APPEAL NO. 92535

At a contested case hearing held in (city), Texas, on August 13, 1992, the hearing officer, (hearing officer), determined that on (date of injury), respondent (claimant), in aggravating a previous back injury, sustained a compensable back injury, and timely notified the (employer/clinic) of such injury. Appellant, the employer's workers' compensation insurance carrier (carrier), challenges the sufficiency of the evidence to support certain pertinent factual findings and legal conclusions. Appellant also asserts error in the admission of certain of claimant's medical records. Claimant's response urges our affirmance.

DECISION

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

Claimant testified that she worked for employer in the clinic's housekeeping department cleaning doctors' offices, examining rooms, and bathrooms. On (date), claimant slipped and fell while getting out of the shower at home and was about 40 minutes late for work. She said this incident resulted in muscle spasm which caused her to have constant pain in her left leg, and occasional back pain. She was treated at the clinic by one of the clinic doctors, (Dr. S), and she also received physical therapy (PT) at the clinic for the muscle spasm. Dr. S took claimant off work for two weeks on September 26th, and released her for light duty work with no heavy lifting effective October 14th. On November 4th, she was released to resume her regular duties. However, on November 17th, claimant suffered a flare-up and her left leg was hurting "real bad again" from the muscle spasm. She was returned to light duty on November 18th, apparently by Dr. S. Claimant testified that after the (month) fall, the pain was constant in her left leg and that she only occasionally had low back pain. She said she talked to (Mr. M), her supervisor, about it on November 19th (sic) and to Dr. S. Claimant also testified that Mr. M had indicated all along that, notwithstanding Dr. S's work restrictions, he expected her to perform her regular duties, including sweeping and mopping, or she would be replaced. She said the sweeping and mopping were the "problem activities" and that she did them every day. Dr. S told her it was the mopping and sweeping that got her back so bad. She also said that Dr. S was aware that Mr. M paid no heed to the work restrictions.

On (date of injury) at about 8:30 a.m., while on her knees, bending and twisting to clean the pipes beneath a bathroom sink at the clinic, she hurt her leg and back and was unable to arise. She thought it was the same pain from the muscle spasm as she had previously experienced. She eventually pulled herself upright and went to the PT department where she was given therapy. She said she told the therapists, (Mr. D) and (Ms. K), about her injury and they assisted her in completing an accident report which Mr. D advised would be given to Mr. M. No such report was offered into evidence. The hearing officer denied claimant's request for subpoenas for these therapists; however, no appeal of that ruling has been taken. Claimant also testified that when she attempted to get off the

PT table from a sitting position late that morning, her legs gave way and she fell to her knees and was driven home. After this fall, she said she had pain in her back, a different, sharp pain, and pain in her stomach. She returned to the clinic about 2:30 p.m. that day, was seen by Dr. S, and told him about the sink pipe cleaning incident and the PT table incident. He advised her that her back "was hurt bad," gave her Darvocet, and said he wanted a CT scan. According to claimant, Dr. S told her on (date of injury) that her back "got like that" because of her not doing her light duty as instructed, and indicated an awareness that her boss wouldn't listen to Dr. S's "excuses" for her. However, carrier introduced a Specific and Subsequent Medical Report (TWCC-64), signed by Dr. S nearly four months later on March 13, 1992, which stated on its face the reason for the report as "Commission request only," referenced a date of visit of "(ate of injury)," and stated that claimant did not state her injury as happening on the job, but presented as a follow-up to the back pain she previously suffered in (month), made worse on (date of injury) by PT.

On December 5th, claimant was seen by (Dr. E), one of three neurosurgeons who visited the clinic weekly from another city. Claimant testified she told Dr. E of the (month) fall incident and the sink pipe cleaning incident, but could not recall whether she told him about the fall from the PT table. According to Dr. E's records, claimant "felt the abrupt onset of a little low back and a marked amount of left leg pain" about a week earlier while doing her chores at the clinic, and last worked on "the day of injury, (date of injury)." Imaging studies obtained by Dr. S "documented an L4-5 disc hernia." Dr. E's records contained no reference to claimant's earlier fall at home in (month) nor to her fall from the PT table. Claimant underwent back surgery (lumbar laminectomy and diskectomy) by Dr. E on December 19th and was discharged from the hospital on December 23rd. The post-operative diagnosis was left L4-5 herniated nucleus pulposus and left L5 radiculopathy. A letter from Dr. E, dated May 1, 1992, stated that when he first saw claimant at the clinic on December 5th, she had then mentioned that about one week earlier she had an abrupt onset of low back and marked left leg pain while doing her sweeping and mopping chores. His letter further stated that her disc hernia was "apparently the result of injuries sustained at work."

According to claimant, Dr. E told her, apparently on her December 5th visit, to tell employer to put her on workers' compensation. At some time after she was discharged from the hospital on December 23rd, she told (Ms. G), employer's administrative assistant, that Dr. E had advised her to file for workers' compensation and that she would be out five to six months because her leg was "real bad" and her back was "done."

Mr. M testified that claimant was put on light duty, pursuant to slips from Dr. S, that she was expected to follow the restrictions, and he denied requiring her to perform her regular duties or be replaced. He also testified that claimant had never directly reported her (date of injury) injury to him. This was consistent with claimant's testimony that she tried, without success, to contact him at the clinic on (date of injury), and later by phone, to advise him of her injury. He said that Mr. D had just briefly informed him claimant was having problems and he was sending her home. However, he also stated he first became

aware that claimant was claiming a job-related injury in early to mid-December when he heard it mentioned in the clinic administration office. Ms. G asked him if he had the paperwork on the incident and he advised he was unaware of it.

Ms. G testified that the handling of the clinic's workers' compensation and disability insurance programs were among her responsibilities. On or about December 5th, when claimant was seen at the clinic by Dr. E, the nurse with Dr. E asked if the charges should go on workers' compensation, and said it was a back injury but gave no date of injury. Ms. G responded that she had not heard of claimant's on-the-job injury. However, Ms. G said the next day she prepared an employer's first report of injury and sent it to carrier. Ms. G also testified, variously, that claimant had called her in mid-December, on or about December 15th or 16th, or on December 27th, and told her of the incident cleaning the sink pipes on (date of injury). She said she told claimant she had heard there might have been an injury. Ms. G also testified that Mr. M sent claimant a letter on December 26th with information about a leave of absence and long-term disability benefits, that on January 16, 1992, claimant came in seeking assistance, and that she assisted claimant in preparing a claim form for such benefits. She agreed that the disability benefits claim form stated that claimant had applied for workers' compensation benefits on December 6, 1991. Claimant testified she had only a 5th grade education and did not understand the differences between workers' compensation and other insurance.

Carrier asserts error by the hearing officer in admitting three pages of notes of claimant's PT treatments at employer's clinic because claimant had not exchanged them prior to the hearing. The hearing officer was advised by claimant that she had obtained those records approximately 16 days earlier at the office of the Texas Workers' Compensation Commission where they had been "faxed," that she had provided carrier with a release to obtain all of her records, that she had no intent to keep them from carrier, and that she didn't know she was supposed to provide carrier with a copy before the hearing. Though his rationale was not articulated, the hearing officer found good cause for claimant's not having exchanged the exhibit. We agree that good cause is found in the record. *See* Article 8308-6.33 of the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. art. 8308-6.33 (Vernon Supp. 1992) (1989 Act), and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §142.13 (Rule 142.13) which state the requirements for the exchange of documents. As we have previously said, good cause is "that degree of diligence as an ordinarily prudent person would have exercised under the same or similar circumstances," and is a matter for the discretion of the hearing officer. Even if the hearing officer abused his discretion in finding good cause and erroneously admitted the exhibit, we observe it consisted of notes of claimant's PT treatments at the clinic on 5-31-91 and (date of injury), and 21 PT treatments at the clinic during the February - March 1992 period. We have carefully examined the entries and are satisfied such evidence did not probably result in an improper decision. With the exception of the (date of injury) visit, the exhibit did not contain information relevant to the issues of whether claimant's back injury was sustained in the course and scope of her employment, and whether she timely reported such injury. The notes concerning claimant's (date of injury) visit were essentially cumulative of her

testimony. We observed in Texas Workers' Compensation Commission Appeal No. 91021, decided September 25, 1991, that "reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on particular evidence admitted or excluded. (Citation omitted.)" *Compare* Texas Workers' Compensation Commission Appeal No. 92409, decided September 25, 1992, where we not only found error in the hearing officer's determination that an unrepresented claimant had not shown good cause for not timely exchanging his medical records, but further found the error reversible because we were satisfied, having considered the excluded evidence along with the records as a whole, that such exclusion could have caused an improper decision.

Carrier also objected to the introduction of this exhibit on the ground that it was an incomplete record in that it failed to reflect PT visits between (date) and the (date of injury) entry. This appealed issue is also without merit. As we have so frequently stated in prior decisions, Article 8308-6.34(e) provides that adherence to the formal rules of evidence is not required at contested case hearings. Not only did claimant testify that she had provided carrier a release to obtain all her records, but the records of which the questioned exhibit was a part were the records of employer. Further, carrier did obtain and introduce other of the clinic's records on claimant for that period consisting of various "physician releases," apparently signed by Dr. S.

The essence of carrier's position on appeal is that claimant's testimony was so contradictory and so inconsistent with other evidence as to render it incredible, and that the totality of evidence is insufficient to support the challenged findings and conclusions. Carrier points to the absence of mention of the (month) fall at home in Dr. E's records and to claimant's having signed the application for disability benefits in January 1992. Carrier specifically challenged the factual findings that on (date of injury) while cleaning underneath the sink, claimant suffered an aggravation of a previous injury to her back; that claimant's accident of (date) was not the only cause of her suffering incapacity after (date of injury); that on December 5th, Dr. E's nurse told Ms. G that claimant probably sustained an on-the-job injury to her back; and that both employer and carrier knew that claimant had a claim for an on-the-job injury no later than December 16th, within thirty days of (date of injury). Carrier also challenged the legal conclusions that because carrier failed to show that claimant's previous back injury of (date) was the sole cause of her incapacity after (date of injury), carrier may not avoid liability under the sole cause defense; and that carrier is not excused from liability for benefits under Article 8308-5.02 because claimant gave adequate notice of her injury under Article 8308-5.01 within 30 days after (date of injury), and because carrier also had actual knowledge within 30 days of (date of injury) that claimant was claiming the occurrence of a compensable injury. Carrier did not specifically challenge, however, the legal conclusion (No. 4) that claimant sustained a compensable injury and that carrier is liable for compensation under the 1989 Act.

While claimant's testimony was at times inconsistent, her credibility, including her testimony that she lacked education and was not completely conversant with the English language, was a matter for consideration by the hearing officer who was the fact finder who

observed her testimony. We are satisfied the hearing officer had sufficient support in the totality of the evidence for his determinations that on (date of injury) claimant did indeed sustain a compensable injury by the aggravation of a previous back injury, and that not only did she provide timely notice of such injury to her employer, but employer had actual knowledge as well. Though the carrier sought to persuade the hearing officer that claimant's injury was attributable to her earlier slip and fall incident at home in (month), and further suggested it could be attributed to her fall from the PT table later on (date of injury), the hearing officer chose to believe the claimant's undisputed testimony concerning the pain she experienced and her inability to arise after twisting and bending to clean pipes under a sink on (date of injury), followed by her immediately going to the PT facility. There was as well some support for such testimony in the medical records. Carrier did not contest the finding that on (date of injury) claimant was cleaning underneath a sink at the clinic as part of her job as a housekeeper.

More abundant was the evidence to support the findings relating to claimant's timely provision of notice of her injury. While carrier disputes the finding that on December 5th Dr. E's nurse told Ms. G that claimant probably sustained an on-the-job injury to her back, carrier does not contest findings that Ms. G occupied a management position with employer, that on December 6th Ms. G asked Mr. M about such injury and notified carrier that claimant claimed an on-the-job injury, and, that carrier received notice from Ms. G that claimant claimed an on-the-job injury by December 16th. Carrier asserts that the content of the information provided Ms. G by Dr. E's nurse on December 5th was insufficient to constitute the notice required by Article 8308-5.01. Carrier also asserts that claimant's filing in January 1992 a claim for disability benefits amounted to a "denial" of a job-related injury. As we previously noted, Ms G, acting upon the information provided by Dr. E's nurse, not only discussed such claim with Mr. M but also prepared employer's first notice of injury the following morning. As for the disability benefits claim, claimant testified she had little education and did not appreciate the differences in employer's insurance programs. Ms. G testified claimant sought her assistance in preparing the claim after receiving a letter from Mr. M referring to such benefits, and conceded the claim form stated that claimant's workers' compensation claim was pending as of December 6th.

The hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of its weight and credibility. Article 8308-6.43(e). The hearing officer may believe all, part, or none of the testimony of any one witness, including claimant, and may give credence to testimony even where there are some discrepancies. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App. - Amarillo 1977, writ ref'd n.r.e.). As the trier of fact, it was for the hearing officer to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508. S.W. 2d 701 (Tex. Civ. App. - Amarillo 1974, no writ). We will not substitute our judgement for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App. - Texarkana 1989, no writ.) The challenged 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).

Finally, carrier asserts that the hearing officer "added" an issue of sole cause and "shifted" the burden of proof to carrier to prove that claimant sustained an injury on some date or in some manner other than by her cleaning the pipes beneath the sink on (date of injury). This assertion is without merit. At the outset of the hearing, the hearing officer advised claimant she had the burden of proving she sustained a compensable injury and the record contains no indication that the hearing officer required carrier to prove that claimant's back injury was not work related. The hearing officer added no new disputed issue; rather, the carrier raised the defensive doctrine of "sole cause" in its effort to persuade the hearing officer that claimant's back injury was the result of either her fall at home in (month) or her fall from the PT table after her sink cleaning incident on (date of injury). We have previously said that "[a] prior injury will not defeat entitlement to workers' compensation benefits if the current disability is contributorily caused by an accident arising within the course and scope of employment. (Citation omitted.) And, the burden to show that the pre-existing injury is the sole cause of the present incapacitation

or disability is on the carrier. (Citations omitted.)" Texas Workers' Compensation Commission Appeal No. 91051, decided December 2, 1991.

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge