APPEAL NO. 92467

On July 24, 1992 a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The issue at the hearing was whether appellant's inability to work resulted from his (date of injury) work-related injury. The hearing officer determined that the appellant failed to establish that he had disability resulting from a (date of injury) compensable injury to the date of the hearing, and further determined that respondent, the employer's workers' compensation insurance carrier, is not liable for payment of temporary income benefits (TIBS) to the date of the hearing.

Appellant requests that the hearing officer's decision be reversed and the case be remanded in order to allow him to present a medical report of (Dr. B) which was not admitted into evidence, and to have a "qualified medical examiner" examine him to determine his injuries. Respondent requests that the decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The parties stipulated that appellant sustained an injury in the course and scope of his employment with (employer) on (date of injury), when he slipped and fell on his buttocks. The parties agreed that the unresolved issue from the benefit review conference which was to be resolved at the hearing was whether appellant's "inability to work resulted from his (date of injury) work-related injury." In essence, the hearing officer was asked to determine whether appellant had disability as defined by the 1989 Act.

"Disability" means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). An employee who has disability and who has not attained maximum medical improvement is entitled to TIBS. TIBS accrue beginning on the eighth day of disability. Article 8308-4.23(a).

Appellant testified that while working for the employer on Wednesday, (date of injury), he slipped and fell on his buttocks. He said that nothing fell on him and that he did not hit his back or head when he fell. Appellant worked the rest of the day and the next two days. On Sunday, February 2, 1992, appellant was a passenger in a vehicle that was involved in a multi-vehicle pile up on an interstate highway. The vehicle appellant was in, traveling 50 m.p.h., was hit from behind and then hit the car stopped in front. Appellant said that the vehicle he was in was thrown to the side by the impacts and that the vehicle was "totaled." He also said that he felt a jolt from the accident and that his body went backwards and then forwards. He was wearing a seat belt. Appellant denied that he sustained any injury in the vehicle accident; however, he admitted that he has made claims against the insurance companies of the driver of the vehicle he was in and of the driver of another vehicle involved in the accident.

On direct examination appellant said that he started having headaches a few weeks after his accident at work, but on cross-examination appellant said he started having headaches the day after his accident at work. Appellant denied seeking medical treatment for any injuries he may have suffered as a result of the vehicle accident. However, he also testified that when he first sought medical treatment for his headaches on February 11, 1992, he told (Dr. F) that he was involved in a vehicle accident, but did not mention his accident at work. Appellant first testified that he told a supervisor about his accident at work when it occurred, but later acknowledged that he did not report his accident at work until after he saw (Dr. F) on February 11th.

Appellant testified that (Dr. F) told him that the reason he was having headaches was because he had hurt his back. He said that although (Dr. F) took him off work, he continued to work because the same day he saw (Dr. F) he also saw another doctor (from other evidence it appeared that this was (Dr. Be) the employer sent him to who released him to return to work. Appellant saw several other doctors including (Dr. K), (Dr. A), (Dr. B), and (Dr. Ba). He said that (Dr. A) took him off work on March 2, 1992, and that (Dr. Ba), whom he saw as a result of a Commission ordered medical examination, released him to return to work on July 13, 1992. He said that he was off work from March 2nd to July 13th, but has worked for the employer since July 13th. The only medical report offered into evidence by appellant was a handwritten note from (Dr. B) dated May 29, 1992, which appellant said he had had since May and which was excluded from evidence for failure to exchange the report with respondent prior to the hearing. Respondent introduced into evidence several medical reports from (Dr. A). A March 2nd report indicates that appellant was examined by (Dr. A) on that day for complaints of tightness in the lower back and severe headaches and that appellant told the doctor these symptoms began after his accident at work on January 29th. (Dr. A) wrote that appellant's symptoms may be related to a post-concussion headache or that appellant might have developed a migraine type of headache after his trauma. An April 23rd report reflects that on that day appellant had complaints of severe headaches, severe neck pains, severe thoracic pain, and nausea and vomiting. (Dr. A) indicated that he examined appellant, and that he reviewed all previous studies, including magnetic resonance imaging (MRI) scans of the brain, cervical spine, and thoracic spine, and an electromyogram (EMG). (Dr. A) said that he could not find any organic abnormalities that could explain the symptomatology that appellant was having. (Dr. A) gave no opinion as to whether appellant's symptoms were related to any injury sustained at work. There is no mention in the reports of the vehicle accident. (Dr. A) asked appellant to rest for two weeks.

Regarding (Dr. B)'s report of May 29th, when appellant offered this document into evidence he stated that he had had the report since May 1992. Respondent said that it had not received a copy of that report, and appellant offered no explanation for his failure to exchange the report with respondent prior to the hearing. The benefit review conference (BRC) was held on June 1, 1992, and there is no indication in the BRC report that appellant requested the benefit review officer to consider the report of (Dr. B). Pursuant to Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE §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. A party must show good cause for not having previously exchanged information or documents to introduce such evidence at the hearing. From the record developed at the hearing, we cannot conclude that the hearing officer erred in not admitting into evidence the report of (Dr. B). The hearing officer reviewed the claim file for the purpose of taking official notice of medical records of (Dr. B) and (Dr. Ba), but no such records were in the file. The hearing officer kept the hearing record open for approximately two weeks, until August 7, 1992, for receipt of additional medical records; however, no other medical records were provided to the hearing officer. The excluded medical report reported only that most tests were negative except for an MRI of the thoracic spine which revealed a likely bone spur and am EMG which revealed early right carpal tunnel syndrome. (Dr. B) gave no opinion in the report as to whether the likely bone spur and carpal tunnel syndrome were related to appellant's accident at work, or whether appellant's inability to work was related to any injury sustained at work. (Dr. A) had opined that the carpal tunnel syndrome had nothing to do with appellant's injury and he did not report any abnormalities upon review of the MRI of the thoracic spine. If the hearing officer erred in excluding (Dr. B)'s report, we do not believe her ruling would amount to reversible error considering that (Dr. B) did not give an opinion relating to whether appellant's inability to work was because of his work-related injury. 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.).

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 Employer's 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). In the present case, appellant offered no medical opinion as to whether his claimed inability to work resulted from his work-related injury. Thus, his asserted disability rested largely on his own testimony. Considering the number of inconsistencies in his testimony, the hearing officer was not bound to accept his testimony at face value. 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 decision is not against the great weight and preponderance of the evidence.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge