APPEAL NO. 931186

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On September 15, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues recited at the CCH were:

1.Is CLAIMANT currently suffering disability, and if so, when did the disability begin?
2.What is the correct average weekly wage?
3.Has CLAIMANT reached maximum medical improvement?
4.What is the correct impairment rating?

The hearing officer recited that the issues relating to maximum medical improvement (MMI) and impairment were to be returned to the field office and, pursuant to agreement between the parties, were being severed pending receipt of a report from a Texas Workers' Compensation Commission (Commission) selected designated doctor. The record indicates a stipulation that the average weekly wage (AWW) is $183.46. The hearing officer's decision and order indicate that the claimant's AWW was $241.79. Appellant, carrier herein, in its request for review does not address the AWW issue and therefore we will not address it as an appealed issue. Consequently the only issue in this review is the issue regarding disability, if any, and when it began.

The hearing officer, on the disability issue, determined that claimant was terminated on March 29, 1993 (all dates are 1993, unless otherwise noted), for not working on March 28th, that the termination "was not for good cause" and that claimant had disability starting March 29th and continuing through the date of the CCH.

Carrier contends that the hearing officer committed procedural error, that the hearing officer's determinations demonstrate "obvious bias and prejudice" and requests that we either reverse the hearing officer's decision and render a decision in its favor or in the alternative remand the matter to a different "hearing officer who had not shown such bias and prejudice in favor of the claimant." Respondent, claimant herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

After carefully reviewing the record and the evidence, the decision and order of the hearing officer are affirmed.

It is undisputed that claimant fell, when a ladder he was on slipped, and that he fell on a table injuring his neck and back on (date), while employed by (employer), the employer. Claimant testified that he was employed as a mechanic whose duties included repairing the employer's trucks and helping repair oil storage tanks when required. It is undisputed claimant reported his (date) accident, but did not see a doctor at that time. Claimant testified he expected the pain from his injury to get better, and that when it did not, claimant says that he asked (Ms. CB), employer's co-owner, to send him to a doctor. Claimant

testified that Ms. CB selected the doctor but Ms. CB only agrees she made the call making an appointment for claimant to see (Dr. B), D.C. Dr. B apparently saw claimant on February 1st, and placed claimant on light duty. Claimant reported his light duty to the employer and the employer accommodated claimant by giving him lighter duties, hiring claimant's brother as claimant's helper and assuring claimant had a helper. Claimant testified he saw Dr. B "two or three times a week" and continued working full time with lesser duties. At some point, claimant began seeing (Dr. R), D.C., who is associated with Dr. B, but who apparently has an office closer to claimant's home than Dr. B. Eventually claimant began to see only Dr. R.

Apparently the key to the disability issue is the events that occurred on Friday, (date of injury) through Monday, March 29th. Claimant testified, and it is relatively undisputed, that a call came to employer's office that one of the truck drivers needed some tires out in the field. Claimant loaded the new tires onto the truck, took the flat bed truck with the tires to the location in the field, assisted the truck driver in changing the tires out and loaded the old tires back in the truck. Ms. CB testified when she first asked claimant to take the tires out he was "disrespectful" and she was prepared to take the tires out. It is undisputed, however, that claimant performed this chore. Claimant testified that while out in the field, in loading the last old tire, he "put out too much and the hurt in my back just came back, but it came back worse." Claimant testified he told Ms. CB he had hurt his back "with those tires." Ms. CB states she didn't recall claimant saying he had reinjured his back. Claimant testified he didn't want to work the next day, Saturday (date), but because employer needed "that truck" he went to work "and finished out that truck." Both claimant and Ms. CB agree that Ms. CB called claimant either Saturday evening or Sunday morning to confirm claimant would be coming to work Sunday because he was the only one that could patch a particular oil tank. There is disagreement what was said with Ms. CB denying claimant said he was unable to work because of back pain and claimant conceding that at one point he gave as a reason for not working Sunday that it was the "Lord's Day." According to claimant Ms. CB called back again on Sunday morning to ask about some tools. Ms. CB acknowledged she called Sunday morning about the tools, but testified claimant called back "in just a short time, he was very, very, vocal and screaming at [Ms. CB] to be fired." Ms. CB testified she did not recall claimant saying he had reinjured his back. Both claimant and Ms. CB agreed that (Mr. BB) called claimant Sunday night. Again what was said and whether claimant was fired or quit is disputed. Claimant and Ms. CB agree claimant came to the office on the morning of Monday, March 29th, and again an argument ensued whether claimant had been terminated because he had refused a direct work order to work on Sunday morning. Ms. CB and another witness stated claimant was very hostile and there was a very heated argument lasting two hours. Ms. CB testified claimant later calmed down and asked for his job back. Ms. CB testified she refused the request and claimant, over the next week, with the help of others, cleared "his stuff" off employer's premises. It is carrier's position that in February and March claimant was doing a light-duty job and that by either being terminated for cause or quitting, claimant essentially rejected the light duty and therefore had no disability.

The medical evidence consists of Dr. B's initial report of "2-1-93" indicating a referral

by the employer, "tunnel vision," and low back pain. Claimant was referred for an ophthalmic examination for the tunnel vision. By Initial Medical Report (TWCC-61) dated "02/02/93" Dr. B's treatment plan was "conservative Chiropractic Spinal procedures adjuncted with physiotherapy." Claimant's testimony was that after the (date of injury)-29 disagreement he returned to Dr. R who on a Specific and Subsequent Medical Report (TWCC-64) dated April 5th, stated "[p]atient improved until 4/1/93, patient was returned to work under light duty status in which company ignored. Patient attempted to lift (4 tires) individually, causing him to re-aggravate his condition." Claimant was taken off work on April 1st. Claimant stated that he continued to treat with Dr. R in April, but when he did not get better he asked to be seen by a medical doctor (apparently as opposed to a chiropractor). Consequently, Dr. R, by Report of Medical Evaluation (TWCC-69) stated: "[p]atient released himself from treatment on 5-6-93 after working at a loading dock re-injury back. Patient stated he would see another physician. Patient stated he was lifting which caused his back pain to re-occur." Claimant denies working elsewhere, or stating to Dr. R anything about a loading dock. Dr. R certified claimant reached MMI on 5-6-93 with a 0% impairment. Claimant filed an Employee's Request to Change Treating Doctors dated June 24th, stating "he is still under a lot of back pain. He is requesting to see an orthopedic doctor of his choice." Claimant saw (Dr. W), M.D., on July 1st. Dr. W recommended an MRI which apparently has been refused by carrier.

The hearing officer determined in pertinent part:

## FINDINGS OF FACT

5.CLAIMANT was terminated on March 29, 1993 for not working on March 28, 1993. The termination was not for good cause.

7.CLAIMANT has been unable to obtain or retain employment at wages equivalent to his preinjury wage due to his injury beginning March 29, 1993 and continuing through the date of hearing.

## CONCLUSIONS OF LAW

2.CLAIMANT had disability starting March 29, 1993 and continuing through the date of the contested case hearing.

Carrier argues the hearing officer committed reversible procedural error and had "obvious bias and prejudice" against the carrier as exemplified by the fact that although the hearing officer excluded four of claimant's exhibits, the decision reflects the exhibits were admitted and that the hearing officer improperly relied on one of the excluded exhibits. The carrier also contends that contrary to the hearing officer's determinations the claimant either quit his job or was terminated for cause. Further carrier argues that the hearing officer "totally ignored the evidence that the claimant was released to return to work, and in fact, worked after March 29, 1993."

First of all, upon a careful review of the record, we find no evidence of any "obvious bias and prejudice of the hearing officer." Carrier is correct that the hearing officer excluded Claimant's Exhibits 1-4 and the hearing officer's Evidence Presented portion should have shown those exhibits as "not admitted." Similarly the hearing officer's comment in the statement of evidence that "the statement of the truck driver . . . supports [claimant's] version of events of (date of injury)" is improper in that it is based on a statement which the hearing officer had excluded (although the hearing officer could have inferred this from claimant's testimony). As noted below, the hearing officer could have relied only on the claimant's testimony as it was undisputed that claimant did take truck tires out to the location with the only dispute being whether claimant had reinjured himself loading one of the old tires. In order to obtain a reversal of a decision based on the admission or exclusion of evidence it must be shown that the error was reasonably calculated to cause and probably did cause rendition of an improper decision. *See* Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. Civ. App.-San Antonio 1981, no writ). In reviewing the record as a whole, we do not find that the hearing officer's erroneous labeling of exhibits being admitted, when they were excluded, and in referring to one of those exhibits as supporting claimant's testimony, to be such error that was reasonably calculated to cause and probably did cause the rendition of an improper judgment. We find the hearing officer's actions in this regard to be harmless error. Nor do we believe that the hearing officer's concern that he correctly decide whether claimant had disability while he was in a light duty status (given the problems with claimant's AWW, whether claimant worked overtime and the testimony that claimant "was doing less" in the light duty status) as an indication that the hearing officer was biased.

Carrier also contends that the hearing officer erred in determining that claimant's termination was not for good cause when "[t]he evidence is clear the claimant was on light duty and quit his job, or was terminated for cause." Carrier then recites in detail the employer's version of the events of (date of injury) through 29th. We note that in carrier's recitation of the evidence, carrier states that Ms. CB "was never told of any reinjury . . . ." Actually, Ms. CB testified, several times, she did not recall claimant telling her of a reinjury. Further carrier states as fact, a conclusion it draws that "the claimant, in fact, worked after he left the employer . . . ." In fact, the only evidence of any other job was the reference in Dr. R's May 11th, report of an injury at a loading dock. Claimant adamantly testified he had not worked at any other job and did not know why Dr. R had put the loading dock notation in the report. We would only note that Dr. R's report was after claimant told Dr. R, a chiropractor, that the claimant wanted to see a medical doctor, clearly meaning an M.D. specialist in orthopedics. Regarding the testimony of Ms. CB, carrier's other witnesses, and who said what to whom and when, the 1989 Act clearly makes the hearing officer the sole judge of weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer clearly considered carrier's evidence in that he mentioned the testimony of Ms. CB and two other witnesses in his statement of the evidence. In that the hearing officer did not recite the testimony and evidence in as great a detail as carrier would have liked or apparently did not give it as great a weight as carrier would have liked, does not mean the "hearing officer completely ignored substantial evidence" or was biased. Clearly and consistently, we have held that the hearing officer as the sole judge of the weight and credibility of the evidence, and as the trier of fact, resolves conflicts and inconsistencies in

the evidence Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer could choose to believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Here the hearing officer obviously believed the claimant's explanation of what happened and specifically believed claimant's testimony that he was unable to work Sunday because of pain in his back and that he gave as a reason that he would not work on the "Lord's Day" only when Ms. CB "was persistent in having me go to work [on Sunday] . . . . I was hurting too much and I needed to say something."

Carrier also emphasizes Dr. R's report of May 11th where Dr. R mentions claimant "re-injuring" his back "working at a loading dock." Carrier reads this report as meaning the "the claimant was reinjured in May working at another job!" Carrier disregards claimant's testimony that this must have been a misunderstanding and Dr. R's designation on the May 11th TWCC-69 of a "1/5/93" date of injury and the employer's name in the appropriate space. Clearly, to us, Dr. R did not believe the injury at a loading dock was anything other than the (date) injury at issue. As for Dr. R's comment that the patient released himself and "would see another physician," this is consistent with claimant's testimony that he told Dr. R he wanted to see a medical doctor (as opposed to a chiropractor). Claimant subsequently requested to see an orthopedic specialist. Carrier's allegation that the "hearing officer's complete failure to even consider this evidence of reinjury at another job shows his bias and the need for this case to be reheard . . ." is completely unwarranted. Carrier's interpretation of Dr. R's loading dock reference as showing "reinjury at another job" is torturous at best, given that Dr. R names BB&C Transport as the employer with a 1/5/93 date of injury. That interpretation is certainly capable of being disbelieved and disregarded by the hearing officer, as it apparently was.

Carrier at various places in its appeal complains that the hearing officer "ignored substantial evidence" or failed to recite all the evidence carrier believed should have been emphasized. In this regard we would only note that a hearing officer is not required in a decision to recite all the evidence admitted at the hearing and the contentions of the parties. The 1989 Act only requires findings of fact, conclusions of law, a statement of whether benefits are due and an award of benefits due. Section 410.168. If a statement of evidence is made, it need only reasonably reflect the record and the Appeals Panel will not ordinarily consider questions about why part of the evidence was included and part omitted. Texas Workers' Compensation Commission Appeal No. 93791, decided October 18, 1993. We have reviewed the evidence and testimony and conclude that the hearing officer adequately recited and considered all of the evidence.

Having reviewed the record, we find no reversible error and sufficient evidence to support the hearing officer's factual determinations. In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (Tex. 1951).

The decision and order of the hearing officer are affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

I concur that there is sufficient support for the hearing officer's finding of fact regarding claimant's inability to retain and obtain employment at the pre-injury wage, notwithstanding the termination. But I have a cautionary note to share lest our triers of fact go too far down the road of employment law.

While termination for cause may be viewed as strong (but not conclusive) evidence against a claim of disability due to the injury, I don't believe that the absence of good cause for a firing, in and of itself, means the converse: that disability continues. A finder of fact that stops further inquiry and weighing of the evidence on a finding of a "no good cause" termination would not, in my mind, have implemented the definition of disability in the 1989 Act. The hearing officer must still find (as the hearing officer has done here) that the inability to retain and obtain employment results from the compensable injury.

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Susan M. Kelley
Appeals Judge