APPEAL NO. 92658

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 September 16 and October 29, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant, claimant herein, injured his neck on the job on (date of injury) and had disability until June 8, 1992; she also found that he did not injure his lower back in that accident and had no disability after June 8, 1992. Claimant asserts that the decision in regard to his lower back and time of disability is in error and cites a video as being improperly admitted. Respondent accepts the decision without appeal and points out that the video was admitted without objection.

DECISION

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

Claimant was 34 years old at the time of the accident and drove a dump truck for the city. On (date of injury), claimant and two other employees were in the cab of a dump truck parked at a fast food outlet to "use the restroom." Another truck entered the parking lot and, in attempting to park next to claimant, scraped claimant's truck on the left side of the left front fender with the tire of the entering vehicle; the force exerted by the entering vehicle was on the side and front left corner of claimant's vehicle. While neither party called either of the two passengers or provided written statements by either, an investigation report indicated that the two passengers in the city dump truck used the word "sway" to describe their movement upon the brushing of their truck by the other. Neither of the other passengers in the city truck was injured.

Claimant called his employer who came to the scene. Claimant told his supervisor his neck hurt so supervisor took him to Dr. H. Dr. H took some x-rays, took claimant off work, and referred him to his own physician. Dr. T was claimant's personal physician, and he referred claimant to Dr. E, a neurologist. Claimant first saw Dr. E on March 26th and saw him through June 3, 1992. Dr. E's initial report describes claimant as being in a parked truck when another "collided with his truck head-on. He suffered sudden propulsion/retropulsion movement of the head and neck." Dr. E also reported that an MRI dated March 12th indicated disc bulging at two levels in the neck. (The MRI itself says that the two bulges are "mild.") On June 3, 1992, Dr. E reported that the neck sprain was resolved and returned claimant to work as of June 8, 1992; Dr. E also stated on a TWCC Form 69 that claimant had reached maximum medical improvement (MMI) with no impairment. Previously, on April 29, Dr. E had written that claimant's neck problem had "significantly resolved;" Dr. E also wrote at that time that he was "pleased with the clinical progress," but thought claimant needed physical therapy and no work for four more weeks at which time he would reevaluate him.

Claimant next chose Dr. He for treatment and saw him for the first time on June 16, 1992. Dr. He reported lumbar pain, both in claimant's history and as expressed during his

examination. Dr. He also said that the MRI of claimant's neck showed that one of the bulging discs was probably herniated. Dr. He criticized a video of the claimant that consisted of approximately one hour on May 1, 1992 as not comparable to the demands of an eight hour work day. Dr. He diagnosed a lumbosacral strain, recommended more studies be done, criticized Dr. E for returning claimant to work after "seeing the video," and on October 15, 1992 said, "(i)t is thought positively that the lower back problem is related to his injury of (date of injury)."

Claimant stated that he had told both Dr. T and Dr. E of the pain in his back. No medical records were introduced in which either doctor indicates any question as to the back. Claimant also testified that Dr. E told him that he had been visited by the adjuster for the carrier and been shown the video. Claimant added that Dr. E said he was releasing him to return to work because he did not want the "hassle." Claimant on June 9, 1992 wrote a letter changing doctors in which he said Dr. E had "been intimidated and harassed by representatives of (LM) claims service into returning me to work even though the injuries to my neck have not yet healed." No statement from Dr. E was offered in regard to why he released claimant to work.

Claimant testified that his back hurts all the time. More particularly, he says that he cannot squat without hurting. He also said that it hurts his neck when he turns his head as he would have to do whenever operating a truck in reverse gear. He indicated that Dr. He has not released him to return to work. He saw the video and described himself as adjusting the valves and carburetor; he did not pull the motor on the vehicle he was working on. He said he stopped often.

When the video was offered into evidence, claimant's attorney at first objected to it unless the video covered the entire time span of filming. Claimant's attorney raised the question that parts could have been edited out. The hearing officer satisfied herself that the video offered has been exchanged and was the one that both parties were familiar with. She then said that she would take into account that filming would stop and then start again and give it the weight it deserved; she also said that a doctor could probably tell more from it than she could. Claimant's attorney then said that he didn't really have an objection other than relevance. The video depicts claimant and another person working on the engine area of a car. At one point the claimant with arms above his head, holds up the hood as the other person disassembles it from the car. Claimant can be seen exerting some pressure with a wrench. Claimant is also shown several times to stop what he is doing and sit erect with shoulders thrown back as if he were stretching an aching muscle somewhere between his head and legs.

The investigation report referred to at the beginning of this opinion was conducted by an organization that purports to have no interest in any person or organization addressed by the report. While there is no testimony as to cost, it would be reasonable to suspect that the city in some manner paid for this engineering and medical study of the events. It addressed bracing of the bumper on the city truck, energy dissipation, the fiberglass fender

of the city truck, claimant's statement that he blew the horn to alert the other driver (claimant was alert to the possible impact and had his hands on the wheel to brace himself--unlike the other two passengers in the truck) and the statements of the other two passengers to speculate that any injuries of consequence would be doubtful.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. She could give weight to the medical records of the claimant's treating physician, Dr. E, even though claimant testified that Dr. E only returned him to work when the carrier brought pressure on him. She could question whether claimant did tell Dr. E of his lower back problem when Dr. E made no entry about such a problem. In viewing these questions between claimant and Dr. E's records, the hearing officer could consider that Dr. E had commented in his record on April 29th that claimant was improving, but he thought claimant needed four more weeks of therapy--the video was not made until two days later. Claimant, himself, when requesting on June 9th to change doctors because of what he reported as the harassment of Dr. E, refers only to his neck injury without mention of his back problem.

The hearing officer could also have considered the facts set forth in the investigation report. She could question why the two passengers in the city truck provided no statement or testimony. *See* Texas Workers' Compensation Commission Appeal No. 92300, dated August 15, 1992. The record indicates that claimant's initial objection to the video was replaced by an acknowledgement that the hearing officer would decide relevancy of that exhibit. Admission of the video was not in error, and claimant's abandonment of his objection at the hearing affects his ability to object on appeal.

While claimant's appeal mentioned Conclusions of Law Nos. 3 and 4, which state that claimant did not injure his lower back in the accident and that disability did not continue past June 8, 1992, two comments about Finding of Fact No. 11 are offered. Finding of Fact No. 11 (6) says that the first medical record entry as to a lower back problem occurred on June 16, 1992. Claimant's Exhibit No. 5 indicates that claimant mentioned "pain in the low back" on April 24, 1992 to a physical therapist. Finding of Fact No. 11 (5) says that claimant could not have performed the work shown in the video if he had injured his lower back in the accident. While this is not against the great weight and preponderance of the evidence, the evidence may not be as absolute as this subfinding indicates.

The evidence in the medical records is sufficient to support the conclusion that a low back injury was not caused by the accident of (date of injury). No doctor until Dr. He on June 16th even noted such a complaint. In addition the evidence is sufficient to support the conclusion that disability stopped on June 8th, the day that Dr. E said claimant could return to work. Claimant correctly points out that the hearing officer refers to the accident incorrectly as (date) when it should be (date of injury). While not asserting error in Conclusion of Law No. 5 that said claimant has not reached MMI, claimant takes issue with the quality of the TWCC Form 69 of Dr. E. The hearing officer in determining that MMI had not been reached, gave presumptive weight to the designated doctor, Dr. P, who found that

MMI had not been reached, so any question of Dr. E's report is moot.

The decision and order are based on sufficient evidence and are affirmed. Insofar as the decision refers to (date) as the day of the accident in question, it is modified to read (date of injury).

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge