APPEAL NO. 92409

A contested case hearing was conducted by the hearing officer, (hearing officer), in (city), Texas, on July 17, 1992, pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The hearing officer determined that respondent had timely contested the compensability of appellant's claim pursuant to Article 8308-5.21(a) (1989 Act). The hearing officer found that appellant was not struck by a forklift on (date of injury), and consequently concluded that appellant failed to prove by a preponderance of the evidence that he sustained an injury in the course and scope of his employment on (date of injury). Because of his determination of that issue, the hearing officer did not reach the third disputed issue, namely, whether appellant was entitled to temporary income benefits (TIBS) after November 4, 1991. In his request for review, appellant essentially challenges the hearing officer's adverse determinations respecting the compensable injury and TIBS issues, but does not controvert the determination that respondent timely contested the claim. Respondent views those as the only appealed issues and urges our affirmance. However, appellant, in setting out the issues appealed, mentions the exclusion of his medical records from evidence. We regard such as an issue raised by appellant in his request for review and, accordingly, address it.

DECISION

Finding reversible error in the exclusion of appellant's medical records, we reverse and remand.

Appellant testified that he was employed by (employer) on October 2, 1991, and assigned to work as a laborer at the (company). His job entailed opening small cans of liquid heating fuel, emptying the contents into a barrel, and discarding the containers into a hopper. On (date of injury), at about 2:00 p.m., appellant was returning to his work site in the warehouse from the bathroom, and as he passed a stack of products, which blocked his view, he immediately encountered a forklift backing up. He said he yelled out "hey," and threw his hands and arms out to stop it. The forklift hit his hands and pushed him backwards. He said the force jerked him backwards off his feet although he did not fall. He said he felt "stunned" and the driver twice asked if he was all right to which he replied in the affirmative. He continued on to his work area, told coworker (TB) he had almost been run over, and sat down. He soon began to experience numbness and stiffness in his knees and legs, as well as pain and headache, so he went to an office where he advised his supervisor, (Mr. S), and the safety coordinator, (Mr. R), of the incident. Appellant denied telling (Mr. R) the forklift hit him in the chest but said he told him he was hurting in the chest area. He admitted telling respondent's adjustor in a recorded interview on October 31st, that he was hit in the chest but said he was under sedation in the hospital and not certain what he told the adjuster. His statement of October 31st described the forklift as striking him between his waist and chest with his hands up there. Other evidence indicated that the back of the forklift was approximately waist high. His supervisor testified that the small Nissan 3000 forklift involved wasn't high enough to hit a man in the chest and the driver said it was only waist high.

The forklift driver, (RC), testified that the backup warning device was operating and that he was looking backwards while backing the forklift into the main aisle, but did not see appellant. He said that after backing up, he stopped the forklift so as to go forward and heard someone yell "hey." He turned around and saw appellant standing to the side. He said he did not hit appellant but nevertheless twice asked him "did I get you," to which appellant responded "no, man, no, you didn't hit me," and indicated he was all right. Coworker (TB) said that when appellant returned to the work area, he said he "just liked to have been hit," and she understood him to mean he had almost been hit, but not actually hit. She saw nothing on (date of injury) which led her to believe appellant had been injured. She said appellant then went to the office and shortly later departed the building. Appellant's supervisor, (Mr. S), testified that appellant told him in the office that he "had been hit by a fork." In his prior statement, (Mr. S) had stated that appellant said a forklift backed into him, "hit him about chest," and that he had complained of head and neck injury. Appellant had pointed to his chest when asked where he had been hit. (Mr. S) said that particular forklift couldn't have hit appellant in the chest and he had no reason to believe appellant had been injured.

His employer was called and appellant was directed by employer to the (Center) where he saw (Dr. D). He denied telling (Dr. D) the forklift hit him in the back although (Dr. D) Initial Medical Report (TWCC-61) so reflected. (Dr. D) noted appellant's complaint of right shoulder and neck pain, examined appellant, and found neck muscle spasm with limited range of motion, and limited flex and extensor motion of the L5 area. He prescribed medications, daily physical therapy (PT), light duty for one week, and scheduled a follow-up visit for October 18th. Appellant testified he didn't attend the PT sessions because of pain and lack of transportation, and he last saw (Dr. D) on October 18th at which time he was released to return to normal duties. (Dr. D) signed a Report of Medical Evaluation (TWCC-69) which stated that appellant was treated on subjective symptoms, had very mild neck muscle spasm and flex and extensor limitations, had failed to follow medical advice, had no positive physical findings and had reached maximum medical improvement on October 18th. (Dr. D) notes indicated that appellant was released to return to normal duties on October 18th. According to appellant and a witness for employer, appellant never sought light or normal duties with employer after (date of injury). Appellant said he didn't feel he was able to return to work. Appellant told employer when he came in to pick up his check on October 18th that he was still sore.

Appellant said that on October 30th, he visited (Dr. B), because he was still having pain and (Dr. B) was closer. (Dr. B) admitted appellant to a hospital where he was treated for approximately 15 days. Appellant believed he last saw (Dr. B) on or about February 10, 1992 when he was released by him. Appellant said he believed he could have returned to work at that time but has not obtained employment.

When appellant offered (Dr. B) records including the hospital records into evidence, respondent objected on the grounds that the records had not been exchanged. The attorney

for respondent had stated earlier in the hearing that these records had been "made available" to her for the first time that day. The hearing officer did not inquire to clarify whether such records had been earlier provided to the respondent but had not, for whatever reason, been made available to respondent's attorney. Appellant stated that he obtained the records on or about May 4, 1992 and didn't exchange them with respondent because the doctor said he had already sent the records to the insurance company pursuant to its request. The doctor didn't want to give appellant a copy because they had already been provided to the carrier. Appellant said he was also told at the doctor's office the records had to be acquired through an attorney. Appellant said he was eventually provided the records. The hearing officer determined that appellant's explanation did not constitute good cause for his failure to exchange these records and excluded them from the evidence.

The 1989 Act requires a party intending to offer documents into evidence to exchange them within the time prescribed by the Texas Workers' Compensation Commission, and a party failing to do so may not introduce such documents unless good cause is shown for not having done so. Articles 8308-6.33(d) and (e). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (TWCC Rule) requires the parties to exchange documentary evidence not later than 15 days after the benefit review conference (BRC) and, thereafter, as it becomes available. The BRC in this case was held on January 9, 1992. However, appellant said he thought he had last seen (Dr. B) on February 10, 1992. Documentary evidence not previously exchanged is to be brought to the hearing where the hearing officer must determine whether good cause exists for a party to introduce such evidence. TWCC Rule 142.13(c).

The standard for review of the hearing officer's determination of good cause is one of abuse of discretion. *See* Texas Workers' Compensation Commission Appeal No. 92165 (Docket No. redacted) decided June 5, 1992, and cases and Appeals Panel decisions cited therein. We have previously described the test for the existence of good cause as that of ordinary prudence, that is, "that degree of diligence as an ordinarily prudent person would have exercised under the same or similar circumstances." Texas Workers' Compensation Commission Appeal No. 91009 (Docket No. redacted) decided September 4, 1991; Appeal No. 92165, *supra*. There was no evidence to controvert appellant's assertion that he had been told by the doctor's office that his records had already been provided to the insurance company. If that was indeed the case, appellant would not be required to provide a second set of the same records to respondent. *See* Texas Workers' Compensation Commission Appeal No. 91088 (Docket No. redacted) decided January 15, 1992. We have evaluated the hearing officer's ruling and, under the circumstances presented, believe he abused his discretion in determining that appellant did not show good cause for not exchanging his medical records prior to the hearing. We do not think an ordinarily prudent person would have been expected to challenge the information appellant was given at the doctor's office, much less to provide a copy of records to the insurance carrier after having been advised by the doctor that the carrier had already requested and been provided with the records.

The court in Harbison v. Service Lloyds Ins. Co., 808 S.W.2d 690, 693 (Tex. App.-

Corpus Christi 1991, no writ) stated the following principles to be considered when reviewing the effect of error in the admission or exclusion of evidence.

> To obtain reversal of a judgment based upon the trial court's error in admitting or excluding evidence, the following must be shown: (1) that the trial court committed error, and (2) that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. (Citations omitted.) Whether the error probably did cause the rendition of an improper judgment is to be determined in light of the record as a whole. (Citation omitted.) When the evidence is cumulative and not controlling on a material issue dispositive of the case, it will not ordinarily be reversible error. (Citations omitted.) The question here is: Was the judgment controlled by the testimony that should have been excluded?

The excluded records show that appellant was admitted to (Hospital), by (Dr. B) on October 30, 1991 and discharged on November 12, 1991. He was diagnosed as having "Acute Strain-Neck Muscles/Acute Strain-Lumbar Muscles/ Acute Bruise-Thoracic Muscles-Accident," was administered a variety of medications, and was provided with ultrasonic and diathermy treatments to his neck and back while in the hospital. He was released with some improvement, and was to continue medications and return to the doctor's office for further treatment. The records indicated that as of January 17, 1992, appellant was still under treatment receiving physical therapy, muscle relaxers, and pain medications. His "date of release" was still undetermined at that time. The records contained no entry after that date.

We have carefully reviewed the excluded medical evidence, as well as the record as a whole, and are satisfied such exclusion reasonably could have caused an improper decision. (Dr. D) examined appellant on the very day of the incident and found neck muscle spasm and some range of motion limitation in the neck and L5 area. Sixteen days later, (Dr. B) found acute neck and lumbar muscle strain and acute bruise of thoracic muscles for which appellant was hospitalized and treated for two weeks, and for sometime thereafter. That (Dr. B) diagnosed chest muscle bruising was, we believe, a significant fact which was not otherwise in evidence. (Dr. D) had noted the absence of objective findings.

Given the somewhat balanced nature of the evidence in this case involving different versions of the incident in question, the actions taken by the appellant in seeking medical attention shortly after the incident and the records from (Dr. D), we can not say with any degree of certainty that a different result would not have been reached had the excluded medical evidence been considered.

The decision of the hearing officer is reversed and the case is remanded for the expedited development of appropriate evidence, if any, and reconsideration not inconsistent with this opinion. Pending resolution of the remand, a final decision is not rendered in this case.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge