APPEAL NO. 92449

On July 24 and 28, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the claimant, (claimant), respondent herein, injured his back in the course and scope of his employment with (employer) on (date of injury), and ordered appellant, the employer's workers' compensation insurance carrier, to provide benefits to respondent in accordance with his decision and the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant contends that the determination that respondent sustained an injury in the course and scope of his employment is against the great weight of the credible evidence; that if respondent sustained an on-the-job injury, his period of disability is limited to (date of injury) through (date); and that the hearing officer erred in finding that there was good cause for respondent's failure to exchange a medical report within the time period required by Texas Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE Sec. 142.13. Appellant asks that the decision be reversed and a new decision rendered that respondent did not sustain a compensable injury. In the alternative, appellant asks that if we affirm the determination that respondent sustained an injury in the course and scope of his employment, that we limit the decision of the hearing officer and find that the period of respondent's disability was for only four days.

Respondent responds that he met his burden of proof by a preponderance of the evidence; that the only issue before the hearing officer was whether he sustained an injury at work; and that if the hearing officer erred in finding good cause and admitting the medical report, such did not amount to reversible error.

DECISION

The decision of the hearing officer is affirmed.

The parties stipulated that on (date of injury), respondent was an employee of the employer and that appellant was the employer's worker's compensation insurance carrier. On (date of injury), respondent and several other employees were working for the employer constructing a parking garage. Respondent testified through a Spanish-speaking interpreter. He said he does not speak English.

Respondent claimed that on Monday, (date of injury), he injured his back at work. He testified that the crane was not operating that day so the employees had to mount wall sections by hand. He and a coworker, (J F), strapped themselves to rebar with their safety belts about 12 feet from the ground and took wall sections which were handed to them from below by (J J). Respondent said that the wall sections were heavy and that after he and (J F) had received and mounted about five sections he felt a "warm feeling" in his side when he bent over and took hold of another section that was handed to them. About that time, he said that (J F) let go of the wall section and that he felt "some kind of a stretch" when he

attempted to hold onto the wall section by himself. Respondent said that at lunch that day his back began to ache and he told his coworkers he felt bad. Respondent worked the rest of the day and on Tuesday and Wednesday, but he said he had a lot of back pain on those days. On Thursday it rained so the crew did not work. However, several of them stayed in the parking garage waiting for their paychecks. Respondent said that while they were waiting for the checks, a coworker made a small ball out of Styrofoam and that he and the coworker threw the ball back and forth several times while he was sitting down. He denied running, jumping, or playing soccer that day. Respondent denied injuring his back playing with the ball, but testified that he thought he aggravated his already existing back injury from the incident on Monday. Respondent said he continued to have back pain while at work on Friday and Saturday. On Saturday, he asked a coworker who spoke English to tell the foreman that he had injured his back at work on Monday. Respondent said that he did not tell the foreman about his accident any sooner because he was afraid he would be fired. Respondent said that the foreman told him to wait until Monday when the construction supervisor would give him a paper to see a doctor. On Monday, September 23rd, respondent said he had another coworker who spoke English tell the construction supervisor that he hurt his back at work the previous Monday. Respondent said that the construction supervisor did not believe he was hurt at work and refused to send him to a doctor because the supervisor said he saw him playing soccer on Thursday. Respondent testified that he attempted to see a doctor on his own on September 27th, but was refused treatment because the employer would not authorize it. He said he was also refused treatment at a medical clinic because he did not have insurance. Respondent eventually was able to see a doctor in May 1992. Respondent testified that, except for one day when he tried to sell pillows door-to-door, he has not worked since September 23, 1991, because of his back pain.

(J F) testified that about a week before respondent stopped working for the employer, he and respondent were "hanging from the wall on a chain" and picking up heavy 8 or 10 foot forms when respondent suddenly said something about his back hurting. This witness said that respondent continued to complain of back pain and walked slowly after work that day. He said that after the incident, respondent was not able to work the same way as he had before the incident. He said that while he saw other workers play soccer with a Styrofoam ball on Thursday, he did not see respondent play. He also said that he took respondent to a doctor, but could not recall when that was.

(J J) stated in an affidavit that on or about (date of injury) he was passing down some forms to respondent and another coworker when respondent mentioned that he felt pain in his back. After that, he noticed that respondent was working slowly. Another coworker, (C F), testified that the day before the soccer game, respondent had told him he had hurt his back at work pushing forms up. This witness said that on Thursday, while the crew was waiting for the paychecks, he saw respondent kick a small Styrofoam ball several times, but that he did not see respondent run or jump. This witness further testified that on Monday, September 23rd, when he saw that respondent was really hurting, he told the construction supervisor that respondent had injured his back at work.

An initial medical report from (Dr. H), D.C., dated May 28, 1992, revealed that (Dr. H) examined respondent on that date for injuries respondent told the doctor he had sustained at work on (date of injury). Respondent complained of lumbosacral pain and pain in both legs. After x-rays and examination, (Dr. H) diagnosed lumbar radicular syndrome and lumbar myofascitis. He indicated that further testing should be done to rule out lumbar intervertebral disc syndrome. He recommended that respondent undertake daily physical therapy for two weeks, and referred respondent to another doctor for evaluation of a possible hernia. Over appellant's objections, a signed, undated, addendum to (Dr. H) initial medical report was admitted into evidence. In the addendum, (Dr. H) indicated that respondent entered his office on or about September 27, 1991 (11 days after the date of the claimed injury) and that the office manager tried to obtain approval for evaluation and treatment of respondent, but the employer refused to confirm an injury had occurred. (Dr. H) said that respondent was told he should go to (Hospital).

The foreman testified that he saw respondent and other employees playing soccer with a Styrofoam ball while waiting for the paychecks on Thursday, (date). He said that respondent ran, jumped, threw and kicked the ball, and hit the ball with his head. He said that respondent appeared to be in good physical health and that he did not see respondent get injured playing soccer. This witness said that on Saturday, September 23rd, an employee told him that respondent had been injured working on the wall forms, so he sent respondent home after telling respondent that he would have to check with the construction supervisor on Monday.

The construction supervisor testified that he also saw respondent play soccer with the Styrofoam ball on Thursday, (date), that respondent did not appear to be in pain, and that he did not see respondent get injured while playing soccer. This witness said that on Monday, September 23rd, respondent reported to him through an interpreter that he had injured his back at work the previous Monday. He said that at the time the incident was reported to him, he did not believe that respondent had been injured at work because he had seen him play soccer on Thursday.

We first address appellant's contention that the hearing officer erred in finding that the respondent had good cause for failing to timely exchange the addendum to (Dr. H) initial medical report and in admitting the document into evidence. The benefit review conference (BRC) was held on May 15, 1992. Pursuant to Rule 142.13(c) parties must exchange documentary evidence, including medical reports, no later than 15 days after the BRC, and thereafter must exchange additional documentary evidence as it becomes available. This same rule provides that the hearing officer must make a determination whether good cause exists for a party not having previously exchanged information or documents to introduce such evidence at the hearing. The complained of document is undated but is an addendum to a medical report dated May 28, 1992. Respondent's attorney represented that she received the addendum from the doctor's office on July 20, 1992 and immediately sent it to appellant's attorney. Appellant's attorney acknowledged receipt of the document on July 22nd. The first session of the hearing was held two days later on July 24th. From the record developed at the hearing, we are unable to conclude that the hearing officer abused

her discretion in finding good cause for not having disclosed the document earlier and in admitting the document into evidence. *See* Texas Workers' Compensation Commission Appeal No. 92378 (Docket No. redacted) decided September 14, 1992. However, if the hearing officer erred in admitting the document, we do not believe her ruling amounted to reversible error. Reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

Respondent's testimony concerning the occurrence of a work-related back injury on (date of injury), is in large part corroborated by several of his coworkers. His testimony that he attempted to see a doctor shortly after the accident but was refused treatment until several months later is also corroborated by documents in evidence. The evidence also showed that he reported his injury to his supervisors within a week of the accident. The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). As the trier of fact, the hearing officer weighs all the evidence and decides what credence should be given to the whole, or to any part, of the testimony of each witness, and resolves conflicts and inconsistencies in the testimony. Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203 (Tex. Civ. App.-Austin 1967, no writ); Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We observed in a previous decision that an injury may be compensable even though aggravated by a subsequently occurring injury or condition. *See* Texas Workers' Compensation Commission Appeal No. 91038 (Docket No. redacted) decided November 14, 1991. That different inferences might reasonably be drawn from the evidence is not a basis to set aside a fact finder's determination where the determination is supported by sufficient evidence. Garza, *supra*. The decision of the hearing officer will only be set aside if the evidence supporting the hearing officer's determination is so weak or against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Middleman, *supra*; Texas Workers' Compensation Commission Appeal No. 92398 (Docket No. redacted) decided September 18, 1992. Having reviewed the record, we conclude that the hearing officer's determination that respondent sustained a back injury in the course and scope of his employment on (date of injury), is sufficiently supported by the evidence, and is not against the great weight and preponderance of the evidence.

We do not address appellant's alternative contention on appeal that if respondent sustained a compensable injury, his period of disability should be limited to three days, because disability was not an issue at the hearing. The sole issue at the hearing was whether respondent sustained an injury in the course and scope of his employment. *See* Texas Workers' Compensation Commission Appeal No. 92113 (Docket No. redacted) decided May 7, 1992. We note that appellant acknowledged at the hearing that disability was not an issue before the hearing officer. The hearing officer made no findings or conclusions concerning disability, but determined that respondent had sustained an injury in the course and scope of his employment, and ordered appellant to provide benefits to respondent in accordance with his decision and the 1989 Act. Article 8308-4.61(a)

provides that an injured employee is entitled to all health care reasonably required by the nature of the compensable injury as and when needed. Article 8308-4.21(b) provides that except as otherwise provided by the Act, income benefits shall be paid without order from the Commission on a weekly basis as and when they accrue.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge