APPEAL NO. 93620

On May 13, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues determined at the contested case hearing were whether claimant had sustained an injury on (date of injury), in the course and scope of his employment with (employer), and whether he sustained disability as a result of such injury. The record was held open to allow the carrier to respond with evidence to meet a medical report from (Dr. S) which was admitted over objection from the carrier, and which had not been prepared by the doctor until the day of the hearing. No response to that report was submitted and the record closed June 18, 1993. The hearing officer determined that the claimant had sustained an injury, muscle strain and diffuse myositis, as a result of moving a concrete cutter and operating a jack hammer on (date of injury), and that he had disability beginning on October 5, 1992 and continuing thereafter.

The carrier has appealed, arguing that the evidence was insufficient to prove that claimant's injury occurred. The carrier further argues that harmful error on the issue of disability was committed by the hearing officer in admission into evidence of a medical report from a doctor, Dr. S, whose identity had not been disclosed in response to interrogatories, and whose report had not been exchanged until the date of the hearing. The claimant responds by asking that the determination of the hearing officer on the issue of injury be upheld, and further responds that any error committed by admission of the medical report was offset by holding the record open to allow carrier to respond.

DECISION

Finding no reversible error in the points raised, we affirm the hearing officer's decision.

There was conflicting evidence from the claimant and his wife on one side, and four witnesses for the carrier on the other side, about the occurrence of an injury on (date of injury).

The claimant stated that he was injured around 8:30 a.m. the morning of (date of injury), a Friday, at a construction site located at the School when he was assisting a coworker, (Mr. G), with lifting a concrete cutter off a slab down approximately 2-3 feet onto the ground. The concrete cutter was described by several witnesses as generally configured like a lawn "weed eater," with the blade end being the heaviest. The claimant estimated that the cutter weighed about 400-450 lbs. The claimant said he was holding the heavy end and was pulling it over the threshold, when Mr. G unexpectedly let go of the handle end, and that the heavy end pulled him down. On direct testimony claimant at first indicated that he was "snatched down" by the cutter; on redirect he indicated that this meant he was pulled forward onto the machine, but did not fall to the ground. He said that Mr. G asked him if he was all right. He thereafter got up and walked around. Claimant was then directed by his supervisor, (Mr. M) to get some water hoses. He did so, and then was directed by Mr. M to use a jackhammer. Claimant indicated that he operated the

jackhammer continuously for about 45 minutes to an hour, which caused increasing back pain.

Claimant then said he told Mr. M he had to go, and that his back wasn't feeling right. Claimant asked Mr. M about getting his check, since it was payday. He stated that Mr. M speculated his back might hurt from the jackhammer. Claimant said he told Mr. M he had to leave at around 10:00, and he called his wife, who subsequently came to pick him up.

Claimant stated he laid around the house, using hot packs as suggested by his wife, who worked as an aide at a nursing home. The claimant said his wife worked from 2 p.m. to 10 p.m., and when she came home she saw he was still in pain and took him to the emergency room of County Hospital, where he was told he had a bad muscle sprain. He went to the C headquarters of employer on Monday, October 5, 1992, where he spoke to (Mr. C), a supervisor, to report his injury. Claimant went that day to a clinic where he was treated by (Dr. H). Claimant thereafter received daily physical therapy. Claimant said he has not been able to work since the date of injury and has not been released for work by any doctor. Claimant said he had no back problems prior to this date.

In brief summary, medical records from the emergency room indicate treatment on (date) in the very early morning hours for a back muscle sprain and strain. An initial medical report from Dr. H dated October 6, 1992, recites that claimant gave a history of injury to his right shoulder and lower back while moving a concrete cutter. The recorded diagnosis was diffuse muscle strain and myositis. Dr. H took him off work pending a recheck. A letter to the carrier from Dr. H, dated October 28, 1992, recites a CT scan as showing that claimant had only four lumbar vertebrae, a "transitional vertebrae" at "T12," and no disc herniation or bulges. Dr. H noted that as of the date of the letter, claimant was undergoing physical therapy and showing improvement, and that he would be re-evaluated for return to work on October 29, 1992. A referral was made on November 11, 1992, by Dr. H to Dr. M or Dr. S. The letter cited as a basis for referral that claimant had shown no resolution despite physical therapy and medication.

The claimant indicated that he was unable to follow up on this referral because the carrier disputed the claim. Claimant denied that he told anyone on (date of injury), that he had a dentist appointment. Claimant's wife testified and basically corroborated claimant's testimony, noting that they were seen at the emergency room shortly after midnight.

Mr. G testified and stated that he did not assist claimant on (date) with moving the concrete cutter, but that claimant moved it with Mr. M. He said that the threshold "drop off" at the work site was eight inches, and there were not drop offs as great as two to three feet. Mr. G conceded that two people would be needed to move the concrete cutter for a drop-off depth beginning at about 12 inches. Mr. G said that claimant told him he had a dentist appointment that morning, but would be back later. Mr. G said that claimant looked and

indicated that his wife's car was waiting for him. He stated that claimant never told him he had been injured. Mr. G testified that claimant grumbled that morning about having to operate the jack hammer.

Mr. M testified that Mr. G, claimant, and he all moved the concrete cutter that morning. Mr. M speculated that claimant likely did assist at some point in carrying the cutter, although he said he himself carried the heavy end and did not recall claimant being at his end. Mr. M said that the cutter weighed about 200 lbs, which would be stretching it. Mr. M stated that the ledge where the concrete cutter had to be lifted was about an eight inch drop off, and that there were no 2-3 foot drop offs in this area. Mr. M agreed he had directed claimant to get the water hose, and then the jackhammer. He stated that claimant came to him around 10:00 or 10:30 and said he had a dentist appointment and wanted to get his paycheck to pay for it. Mr. M arranged with the central office to send claimant's check to the work site; when he did not hear anything about the check, Mr. M stated he called the central office around 5:00 p.m. and found out that claimant had picked up his check there.

Mr. C testified that claimant talked to him on Monday, October 5, and asked if he had heard what happened to him the previous Friday. Mr. C indicated that claimant said he had hurt his shoulder while operating the jackhammer. Mr. C corroborated that the drop-off was about eight inches, and he further said that the concrete cutter weighed between 200-250 lbs.

At the hearing, claimant submitted a May 13, 1993, letter from Dr. S, a family practitioner, who recited claimant's history of injury and noted that claimant continued to have pain and limited range of motion, based upon an examination of May 11, 1993. Carrier objected to the exhibit based upon failure of claimant to disclose Dr. S in answer to interrogatories, and upon the failure to exchange the letter. The hearing officer found good cause to admit the document, but indicated that she would entertain a motion from carrier to hold the record open to give him an opportunity to respond to this evidence. The carrier made such a motion at the end of the hearing.

After the hearing, a telephone conference call between the hearing officer, the claimant's attorney, and the carrier's attorney occurred on June 8, 1993. The carrier's attorney had scheduled a medical examination with a doctor of its own choice for the date of the call. Claimant's attorney indicated that he had not understood that the examination would happen on that date and did not think his client could be in (city) for the examination. After discussion, the parties indicated to the hearing officer that they would attempt to agree upon a doctor to perform such an examination, the purpose of which was described by the carrier's attorney as development of evidence to address the late-submitted letter from Dr. S. However, the agreement apparently broke down, with the claimant's attorney changing his position that he would agree to a medical examination of his client.

WHETHER AN INJURY OCCURRED IN THE COURSE AND SCOPE OF EMPLOYMENT ON (DATE OF INJURY)

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. TEX. LAB CODE ANN. 410.165(a) (1989 Act) (formerly Art. 8308-6.34(e)). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The testimony of a claimant alone is sufficient evidence to support that claimant sustained injury. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). While the record here could support contrary inferences, we cannot say that the determination of the hearing officer is subject to reversal or without sufficient evidence in the record.

WHETHER THE HEARING OFFICER ERRED BY ADMITTING DR. S's REPORT

The report from Dr. S was written the morning of the hearing. The record was held open a month for response. It appears that the carrier sought a medical examination by its doctor after 2½ weeks had elapsed. It does not appear that the only way for carrier to respond to Dr. S's report was through a medical examination by another doctor conducted after the contested case hearing, and there is no indication in the record as to whether carrier attempted to solicit information from Dr. S by other means.

Even if the report were admitted in error, it would be harmless error under the facts here. We have noted before that the hearing officer may determine that a claimant has disability even if contradicted by medical evidence. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992. Claimant's own testimony at the hearing was that he could not work as of the date of the hearing and this would be sufficient standing alone to support a finding of disability. Texas Workers' Compensation Commission Appeal No. 92299, decided August 10, 1992. We would further note that records from Dr. H indicate that as of November 1992, claimant had not, in that doctor's opinion, made progress in recovery and that further analysis was necessary. We cannot

agree that the hearing officer abused her discretion by finding good cause to admit the report, or that harmful report was committed by the hearing officer.

For the reasons stated above, the determination of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

_____
Lynda H. Nesenholtz
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge