulder in the course and scope of his employment. Article 8308-6.34(e) makes the hearing officer the sole judge not only of the relevance and materiality of the evidence, but also of the weight and credibility to be given the evidence. As the trier of fact, the hearing officer weighs all the evidence, decides the credence to be given the whole, or any part, of the testimony of witnesses, and resolves conflicts and inconsistencies in the testimony. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The hearing officer may also draw reasonable inferences and deductions from the evidence. Harrison v. Harrison, 597 S.W.2d 477, 485 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.).

We further find the evidence sufficient to support the hearing officer's conclusion that respondent had good cause for not timely reporting his injury to employer, that is, for not reporting it not later than 30 days after (date of injury), the date the hearing officer found respondent knew or should have known that he was injured and that his injury was related to his employment. The hearing officer found that respondent did not report his injury to employer until December 20th when he was terminated, and that he did not believe the pain and trauma in his left shoulder were serious and did not seek medical attention until January 1992. Article 8308-4.14 provides that the date of injury in the case of an occupational disease (which includes repetitive trauma per Article 8308-1.03(36)) is the date the employee knew or should have known the disease may be related to the employment. The hearing officer determined that date to be (date of injury) and the parties stipulated respondent did not report the injury until December 20th. The respondent testified repeatedly that he tried to ignore the pain in his left shoulder in the hope that it would go away. In other words, as the hearing officer found, he trivialized his injury. In Texas Workers' Compensation Commission Appeal No. 91030 (Docket No. redacted) decided October 30, 1991, we considered this issue and cited Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370, 372 (1984) wherein the Texas Supreme Court stated that "[t]he law is well settled that a bona fide belief of a claimant that his injuries are not serious but trivial is sufficient to constitute good cause for delay in filing a claim." *And see* Texas Workers' Compensation Commission Appeal No. 91066 (Docket No. redacted) decided December 4, 1991. We are satisfied the evidence supports the hearing officer's resolution of this issue.

Finding no reversible error and further finding the evidence sufficient to support the hearing officers' findings and conclusions, we affirm.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge