

## APPEAL NO. 93005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on December 7, 1992, to consider the issue of whether the claimant had disability as the result of an (date of injury) compensable injury. The hearing officer, (hearing officer), determined that the claimant continued to have cervical and lumbar pain as the result of the compensable injury such that he was unable to return to his former employment at wages equivalent to his former pay, and that with the exception of two hours of employment in May of 1992, the claimant had performed no work for any employer since the date of his injury. He accordingly held that the claimant suffered disability which has continued through the date of the contested case hearing, and accordingly ordered the carrier to pay temporary income benefits (TIBS) in accordance with that decision.

In its request for review the carrier alleges error in the finding of fact and conclusion of law holding that the claimant is still unable to return to employment, because no medical evidence shows claimant is unable to work and the evidence in the record shows that the claimant was in fact able to work. The carrier also complains of error in the hearing officer's excluding from evidence certain carrier exhibits and the testimony of two carrier witnesses. Finally, the carrier says the testimony of claimant should not have been considered because he was not placed under oath prior to testifying.

## DECISION

Finding no error on the part of the hearing officer, we affirm his decision and order. The fact of claimant's compensable injury had not been disputed by the carrier. Claimant, who was a "taper" employed by (employer), for workers' compensation insurance purposes, fell to the ground on (date of injury), when the stilts on which he was standing broke. He stated that he was not able to use his hands to break his fall because he was holding knives which he used in his work. He testified that his injury was to his chest, back, and neck.

Claimant went to a clinic the day after the accident, but was only seen there three times. He was next seen by (Dr. C), carrier's doctor, who, claimant said, told him toward the end of May to try to work if he felt like it. (Dr. C's Initial Medical Report dated May 4, 1992 leaves blank the section on anticipated date of return to work.) Claimant went back to work for one day, but left after two hours because he said he could not do the work. Beginning June 10th, he began treating with (Dr. M), whom he was seeing three times a week for therapy. On that date Dr. M took him off work until further notice. At the hearing claimant stated he had not gone back to work for employer, nor had he worked for anyone else. He also stated that he did not think he could perform his old job because he continued to have pain in his back and numbness in his legs and feet.

At the hearing the carrier offered the testimony of Mr I, a private investigator who had performed surveillance on claimant, and employer's foreman, Mr Z. The carrier also

attempted to introduce certain documents in the form of medical reports. Claimant's attorney objected to this testimony and evidence on the grounds that the carrier did not disclose information concerning such individuals or such evidence within 15 days of the benefit review conference, as required by Commission Rule, Texas W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). The hearing officer sustained this objection. However, a videotape made by the private investigator, as well as his field notes, were admitted. The videotape purported to show claimant, among other things, loading and unloading trash into a pickup truck, doing drywall work, and pulling siding off a house. Claimant's attorney questioned whether the individual performing such tasks in the film was claimant.

The hearing officer made the following finding of fact and conclusion of law which are challenged by the carrier:

### **FINDING OF FACT**

6.The claimant continues to have cervical and lumbar pain as the result of the compensable injury such that he is unable to return to his former employment at wages equivalent to his former pay.

### **CONCLUSION OF LAW**

2.The claimant has been unable to obtain and retain employment at his preinjury wage level since April 28, 1992, and continuing through the date of the Benefit Contested Case Hearing.

Because a claimant's own testimony is evidence bearing upon the issue of whether he has disability, see Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992, we will address the threshold issue raised by carrier of whether the claimant's testimony cannot be considered because he was not placed under oath prior to testifying.

The record of the hearing below indicates that claimant was not sworn before he gave his testimony, although the oath was administered to the translator who assisted him. After claimant had finished giving his testimony, and following an off the record discussion, the hearing officer asked the claimant to swear or affirm that the testimony he had provided was the whole truth, under penalty of perjury, and the claimant so swore or affirmed. If any objection was raised by counsel for the carrier, it was not noted on the record. The carrier also cross-examined the claimant while he was on the witness stand.

The claimant refers us to Castillo v. State, 739 S.W.2d 280 (Tex. Crim. App. 1987) and alleges that any objection by the carrier was waived. In the alternative, claimant argues

that any defect was cured by the hearing officer's later administration of the oath. We believe this clearly is the case, and that the hearing officer properly considered claimant's testimony. As the court stated in Castillo, "almost every right, constitutional and statutory, may be waived by the failure to object. Furthermore, an objection to the unsworn testimony must be timely, and comes too late if made after the verdict or on motion for new trial. The purpose for the contemporaneous objection rule is to call the trial court's attention to the failure to swear a witness, so that the irregularity can easily be remedied." *Id.* at 297 (citations omitted.)

Carrier's second point of error is that the hearing officer erred in excluding the testimony of its two witnesses, as well as two of carrier's exhibits, because good cause existed for the late exchange of this information. The 1989 Act provides that within a time to be prescribed by Commission rule, the parties shall exchange evidence pertinent to the contested case, including all medical records, the identity and location of any witness known to have knowledge of relevant facts, and all documents which a party intends to offer into evidence at the hearing. Article 8308-6.33. Rule 142.13(c) implements this statute by providing, with one exception not relevant here, that such information shall be exchanged no later than 15 days after the benefit review conference. Thereafter, the rule says, parties shall exchange additional documentary evidence as it becomes available. The hearing officer shall make a determination whether good cause exists for a party not having previously exchanged such information or documents to introduce such evidence at the hearing. Rule 142.13(c)(2), (3).

There was no dispute at the hearing that the carrier did not timely exchange the documents it sought to offer, nor its witness list. Moreover, there was no showing that any such documents had been originally received through an exchange with the claimant. See Texas Workers' Compensation Commission Appeal No. 91088, decided January 15, 1992. Essentially, carrier argued at the hearing and argues on appeal that good cause existed because this evidence or testimony would not have caused the claimant any surprise. This panel has held that lack of surprise, in and of itself, does not excuse, nor constitute good cause for, failure to comply with exchange requirements. See Texas Workers' Compensation Commission Appeal No. 91058, decided December 6, 1991; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).<sup>1</sup> The hearing officer below entertained lengthy argument from attorneys for both parties concerning the circumstances surrounding the carrier's failure to disclose. We will not overturn a hearing officer's determination of good cause (or lack thereof) unless he abused his discretion. Texas Workers' Compensation

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<sup>1</sup>On appeal, the carrier also argued good cause due to proximity in time to the Thanksgiving holidays. At the hearing, the carrier put forth this argument with reference to claimant's additional objection, on the basis that carrier had not timely answered claimant's interrogatories pursuant to Rule 142.13(d). However, the hearing officer overruled the claimant's objection on this point, while sustaining it with regard to Rule 142.13(c).

Commission Appeal No. 91117, decided February 3, 1992. Upon review of his actions, we find that he did not abuse his discretion in making this ruling.

Finally, the carrier contends that the evidence shows the claimant did not meet his burden to show that he continued to have disability. In this regard, the carrier points to a lack of objective medical evidence of incapacity, as well as the absence of a medical report stating that claimant is unable to work. Carrier also contends that the surveillance videotape clearly shows the claimant engaged in activity which he claims to have been unable to perform.

The evidence in this case included claimant's own testimony and certain medical reports from Drs. C and M. While the medical evidence may have not been complete, we have previously held that objective medical evidence is not a prerequisite to a finding of disability. Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. Based on those reports which are in the record, it does not appear that Dr. C had unequivocally released claimant to full time work, and it shows that Dr. M had taken him off work. Claimant also testified to his own pain and physical limitations, which is also evidence bearing on the issue, see Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. Evidence to the contrary came from the video and the private investigator's notes, dated October 12, 1992. The latter reported that claimant was a member of a large family that subcontracts drywall installation from various contractors, and that an individual at a drywall company stated he was dealing with both claimant and his brother, but a planned surveillance did not show claimant working at that site. The report further stated claimant was observed at a medical appointment and thereafter was followed and observed assisting in the renovation of a house, including unloading a truckload of debris. The report concluded, "During the course of this investigation, the subject was videotaped as he walked, drove, bent, and performed heavy physical labor. He did not wear a brace or support; his movements appeared normal and unrestricted. He did not exhibit any signs of pain or discomfort as he went about his activities. . . ." From the video, however, it was not entirely clear whether claimant or one of several other men was performing the more strenuous tasks (as opposed to the film footage of claimant standing or walking). The video showed claimant putting some debris, such as sticks, into the bed of a pickup truck, and later unloading the debris at a dump. From most of the footage, however, it appeared that claimant was merely standing by as others worked. Contrary to the assertions in the report, claimant's movements were not fluid or unrestricted; a few times he appeared to descend a porch with care and hesitation.

Where disability is in issue, the hearing officer can consider all evidence, both medical and lay, in reaching his determination. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Article 8308-6.34(e). As fact finder, he is entitled to resolve conflicts in the testimony and evidence,

including the medical evidence. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). We will not set aside his decision where, as here, it finds adequate support in the evidence and it is not so against the great weight of the evidence as to be unfair and unjust. In re King's Estate, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are accordingly affirmed.

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Lynda H. Neseholtz  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Susan M. Kelley  
Appeals Judge