APPEAL NO. 92521

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 May 28 and July 10, 1991 a contested case hearing was held in (city) and (city), Texas, with final arguments and minimal evidence introduced in a telephone hearing between counsel for the parties and the hearing officer on September 3, 1991. The hearing officer, (hearing officer), held that respondent, claimant herein, aggravated his back condition in a motor vehicle collision on (date of injury), and ordered that benefits be provided. Appellant, carrier herein, argues that the hearing officer incorrectly summarized the evidence in his decision, that the evidence does not support the decision, and specifically objects to Findings of Fact Nos. 5 through 8. Claimant did not respond to carrier's appeal.

DECISION

Finding that the decision is supported by sufficient evidence of record, we affirm.

Claimant is a truck driver who had worked for his employer since October 1987 when he was driving an 18-wheel rig weighing approximately 70,000 pounds at 65 miles per hour during the night of (date of injury) near (city), Texas. A northbound Hyundai crossed over into his southbound lane of Interstate Highway 35 and the two vehicles met head-on after claimant attempted evasive action. After the police investigation, claimant called his dispatcher in (state) and reported the accident. He was able to drive the truck to (city) at a reduced speed. He did not see a doctor then but did take a week off from work and stayed in bed with back pain. In answer to questions from the hearing officer, claimant described swerving in an attempt to avoid the collision, being thrown forward on impact--then jerked back, and feeling pain like a sting in his low back. He added that his left leg felt a pinch as he stepped down from the cab after the impact. He also said his hip hurt as if something were stuck in the center of his back near his belt; he limped to take weight off his left leg at the scene of the accident.

There was no issue of notice. The only issues were did an injury occur on the night of (date of injury), was there an intervening cause of the injury, and was there an aggravation to the injury of (date of injury). The carrier on appeal indicates that its position was that "the claimant did not sustain any incapacity as a result of the (date of injury) incident." Later in the appeal, however, carrier objects to Findings of Fact Nos. 5 and 6 which reflect that the claimant was injured in the collision and that the collision aggravated his degenerative disc disease.

The carrier also introduced a short video and some still photographs taken of claimant in May 1992, while he was painting a fence less than four feet high. This visual evidence could raise a question of whether there was any injury to the back, but the medical records included MRIs and an orthopedic surgeon's opinion that claimant had multiple herniated discs with one severe. Between hearing dates in July and September 1991, claimant had surgery to have his spine fused. There is ample evidence that claimant did

have a medical problem with his back.

Carrier asserted that Dr. M's record of claimant's initial visit after the (date of injury) accident showed an intervening cause for the back condition. Claimant saw Dr. M on July 29, 1991, the first time he saw a doctor after the accident. The Progress Notes of that date appear to be made by two people. At the top are a series of numbers for blood pressure, temperature, pulse, etc., on one line. Next, are two lines of flowing, legible writing that is not unlike what a nurse would take down from a patient before that patient is seen by a doctor. Those lines read, "Patient complains of ___ back pain since Friday 7/26/91 had been working, digging holes and running after a goat." Then in a smaller, choppier form of printing which continues for a page and one-half, the physician constructs a thorough medical entry. It begins with a history which says, "[p]atient complains of back pain since 7/26/91. Patient has been digging holes on Thursday 7/25/91." We note that the legible first entry appears to be in answer to a question, such as, "when did you notice the problem." The doctor's note then does not reflect that the claimant said he felt any sudden catch in his back or that a problem developed while he dug holes; rather it shows that pain developed the day after he dug holes. At the end of the entry, Dr. M writes that claimant had a "pinched nerve" in 1968 and has had back pain flare-ups since then that responded to medication. On the claimant's next visit to Dr. M on August 8th, he discussed his pain in driving a truck for long distances and related that he had the collision in June. He also said that his back hurt when he raised the hood on his truck on August 2nd.

While Dr. M never indicates that claimant's back problem resulted from hole digging or goat chasing (he saw claimant five times for his back after the accident), Dr. D, the orthopedic surgeon claimant first saw in August, refers to the "huge herniation" at L4-5 and says on September 18, 1991, "I think this is the direct result of his accident." In an August entry, he had said that claimant's back, groin, and leg pain dated back to the "motor vehicle accident which occurred (date of injury)."

The description by claimant of the accident in June, his pain at that time, and the way it affected him provided sufficient evidence on which the hearing officer could base his Finding of Fact No. 5 that said the collision injured claimant's lower back. *See* Texas Workers' Compensation Commission Appeal No. 92167, dated June 11, 1992. In addition, as shown, Dr. D states his belief that the accident caused the injury. Similarly, Finding of Fact No. 6 (the accident in June aggravated the claimant's degenerative disc disease) is sufficiently based on the results of the MRI, which showed degenerative disc disease and herniated discs, coupled with the evidence of injury from the accident in June.

Claimant testified that he took a week off from work right after the accident and stayed in bed. He also stated that he still is in pain and found it so painful to drive that he had to quit working prior to his recent back surgery. These statements, along with claimant's report to Dr. M about a goat, plus the medical evidence of a severe herniated disc sufficiently support Finding of Fact No. 7. That finding simply said claimant experienced pain, including an episode after goat and hole chores, from the June injury.

While the hearing officer could choose to believe claimant's statement about being injured in the collision and disbelieve claimant if he had said there was another cause, none of Dr. M's entries indicate that claimant said that chasing a goat or digging holes caused his injury. There is sufficient evidence to find that there was no intervening cause for the injury. In regard to an aggravation subsequent to the injury of (date of injury), the hearing officer heard no argument that such an aggravation was the sole cause of claimant's bad back. *See* Texas Workers' Compensation Commission Appeal No. 91030, dated October 30, 1991, indicating that a subsequent aggravation must be shown to be the sole cause of the disability in order to defeat payment of temporary income benefits. Even if there had been a finding that a subsequent aggravation occurred when claimant felt pain upon raising his truck's hood on August 2nd, the evidence was not so strong as to compel the hearing officer to find that it was the sole cause of the disability.

The conclusions of law in question stem from the findings of fact discussed and are sufficiently supported by them and the evidence. Those conclusions state that claimant was injured in the June accident which aggravated an existing condition, and no subsequent event caused the injury. Finally, carrier mentions that the hearing officer at one point used the words "smoke screen" in relation to a carrier contention and asserts that he is biased. The record reflects that the hearing officer said that there was "some smoke out there about the goats and the post holes" which he then withdrew when carrier opined that there was more than smoke. The hearing officer had just recited that the "threshold issue" was whether claimant had been injured in the accident of (date of injury). The context of the use of the phrase was a lengthy discussion about leaving the record open until after the claimant's scheduled back surgery. Carrier had rested its case at the time and the hearing officer then mentioned the claimant's burden of proof in considering whether to leave the record open for added evidence by claimant. Carrier raises this point on appeal in conjunction with an allegation that the Statement of Evidence in the hearing officer's decision disregarded carrier's evidence, particularly as to Dr. M's recitation of a history that included running after a goat and digging holes. We note that while the Statement of Evidence did not mention that part of the history, Finding of Fact No. 7 did refer to pain associated with the holes and goat in question.

The hearing officer is not required to provide a Statement of Evidence in his decision. As the lengthy discussion in this opinion indicates, the note in Dr. M's records does not reflect that claimant ascribed an injury to the goats or the holes or even that he felt any pain the day he encountered them. In addition, the hearing officer did not say "smoke screen" as alleged, and he corrected his expression. An examination of the record in its entirety reveals fair conduct toward both sides with no indication of prejudgment. *See* State v. Burke, 434 S.W.2d 240 (Tex. Civ. App.-Waco 1968, no writ). *Compare* Texas Supreme Court, Code of Judicial Conduct, Canon 3, pt. A (9) 1992). In the context of the discussion, the phrase in question did not show that the hearing officer could not act impartially; there is no reversible error.

The decision and order of the hearing officer are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge