APPEAL NO. 92428

A contested case hearing was held in on July 23, 1992, (hearing officer) presiding as hearing officer. He determined the respondent was injured in the course and scope of his employment and had disability up to the time of the contested case hearing. Accordingly, he awarded income and medical benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). Appellant asserts error in several of the hearing officer's findings of fact and conclusions of law and complains about the hearing officer's rulings in admitting some evidence. Respondent urges that the decision be upheld.

DECISION

Finding the evidence sufficient to support the hearing officer's determination that the respondent suffered a compensable injury in the course and scope of his employment but finding error in his determination on disability, we affirm in part and reverse and render in part.

The issues presented for resolution at the contested case hearing were whether the respondent suffered an injury in the course and scope of his employment and whether he had disability. The respondent did not appear at the contested case hearing but was represented by his mother. His presence was precluded, apparently because of his incarceration starting December 20, 1991, although it is not clear whether he was incarcerated because of a parole violation or because he was awaiting trial on new charges. In any event, his mother presented evidence, including a sworn statement of the respondent, satisfactory to the hearing officer to establish that the respondent suffered a back injury on _____, by pulling a "purling" while working on a construction job for his employer. He did not return to work the following days because his back was painful, and he finally went to an emergency room of a hospital on (8 days after date of injury), where he was diagnosed as having "low back pain with radiculopathy." Suffice it to state that we have reviewed the testimony and evidence of record on the course and scope issue and do not find that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986). *See also* Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

The appellant's complaint surrounding the issue of course and scope centers around the hearing officer's admission into evidence of a sworn statement of the appellant. (This statement does not address the matter of disability.) From the record it is apparent the appellant did not receive a copy of the statement, sworn to on July 15, 1992, until 3 days before the hearing on July 23, 1992. The delay in exchanging documents was occasioned, according to information before the hearing officer, because of considerable difficulties with an attorney who indicated he was going to represent the respondent but who apparently changed his mind at the last minute. The respondent's mother indicated that as soon as she found out the attorney was not going to represent her son, and that he

had failed to send the appellant any documents, she picked up the file at the attorney's office and, as soon as she could, mailed them to the appellant. With these circumstances before him, the hearing officer apparently deemed there was good cause for the lack of timely exchange and admitted the respondent's statement. We caution that just because a claimant is pro se or represented by a lay person not does excuse the discovery requirements of Article 8308-6.33, 1989 Act, and of Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE §142.13, and that it is necessary that a factual basis be fully developed in determining an issue of "good cause." Good cause, as we have observed, is that degree of diligence an ordinarily prudent person would have exercised under the same or similar circumstances. *See* Texas Workers' Compensation Commission Appeal No. 91117, decided February 3, 1992.

We cannot say that, under these circumstances, the hearing officer abused his discretion in finding good cause or that the evidence did not support his determination. Morrow v. HEB Inc., 714 S.W.2d 297 (Tex. 1969). Aside from the matter of good cause, we believe a credible position could be taken that a sworn statement of an absent claimant would always be admissible since a claimant always has a right to testify. *See* Texas Workers' Compensation Commission Appeal No. 91088, decided January 15, 1992. We find the appellant's challenge to the hearing officer's finding and conclusion determining the respondent was injured in the course and scope of his employment to be without merit.

Turning to the issue of disability, we are not able to find sufficient evidence to support the hearing officer's determination that the respondent had disability due to his compensable injury from November 14, 1991, through the date of the hearing, July 23, 1992. Article 8308-1.03(16) of the 1989 Act defines disability as "the inability to obtain and retain remployement at wages equivalent to the preinjury wages because of a compensable injury." The evidentiary posture on this issue measures up to little more than speculation or a mere scintilla of evidence. In this regard, and following cross-examination of the respondent's representative, the hearing officer advised her that she hadn't testified or offered evidence on disability and that he needed to be told "more about that." It was apparent that the representative was confused and in extending every effort to provide assistance and fulfill his responsibilities to develop a record necessary to make the determinations before him (Article 8308-6.34(b)), the hearing officer, *inter alia*, read the definition of disability from the 1989 Act. The representative responded "yes, he does have that." When the hearing officer indicated that this wasn't good enough, the representative stated "I'm gonn'a say he cannot perform work as he did before and probably at this stage not any type work at all." The representative further stated the respondent was off work because of a herniated disc, that he has not been treated for it, and that a doctor said he will have to have surgery for it. Although the hearing officer refused to admit a doctor's work excuse because it was not properly exchanged, he allowed the representative to testify about it. She stated "he's still off work and he was off till December 20 when he was arrested and if he wasn't in jail he would be still off work because of this injury." The basis for the representative's comments is not otherwise indicated in the evidence. On cross-

examination she stated that she has not had any doctor tell her the respondent "was--any amount of disability or anything, no." She further testified that the only doctor that took him off of work "only took him off for 7 days." This referred to the work excuse, which was not admitted, dated "11/21/91" and excusing the respondent until "11/28/91." There are gaps in the evidence as to the activities, capability and condition of the respondent from (8 days after date of injury), to the time of the hearing, although it appeared his incarceration on December 20, 1991, was related to a burglary charge. A statement in evidence indicates that he was taken to a Dr. L office on January 3, 1992 as a result of a referral from the doctor who treated him in the emergency room on (8 days after date of injury). No examination or treatment was rendered then because the doctor's office was advised that the respondent's claim "had been controverted and they would not guarantee payment." There also was a medical report dated April 8, 1992, from a Dr. B with an impression stated as: "[e]xtremely high degree of functional overlay. I think we have to rule out a herniated nucleus pulposus, L5-S1 on the left. Let's get a CT scan;" and a subsequent letter dated May 20, 1992 which indicated the respondent was seen in Dr. B's office on April 21, 1992 and "diagnosed to have a ruptured disc with severe functional overlay."

There is nothing in the medical reports or other evidence probative on the matter of disability during the time of the respondent's incarceration. In our review of the evidence of record, there was nothing else pertinent to disability from November 28, 1991 on.

With the evidence in this state, we do not reach the matter of whether a claimant's entitlement to temporary income benefits based upon disability as defined in the 1989 Act would end upon incarceration. By definition, disability requires that the inability to obtain or retain employment at wages equivalent to the preinjury wage be because of a compensable injury. Needless to say, incarceration results in the inability to obtain or retain employment other than whatever programs or opportunities are provided by the particular institution. There is no evidence on this latter matter in this case. We are not aware of any Texas case authority in this area as regards disability under the concepts of the 1989 Act. We do observe there is a split of opinion in other state jurisdictions. *See generally* Larson's Workmen's Compensation Law, Vol. 1 C, §47.31(g), pp. 8-333 Matthew Bender, N.Y., N.Y.

As indicated, the only evidence, other than the speculative comments of the respondent's representative, that establishes any disability in this case is the testimony relating to the week following the respondent's injury and the doctor's excusal covering the period until November 28, 1991. The evidence is sufficient to support a finding that the respondent suffered disability during this period. The speculative comments of the representative, under the circumstances present, are no more than a scintilla of evidence regarding disability following the ending date of the doctor's excusal. Where testimony is slight and its probative force is so weak that it only raises suspicion of existence of facts sought to be established, such testimony falls short of being evidence and does not support a verdict. *See* Texas Pacific Coal & Oil Co. v. Wells, 151 S.W.2d 927 (Tex. Civ

App.- Waco 1991, no writ). In cases where the question is one of insufficiency, we must review and consider all the evidence and only if the evidence supporting a necessary finding of fact is so weak (or the evidence to the contrary is so overwhelming) is it appropriate to set aside such finding. *See* Schenck v. Ebby Halliday Real Estate, 803 S.W.2d 361 (Tex. App- Fort Worth 1990, no writ). Where the issue is one of "no evidence," only the evidence and inferences which tend to support the finding are considered and the finding is appropriately set aside if there is no evidence of probative force to support the finding in question. *See* Garza v. Alviar, 395 S.W.2d 821 (Tex. 1965). Where evidence offered to prove a vital fact is no more than a mere scintilla of evidence, legal insufficiency points of error must be sustained. *See* Otis Elevator Co. v. Joseph, 749 S.W.2d 920 (Tex. App. Houston [1st Dist] 1988, no writ). We are of the opinion that the evidence in this case would support reversal under either concept. However, we believe the evidence on the matter of disability following the expiration of the doctor's excusal is no more than a scintilla and consequently it is legally insufficient to support the hearing officer's finding that disability continued up to the time of the contested case hearing. Accordingly, we reverse that part of his decision that determines disability continued past November 28, 1991.

The conclusions and decision of the hearing officer are affirmed insofar as they provide that the respondent was injured on _____, in the course and scope of his employment and that he had disability from that date until November 28, 1991. The conclusions and decision are reversed insofar as they determine the respondent had disability after November 28, 1991 and we render a new decision that disability ended November 28, 1991. The respondent is entitled to all medical benefits under the 1989 Act and temporary income benefits in accordance with this decision.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge