APPEAL NO. 92519

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On August 12, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant, claimant herein, did not injure his neck, shoulder and back on (date of injury), while on the job. Claimant appeals saying that parts of the Statement of Evidence in the hearing officer's decision are inaccurate, that a doctor's statement should be considered, and that his lawyer at the hearing should have done better.

DECISION

Finding that the decision is based on sufficient evidence of record, we affirm.

Claimant had worked in construction for 17 years but went to work for this concrete contractor (employer) on October 24, 1991. The next week he carried some wooden panels at work. Then on (date of injury), for about 30 minutes at claimant's estimate, he carried steel rod bundles weighing 50 pounds; employer stated each bundle weighed just less than 40 pounds. Claimant said that he carried one bundle on his shoulder and made repeated trips. Employer said that claimant carried the bundles for 20 minutes and that other employees said claimant carried them in his hands. Employer said other workers carried two bundles at one time, one in each arm. Claimant did not say anything to anyone that day and no one witnessed the injury. Claimant also said that he felt no pain that day, but characterized it as a "delayed reaction" pain that he felt somewhat on November 8th when he went in to get his check, but that it really started hurting over that weekend. He testified that when he carried a bundle on his shoulder, the ground was muddy and the slippery footing made the bundle bounce. At the time, the pain was no more than an ache that a person always feels when carrying a heavy load.

The president of the concrete construction company testified that claimant did not perform as well as other workers and that he considered laying him off. He decided to give him a little more time, however, to see if he picked up his pace. The common practice was for workers to call the employer the night before a work day to see if there would be work, especially when it had been raining as it had done Thursday, November 7th and Friday, November 8th. Claimant did not call the following Sunday night but did call Monday night. According to employer, claimant apologized for not coming to work saying that he had slept on his neck wrong and had a "kink" in it. Employer replied that he had no work for him anyway. Employer said that claimant called back on November 18th and again employer said he had no work for him. At that point claimant said he had seen a doctor and needed to pay him and added that the doctor had said that he could have been hurt on the job--that the inflammation he found could be a delayed reaction. Employer also said claimant mentioned insurance, saying that his doctor suggested he ask whether it could be put on workers' compensation.

Medical records offered by claimant in the form of bills and work statements show

that claimant saw Dr. G on November 12, 1991, at which time Dr. G diagnosed an inflammation of muscles in the neck. On November 16th, the same doctor again noted the same thing and on November 21st, Dr. G noted right shoulder bursitis. Claimant offered a letter from Dr. G dated August 12, 1992, the same day as the hearing, which merely said that the November 21st entry in the patient's chart showed that the right shoulder bursitis was "on the job injury." The hearing officer sustained the carrier's objection to the letter since it related solely to material that was available for months and had not been exchanged before the date of the hearing. The short letter that was excluded did not go into any detail indicating that the doctor was giving his own opinion that the particular demands of the job were likely to have caused the particular problem. Considering the letter in its reference to a job injury as reflecting what the claimant had told the doctor, it was cumulative of what claimant himself testified concerning the basis of his pain. As such, the letter contained no evidence that would have changed the outcome of the decision, and even if it were error to exclude it, was not reversible error. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In addition, claimant later went to another doctor, Dr. S, who in January 1992 noted that claimant stated he was at work carrying steel when he felt a pulling in his right shoulder. This medical report is in the record.

Claimant's assertions of misstatements in the Statement of Evidence relate to emphasis concerning how Dr. G described the delayed reaction to an incident on the job and a reference to the shoulder instead of the neck in regard to claimant's manner of sleeping upon it. Even if the recitation of these points is slightly different from some evidence presented, none indicate a misconception of the evidence that could have led to an erroneous verdict. Were the hearing officer required to compose a Statement of Evidence as part of his decision, any variance in this instance at most could be compared to nonreversible error resulting from admission or deletion of certain evidence.

The evidence of record sufficiently supports the findings of fact made by the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34(e) of the 1989 Act. He could believe the employer's testimony concerning the telephone conversation he had with claimant during which claimant never said he was injured on the job but referred to his manner of sleep and to a suggestion by claimant's doctor as to what the injury might be labeled. He could consider that claimant provided no medical record indicating that he told his doctor of an on-the-job injury at either his first or second doctor's appointment after the incident. (The excluded letter from Dr. G referred only to a note in the third visit claimant made after the incident.) Claimant did not testify that he noticed any injury at the time he states the injury occurred.

The claimant's reference to the level of performance of his attorney at the hearing does not raise a question that this panel can address. *See* Articles 8308-6.41 and 6.42, 1989 Act. The decision and order are not against the great weight and preponderance of the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge