APPEAL NO. 92581

A contested case hearing was conducted in (city), Texas, by (hearing officer), hearing officer, on February 18 and September 21, 1992, to consider the sole disputed issue, namely, whether respondent (claimant) still has disability after his (date of injury) injury. The hearing officer concluded that claimant has, since (date of injury), suffered disability as defined by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03 (16) (Vernon Supp. 1992) (1989 Act). Appellant (carrier) asserts error by the hearing officer not only in his determination of the disability issue, but also in finding that claimant has not been certified as having reached maximum medical improvement (MMI), in concluding that claimant's injury was compensable, in excluding from evidence a medical report, and in failing to keep the hearing record open after the hearing concluded. Claimant filed no response.

DECISION

Finding no reversible error and the evidence sufficient to support the challenged findings and conclusions, we affirm the hearing officer's decision as modified.

There was no disputed issue as to claimant's having sustained a compensable injury. The parties stipulated that claimant was injured while working for (employer) on (date of injury), and that he "was disabled" (sic) from April 22 to April 28, 1991. Claimant testified, through a translator, that on (date of injury), while working for (employer), he fell while descending from a tree and struck and injured his back and ankle while suspended by a rope. He was taken to employer's doctor, (Dr. S), who examined him and released him for light duty as of April 29th. (Dr. S) report of April 26th indicated a magnetic resonance imaging (MRI) exam was "negative" although an MRI report of April 25th showed moderate bulging at the L5-S1 level with some narrowing, and muscle spasm. On April 25th, Claimant was seen by (Dr. X), an orthopedic surgeon, apparently upon referral by (Dr. S), and (Dr. X) noted the MRI results, diagnosed lumbar sacral sprain, and said he would keep claimant on light duty. However, (Dr. S) report of May 2nd released claimant to his regular duties as of May 6th.

Claimant testified he was present at employer's premises from (date of injury) to May 8th and was paid for that time but did no work and just sat around. His supervisor, (Mr. G), testified that when (Dr. S) released claimant for light duty, he told claimant about employer's light duty program, and that claimant did some light duty such as walking paperwork between offices or just sitting around to avoid heavy lifting. He also testified that employer had a light duty program for injured employees the duties of which he did not describe, but which he said varied according to their physical limitations. He at first said claimant quit working on May 6th, when (Dr. S) released him for regular work, and that he never again heard from claimant. At the second hearing, (Dr. G) said claimant was paid through May 8th. He also stated that a secretary mailed to claimant at the address on his application a letter dated June 4th telling claimant he had been advised of employer's light duty program on April 26th when he was released for such by (Dr. S), and that employer

had light duty available if claimant wished to return to work. Claimant denied receiving that letter, stating he had moved from the address to which it was mailed. Claimant further testified that he could not work because of his pain, and that he advised (Dr. G) of this and told him he was going to see another doctor notwithstanding (Dr. S) release.

Claimant next began treating with (Dr. C), apparently on his own, and said (Dr. C) took him off work. (Dr. C's) report of May 8th diagnosed back trauma and stated claimant could not return to work at that time. Claimant testified that he was seen by (Dr. M) upon the referral of (Dr. C) but no records of (Dr. M) were in evidence. An August 7th report of (Dr. C) stated claimant still complained of pain and that his back locks up and he sometimes cannot straighten up. He stated he would obtain a consultation with (Dr. S), an orthopedic specialist, and that the date claimant could return to work was unknown at that time. (Dr. S) report of August 19th diagnosed lumbar spine strain, indicated the previous imaging tests were within normal limits except for some narrowing at the L5-S1 level, and stated claimant could return to light work. Claimant acknowledged having subsequently received a release to work from (Dr. C), apparently based on (Dr. S) recommendation.

At a benefit review conference (BRC) held on September 5th, the benefit review officer recommended that carrier should be paying temporary income benefits (TIBS) as of May 8th and until the disability dispute evidenced by the conflicting doctors' reports was resolved by a doctor agreed upon by the parties. Apparently no interlocutory order for the payment of TIBS was entered, however. Claimant testified he was paid benefits apparently from January 14, 1992 until July 26, 1992 but had no explanation why benefits were not paid for the period after May 8, 1991, and why the benefits stopped on July 26th. Claimant testified that although he liked (Dr. C), he stopped seeing him because his understanding of the BRC outcome was that he was to be examined by two other doctors, one of his own selection and one of the carrier's selection. He acknowledged having agreed to see (Dr. P). However, pursuant to his understanding from the BRC that he was also to see a doctor of his own choosing, claimant saw (Dr. A) who, in various reports in October and December, 1991, and January 1992, noted claimant's persistent back pain complaints and kept him off work. (Dr. A) obtained a CT scan on January 15, 1992 which revealed a herniated disc at L5-S1.

Carrier wrote claimant on November 12, 1991, advising him of an appointment with (Dr. P) on January 14, 1992. (Dr. P) record of claimant's January 14th exam noted the results of x-ray examination, said claimant apparently had not had MRI and CT scan assessments, and asserted he was not then a candidate for returning to work. Claimant was to return in two weeks after obtaining an MRI. Claimant testified he treated with (Dr. P) for approximately one and one-half months and that (Dr. P) then discharged him. He maintained at the hearing on February 18th that he still could not work at all and said (Dr. P) records should reflect such. At that hearing, after all available evidence was adduced and the carrier announced it rested, carrier told the hearing officer that (Dr. P) did not have the imaging tests. Carrier also referred to a new January 15, 1992 CT scan and suggested the hearing be recessed to get the imaging tests to (Dr. P) so he could render an opinion

which carrier said it would accept. The carrier advised it would get the diagnostic tests to (Dr. P) and get claimant an appointment whereupon the hearing officer continued the hearing until further notice.

When the hearing resumed on September 21, 1992, claimant testified that he received therapy in July and August from (Dr. A) who had not yet released him for work and who referred him to (Dr. S). He saw (Dr. S) on September 16, 1992, and was told he had a bad disc caused by his (date of injury) injury and that he could not return to work. He said a report from (Dr. S) would not be available for a week. He said he had not worked since (date of injury), and still could not work because of his pain. He again denied performing any light duty with employer after his injury or receiving an offer for such and (Dr. G) again testified to the contrary.

The hearing officer refused to admit (Dr. P) report of April 2, 1992, offered by the carrier, because although carrier conceded that obtaining such report had been the basis for the continuance on February 18th, and that the report was available to carrier since April 2nd, carrier had not provided a copy to claimant prior to the hearing on September 21st. Carrier's attorney said her office had only received the report by telephonic document transfer on the preceding Friday evening and did not have time to provide it to claimant before the hearing. Claimant testified he had not received the exhibit prior to the hearing. The hearing officer also denied carrier's request to keep the record open "long enough to get the report from (Dr. P) that had previously been discussed on this record," noting that he had continued the hearing since February 18th for just such purpose.

Carrier contended in argument that it was relying primarily on (Dr. S) release of claimant to return to work and (Mr. G) testimony together with employer's letter offering claimant light duty to defeat claimant's contention that he still has disability as a result of his (date of injury) injury. In the alternative, carrier urged that employer had made a bona fide offer of employment consistent with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §129.5 (Rule 129.5). The hearing officer found, and carrier does not here challenge, that claimant suffers persistent pain in the thoracic and lumbar spine, that claimant attempted to work from the time of his injury until May 8, 1991, at which time he did not report to his job and has since been under treatment by various doctors, and that there has been no bona fide offer of employment.

Carrier has challenged the sufficiency of the evidence to support the finding that claimant has been unable to obtain and retain employment at wages equivalent to his preinjury wage since the date of his injury, as well as the corresponding conclusion that claimant has suffered disability, as defined by Article 8308-1.03(16), since (date of injury). Except for the period from (date of injury) through May 8, 1991, a period during which both claimant and (Dr. G) testified that claimant was at work (though differing as to whether claimant actually performed light duty) and being paid, there is ample evidence to support the hearing officer's determination of disability. This is so notwithstanding the parties' problematical stipulation, proposed and articulated by carrier at the outset of the first hearing,

that claimant "was disabled from (date of injury) to April 28th." Disability under the 1989 Act is cast in economic rather than physiologic terms and 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). In proffering the two stipulations, the carrier appeared to be attempting to narrow the issues by conceding that claimant not only sustained a compensable injury on (date of injury), but also had disability from that date until April 28th. However, carrier never explained the significance of the April 28th date, nor did it attempt to explain how claimant could have disability during a period he was at work and being paid. Though it would have been particularly desirable, since claimant was not represented by an attorney and was speaking through a translator, the hearing officer did not inquire to clarify this matter. In any event, the determination whether claimant has had disability since his injury, albeit not commencing until May 9, 1991, was a fact issue for the hearing officer's determination as the trier of fact. Under Article 8308-6.34(e), the hearing officer is the sole judge not only of the materiality and relevance of the evidence, but also of its weight and credibility, and we will not substitute our judgement where, as here, the challenged finding and conclusion are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.- Texarkana 1989, no writ).

Carrier also quarrels with the hearing officer for having found there has been no certification of MMI and for having concluded that claimant's injury was compensable under the 1989 Act. The ostensible basis for these challenges is that MMI and claimant's having sustained a compensable injury were not disputed issues. Such assertions of error lack merit. Not only did the carrier stipulate to claimant's injury, but the challenged finding and conclusion were, at worst, unnecessary and superfluous.

Carrier's contentions that the hearing officer erred in excluding (Dr. P) April 2, 1992 report and in refusing to keep open the hearing for the carrier to later get that exhibit into the record also lack merit. As has been so frequently observed by the Appeals Panel, the 1989 Act requires a party intending to offer documents into evidence to exchange them within the time prescribed by the Texas Workers' Compensation Commission, and a party failing to do so may not introduce such documents unless good cause is shown for not having done so. *See* Article 8308-6.33(d) and (e). Rule 142.13(c) requires the parties to exchange documentary evidence not later than 15 days after the BRC and, thereafter, as it becomes available. Documentary evidence not so exchanged is to be brought to the hearing where the hearing officer must determine whether good cause exists for a party to introduce such evidence. *See* Rule 142.13(c). The hearing officer determined the absence of good cause for carrier's not exchanging (Dr. P) report until the morning of the hearing. The standard for our review of such good cause determination is one of abuse of discretion and we have previously described the test for the existence of good cause as that of "ordinary prudence," that is, "that degree of diligence as an ordinarily prudent person would have exercised under the same or similar circumstances." *See* Texas Workers' Compensation Commission Appeal No. 92409, decided September 25, 1992, and cases cited therein. We are well satisfied here that the hearing officer did not abuse his discretion in excluding the exhibit. We are equally well satisfied the hearing officer did not abuse his discretion in

denying carrier's request to keep open the record for some indeterminate period so as to allow the carrier to get into the record (Dr. P) report or other of his medical records. Claimant was first seen by (Dr. P) on January 14th, said he was discharged from (Dr. P) care approximately one and one-half months later, and (Dr. P) report was signed on April 2nd. Thus the carrier had ample time to obtain and exchange such records as they became available and well before the resumption of the hearing on September 21st.

We note the hearing officer's decision states, in part, that claimant is entitled to all medical and income benefits effective April 23, 1991. Medical benefits are payable from the date of injury (Article 8308-4.61(a)), and since claimant was injured on (date of injury), his medical benefits are payable from that date.

Finding no reversible error and sufficient evidence to support the challenged findings and conclusions, we affirm the decision but modify it to read that claimant is entitled to all medical benefits effective (date of injury), and to all unpaid temporary income benefits accruing on and after May 9, 1992.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge