APPEAL NO. 92586

On September 22, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing record was closed on October 5, 1992. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The issue at the hearing was whether the claimant's (date of injury) compensable injury included an injury to his shoulders. The hearing officer determined that the claimant suffered right and left shoulder injuries that arose out of and in the course and scope of his employment on (date of injury), and ordered that he is entitled to medical benefits for his shoulder injuries and that he is entitled to temporary income benefits provided that he has disability and has not reached maximum medical improvement.

Appellant, hereafter the carrier, contends that it was error for the hearing officer to make her decision without review of medical records that the claimant failed to introduce into the hearing record. The carrier asserts that "this is error as it did not allow a complete construction of the medical evidence nor did it allow carrier an opportunity to review medical records and cross examine or comment on those records." The carrier requests that we remand the case for full review of all records. No response was filed by the claimant.

DECISION

The decision of the hearing officer is affirmed.

The parties stipulated that the claimant suffered a compensable injury on (date of injury). The issue at the hearing was whether the claimant's compensable injury included an injury to his shoulders. The hearing officer concluded that the claimant suffered a right and left shoulder injury that arose out of and in the course and scope of his employment on (date of injury).

The claimant testified that on (date of injury) he and a coworker were lifting a 200 pound printing roller when the coworker dropped his end of the roller. The claimant hung on to his end of the roller and felt immediate pain in his lower back. He reported to his employer that he had hurt his back and the employer sent him to (Dr. D), M.D. On June 11th, (Dr. D) diagnosed claimant as having an acute lumbar strain, recommended physical therapy, and prescribed Parafon. The claimant testified that around June 13th he began having shoulder pain and that he told this to his physical therapist. The physical therapist noted in her report of June 13th that the claimant complained of left shoulder pain on that day and that "extension in lying position was not done" on that day due to the claimant's left shoulder pain. Other reports from the physical therapist do not mention complaints of shoulder pain by the claimant.

In a recorded telephone conversation taken by a carrier representative on June 24th, the claimant complained of back, hip and leg pain, but did not mention shoulder pain. The claimant said that he told (Dr. D) about his shoulder pain and that (Dr. D) told him he had

arthritis. (Dr. D's) medical reports do not mention complaints of shoulder pain by the claimant. (Dr. D) referred the claimant to (Dr. J), M.D., who had a lumbar myelogram done, diagnosed claimant as having a herniated disc at L4-5 with left radiculopathy, and prescribed lumbar epidural steroid injections. The claimant said that the injections "killed" all of his pain for about a month. On October 15th, (Dr. J) reported that the claimant had only minimal discomfort in his lower back and left thigh and released the claimant to normal work activities on October 17, 1991. The claimant stated that he told (Dr. J) that his shoulders bothered him and that (Dr. J) told him he probably had arthritis and bursitis. (Dr. J's) medical reports do not mention complaints of shoulder pain by the claimant.

The claimant was then treated by (Dr. S), a chiropractor, for about seven weeks. (Dr. S) referred the claimant to (Dr. M). The claimant testified that he told (Dr. S) and (Dr. M) about his shoulder pain. No medical reports from (Dr. S) or (Dr. M) were in evidence. The claimant testified that (Dr. M) referred him to (Dr. N) for treatment of his shoulders. The claimant further testified that (Dr. N) ran tests on his shoulders and told him that he "definitely" had rotor cuff tears in both shoulders. The claimant said that no other doctor he had seen had done tests on his shoulders. He said that (Dr. N) told him that he would write a letter to the carrier to see if the carrier would pay for the claimant's shoulder operations.

The hearing officer admitted into evidence, over the carrier's objection that it was not signed, a copy of a letter dated February 22, 1992, to the carrier's adjustor, (Ms. M), from (Dr. N). (Dr. N's) name is typed at the bottom of the letter. In the letter, (Dr. N) reported that the claimant presented to his office on February 6, 1992, complaining of pain in both shoulders "for the last nine months," and that the claimant told him he had injured both shoulders "lifting heavy rollers" when a coworker dropped the other end of the roller. (Dr. N) noted that the physical therapy report of June 13, 1991 had noted complaints by the claimant of left shoulder pain. (Dr. N) stated in the letter that "[i]t is my professional opinion that the shoulder injuries occurred at the time of the original injury at work, with the history being consistent with severe enough trauma to cause rotator cuff tears of both shoulders." (Dr. N) further stated in the letter that the claimant had had arthrograms of both shoulders which are consistent with rotator cuff tears, that the claimant's radiographs are consistent with rotator cuff tears which have been relatively long standing, and that surgical repair of the rotator cuff tears is indicated.

The carrier denied the requested treatment on the ground that the shoulder injuries were not related to the claimant's injury at work on (date of injury). The claimant testified that (Dr. N) performed surgery on his left shoulder on May 18, 1992, and on his right shoulder on September 3, 1992. The surgery reports were not in evidence. (Ms. M) testified that she had worked on the claimant's claim since July 1991 and that she first became aware in January or February of 1992 that the claimant was alleging that he injured his shoulders in his work-related accident of (date of injury).

On the hearing officer's own motion the hearing record was left open for two weeks after the date of the hearing in order for the Commission to request reports of diagnostic

tests and discharge summaries from the hospital where the claimant had his shoulder operations performed. The hearing officer said that if there was any difficulty in obtaining the reports, she would close the record and issue a decision without the records. The hearing officer wrote in her decision that the record was closed on October 5, 1992, without the records having been provided. On appeal, the carrier contends that it was error for the hearing officer to make her decision without review of the hospital records for which she left the record open.

In addressing the carrier's contention, we observe that at the hearing the carrier objected to the hearing officer's suggestion that the record be left open for the receipt of the hospital records on the ground that the records were "irrelevant." We further note that the carrier is incorrect in stating that the hearing officer placed on the claimant the burden of providing the hospital records by a certain date. The hearing officer said that the Commission would request the records, but that if there was any difficulty in obtaining the hospital records, the record would close and she would issue a decision without the hospital records. The carrier also states in its appeal that its efforts to secure the hospital records for introduction into evidence at the hearing were "thwarted by" the claimant because the claimant gave the carrier an invalid medical release. The carrier presented no evidence at the hearing of its attempts, if any, to subpoena or otherwise secure the hospital records, nor any evidence of the need for a release, the tender of an invalid medical release or refusal to give a valid medical release. Consequently, the carrier's assertions on these points are not supported by the record. Our review of the evidence is limited to the record developed at the contested case hearing. Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992; Article 8308-6.42(a)(1). We further note that the record does not contain any indication that the carrier attempted to obtain the hospital records through procedures authorized in Rules 142.12 and 142.13.

While the hospital records may have been of some benefit to the hearing officer in reaching her decision, neither party offered the records at the hearing and we cannot conclude that the hearing officer erred in making her decision without review of those records. The issue at the hearing was whether the claimant's compensable injury included an injury to his shoulders. The claimant's testimony, the physical therapist's report of June 13th, and (Dr. N's) letter constituted sufficient evidence to support the hearing officer's decision that the claimant's injury included an injury to his shoulders. The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e). We conclude that the evidence was sufficient to support the hearing officer's decision and that her decision was not against the great weight and preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 92180, decided June 11, 1992.

In its appeal, the carrier does not request review of the hearing officer's ruling admitting a copy of (Dr. N's) letter dated February 22, 1992 into evidence over its objection that the copy of the letter is unsigned. Instead, the carrier asserts that "[w]ithout inclusion of such records [medical records relating to the shoulder surgeries], the only evidence

supporting claimant's claim is the questionable and unsigned letter from (Dr. N)" and that "[a] decision based on that letter alone coupled with the fact that records were requested and never received is unfair to the carrier." We disagree with the carrier's assertion that the hearing officer's decision must have been based solely on (Dr. N's) letter. The hearing officer's decision is also supported by the testimony of the claimant and the physical therapy report of June 13th. Furthermore, as previously pointed out, (Dr. N's) letter is addressed to (Ms. M), a claims adjustor for the carrier, who testified that she was familiar with the letter. When the claimant offered the copy of the letter into evidence and the carrier objected to it on the ground that it was unsigned, the claimant pointed out that the original letter was in the possession of the carrier and that he had received the copy of the letter from the carrier in an exchange of documents. The fact that the letter was received by the carrier was established in the following exchange between the carrier's attorney and the carrier's claims adjustor, (Ms. M):

Question by carrier's attorney: Do you feel that [the carrier] was given any notice of his [the claimant's] shoulder injury prior to February 22, 1992?

Answer by the claims adjustor: No.

Questions by the claims adjustor to the carrier's attorney: I'm sorry, what was the date? Prior to what date?

Answer by the carrier's attorney: February 22, 1992, and for purposes of the record, I've got the date off of (Mr. N's) correspondence; (Dr. N's) correspondence.

The following exchange between the hearing officer and the carrier's attorney established that the carrier was not contending that the copy of the letter offered into evidence was not from (Dr. N):

Question by the hearing officer: What I'm asking you (Mr. B) [carrier attorney], is: the carrier is not raising a contention that this letter did not in fact originate from (Dr. N's) office?

Answer by the carrier's attorney? No.

Under Article 8308-6.34(e), conformity to legal rules of evidence is not necessary in a contested case hearing held under Article 6 of the 1989 Act. Article 8308-6.34(e) further provides that the hearing officer may accept written statements signed by a witness and shall accept all written reports signed by a health care provider. In this case, we are dealing with a copy of a written report by a health care provider which does not contain the signature of the health care provider. However, the original of the letter was sent to and was received by the carrier, and there is no contention that the letter was not what it purported to be; that is, a letter from the health care provider whose typed name appeared on the letter. The weight to be given to the report of (Dr. N) was for the hearing officer's determination. Article

8308-6.34(e). We are not dealing here with a Texas Workers' Compensation Commission prescribed medical report form such as a TWCC-69 which, by rule, requires that the doctor sign the report. *See* Texas Workers' Compensation Commission Appeal No. 92027, decided March 27, 1992.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge