APPEAL NO. 92431

On July 30, 1992, (hearing officer) presided over a contested case hearing in (city), Texas, and concluded that respondent (claimant below) had suffered a compensable injury to his left shoulder while acting within the course and scope of his employment on (date of injury), 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). Appellant challenges the sufficiency of the evidence to support the hearing officer's findings and conclusions, and also asserts that the hearing officer erred in the admission of certain testimony by respondent, as well as his one documentary exhibit, on the grounds of the rule against hearsay evidence and because of his failure to answer appellant's interrogatories. No response was filed by respondent.

DECISION

Finding no error and the evidence sufficient to support the challenged findings and conclusions, we affirm.

When the hearing commenced, appellant objected to the introduction of respondent's only exhibit, an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), and to the testimony of any witnesses for respondent, because respondent had failed to answer appellant's interrogatories requesting his identification of both relevant documents and of persons with knowledge of relevant facts. The hearing officer summarily overruled the objection without making a determination of good cause, stating that respondent "is a pro se."

Respondent, the sole witness, testified that on Friday, (date of injury), at about 3:30 p.m., while employed by (employer), he was injured when a piece of wood planking fell approximately 15 feet from a scaffold onto his left shoulder. Respondent had been holding onto a small shed being moved by a "cherry picker" (crane) to a different location at the (plant) in (city), Texas, and guiding the crane down a street when the crane boom collided with scaffolding built around some overhead pipes. Respondent said he ignored his injury in his efforts to get the traffic flow restored on the street and the crane re-routed to the site for the shed. When respondent and the crane operator returned with the crane, their shift had ended and he saw none of employer's supervisory personnel in the area. He was briefly interviewed by plant security personnel before leaving. The following Monday, respondent advised his foreman, (Mr. A), of his shoulder injury and was told it was a matter for employer's safety personnel. He was interviewed about the accident that morning by two of employer's supervisors and two safety managers, and he told the four of them his shoulder had been hit by a piece of timber. He said they would not make out a report of his injury, send him to a doctor, or even take him to the safety station to look for a bruise or an abrasion. Instead, employer sent respondent to a facility to provide a urine specimen for drug testing and he was told not to return to work pending the results.

Appellant objected to respondent's testifying to the content of his conversations with

these personnel citing the rule against hearsay evidence, and his failure to identify these individuals as persons with knowledge of relevant facts by answering the interrogatories. The hearing officer advised respondent that appellant was making a "technical objection" to preserve error for appeal and overruled the objection. Respondent testified that after being off work two or three days awaiting the (negative) drug test results, he returned to work and was told by employer's superintendent, (WJ), that he was suspended without pay for one week as punishment for the accident and as an example to others. Appellant's sole exhibit was a memorandum of the Monday meeting with respondent, dated March 8, 1991, which contained information about the accident and respondent's suspension without pay from 3-4-91 until 3-11-91 and pending the drug test results. Appellant's exhibit was largely cumulative of the testimony objected to by appellant.

Respondent also testified that at some time, apparently while temporarily suspended, he went to employer's district office in (city), Texas, where he spoke to (Mr. M), the personnel manager, and advised he had been hurt on the job. He said (Mr. M) talked to P.D. (F), employer's district office safety manager, to ascertain why respondent had not been sent to a doctor. (Mr. F) advised it was a matter for employer's safety personnel at the plant. The hearing officer overruled appellant's objection to respondent's testimony concerning these conversations and gave appellant "a running objection" to such testimony. After the one week suspension, respondent returned to work for employer while continuing to work his second, part-time job driving a gasoline tanker truck. He acknowledged he had not lost any work time because of his shoulder injury, aside from the several days he awaited the drug test results, and the one week suspension. He said he did not seek medical care on his own because he lacked the funds, and that all he presently seeks is medical treatment for his injured shoulder.

Respondent said that by late December 1991, he was still hurting and thought he had twisted his arm. He said he saw a chiropractor friend of his, (Dr. W), who, without charge, examined his shoulder and advised him, without benefit of x-rays, that there was swelling and that the tendons were torn loose. He said (Dr. W) advised him to file a workers' compensation claim. Appellant objected to testimony concerning (Dr. W) because of respondent's failure to identify him in answers to interrogatories. The hearing officer then asked respondent, for the first time, why he had not answered the interrogatories. Respondent replied that he "didn't feel he should . . . [and] saw no reason to fill them out." His position was that he got hurt on the job and reported it, and that employer knew about it but refused him medical treatment. After talking to (Dr. W), respondent said he again visited employer's district office where he was told nothing was going to be done for him. He next went to the Texas Workers' Compensation Commission (Commission) field office in (city), Texas, where he prepared and filed TWCC-41. He said the TWCC-41 was lost and he prepared a second form on March 17, 1992, a copy of which was his sole exhibit.

Appellant challenges the following findings and conclusions:

FINDINGS

3.On (date of injury) CLAIMANT'S left shoulder was injured when a board dislodged by a cherry picker from an overhead scaffolding struck his left shoulder.

4.Although CLAIMANT lost at least 8 work days due to employer's reactions to his (date of injury) accident, he lost no time due to the injury incurred in that accident.

5.CLAIMANT is in need of medical treatment for his left shoulder due to his (date of injury) injury.

CONCLUSIONS OF LAW

1.All notices and jurisdictional requirements have been met; that the Texas Workers' Compensation Commission has jurisdiction of this claim; and that venue is proper in (city), Harris County, Texas.

2.On (date of injury) CLAIMANT suffered a compensable injury to his left shoulder while acting within the course and scope of his employment with EMPLOYER and is therefore entitled to benefits under the Texas Workers' Compensation Act. CARRIER is liable for payment of those benefits.

We find the evidence sufficient to support the findings and conclusions. Respondent's testimony alone may be sufficient to establish the fact of such injury. Texas Workers' Compensation Commission Appeal No. 92069 (Docket No. redacted) decided April 1, 1992. The hearing officer obviously chose to believe respondent's testimony and Article 8308-6.34(e) vests in the hearing officer the sole responsibility for judging not only the materiality and relevance of the evidence, but also the weight and credibility it is to be given. While the hearing officer is not bound to accept the testimony of a claimant at face value (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), he is privileged to believe all, part, or none of the testimony of any witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)). Not only was there no evidence controverting respondent's testimony, but appellant's memorandum of the meeting of respondent with employer's supervisory and safety personnel corroborated respondent's testimony concerning the accident with the crane and the facts that he had been tested for drugs and suspended for a period of time. Even were Findings 4 and 5 unsupported by sufficient evidence, which we do not find, they were unnecessary to a determination of the sole disputed issue. As for Conclusion of Law 1, appellant does not specify the nature of his challenge. Respondent testified to living within 75 miles of (city) and appellant made no issue of the venue of the hearing. As for notices, when appellant adverted to the timeliness of appellant's notice of injury and his claim, the hearing officer pointed out that there was no disputed issue concerning such matters. We have many times refused to consider issues raised for the first time on appeal.

Article 8308-6.31(a) provides that issues not raised at the benefit review conference (BRC) may not be considered except by consent of the parties or unless the Commission determines that good cause existed for not raising the issue at the BRC. *And see* Tex. W. C. Comm'n, TEX. ADMIN. CODE § 142.7 (TWCC Rule 142.7).

Articles 8308-6.33(a) and (b) permit the use of interrogatories for discovery and require they be answered within a time prescribed by Commission rule. Article 8308-6.33(c) goes on to provide that such discovery (depositions and interrogatories) shall not seek information which may readily be derived from the documentary evidence described in Subsection (d) and that the answers need not duplicate such information. Article 8308-6.33(d) requires the parties to exchange the identity and location of witnesses known to have knowledge of relevant facts, as well as all documents a party intends to offer into evidence at the hearing, within a time to be described by Commission rule. Article 8308-6.33(e) then provides that a party who fails to disclose information known to that party or documents which are in existence and in the possession of the party at the time disclosure is required may not introduce such evidence unless good cause is shown for the failure to disclose. TWCC Rule 142.13(c) requires the exchange of documentary evidence and the identity and location of any witness known to have knowledge of relevant facts no later than 15 days after the BRC. TWCC Rule 142.13(c)(3) requires the parties to bring documentary evidence not previously exchanged to the hearing and requires the hearing officer to determine whether good cause exists for a party not having previously exchanged such information or documents to introduce such evidence at the hearing. The hearing officer commented, in so many words, that the Commission had not yet indicated whether a different set of discovery rules applies to unrepresented claimants, and made no good cause determination. His failure to do so was error. *See* Texas Workers' Compensation Commission Appeal No. 92428 (Docket No. redacted) decided October 2, 1992, in which we cautioned that "just because a claimant is pro se or represented by a layperson does not excuse the discovery requirements . . ."

Under the circumstances in this case, we do not find such error reversible. The information in the only unexchanged document, the TWCC-41, was essentially cumulative of respondent's testimony. As for his failure to identify persons with knowledge of relevant facts, respondent neither called any witnesses nor offered any witness statements. Respondent's testimony regarding the out of hearing declarations of the various employer personnel, all presumably known to respondent's insured, and of (Dr. W), may have constituted hearsay evidence if such declarations fell within no recognized exception to the hearsay rule and were offered to prove the truth of the matters asserted. Tex. R. Civ. Evid. 801(d). However, Article 8308-6.34(e) provides that conformity to the legal rules of evidence at contested case hearings is unnecessary. Even if such declarations were inadmissible hearsay, in order to obtain a reversal based thereupon, appellant must show not only that the decisions to admit same were erroneous, but also that such errors were reasonably calculated to cause and probably did cause the rendition of an improper decision by the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 92144 (Docket No. redacted) decided May 28, 1992. *Compare* Texas Workers' Compensation

Commission Appeal No. 92409 (Docket No. redacted) decided September 25, 1992. After carefully scrutinizing the record, we are satisfied that the hearing officer's decision did not turn upon the evidence complained of nor did such evidence result in an improper decision. The findings and conclusions are 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 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Finding no reversible error and sufficient evidence to support the findings and conclusions, the hearing officer's decision is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge