APPEAL NO. 93648

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX LAB CODE § 401.001 *et seq.* On June 23, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) was injured in the course and scope of employment on (date of injury), that claimant still has disability therefrom, and that claimant has an average weekly wage of $253.07. Appellant (carrier) asserts that the hearing officer erred in admitting two exhibits and that the decision was against the great weight and preponderance of the evidence. Claimant did not reply.

DECISION

We affirm.

The issues at the hearing were whether claimant was injured in the course and scope of employment, what is the period of disability, and what is the average weekly wage of claimant.

Section 410.204(a) of the 1989 Act states that the appeals panel "shall issue a decision that determines each issue on which review was requested."

The carrier asserted on appeal that the hearing officer erred in admitting claimant's exhibits three and four over its objection in regard to failure to properly exchange those documents, stating, "(t)here was no evidence of good cause for the failure to exchange evidence and the Hearing Officer made no such finding." In addition, carrier stated that the evidence in support of the decision was insuffient and that disability cannot be present without a compensable injury.

The Appeals Panel determines:

That the hearing officer did not err in admitting claimant's exhibits three and four upon considering evidence as to good cause for failure to properly exchange exhibit three and duly finding that good cause existed.

That the determination of the hearing officer that claimant was injured in the course and scope of employment and has disability therefrom is not against the great weight and preponderance of the evidence.

Claimant worked in maintenance for (employer). He had been with employer approximately two years and had hurt his back previously by falling from a ladder approximately one year earlier. On (date of injury), claimant and another employee, (CR) were moving refrigerators. Claimant testified, through an interpreter, that they moved two refrigerators out of apartments on a second floor and replaced them with two other refrigerators. CR testified that claimant assisted him in taking the two replacements up to the apartments, but did not assist in removing the two old refrigerators. CR also said that

a dolly was used to move the refrigerators and claimant helped by pushing the dolly from below as CR pulled the dolly up the stairs. Claimant testified that he helped with both removal and replacement of refrigerators and that he and CR took turns pulling and pushing the dolly up the stairs. CR testified that they both wore back support belts.

Claimant did not notify his employer immediately after the injury, which he described as beginning with one movement of a refrigerator and occurring again with another movement - referring to what he felt as a tingling or pricking sensation in his back. He further stated that he did not want to stop working and described that his prior back injury from the fall off a ladder had been minor and improved over a short period, causing no problem; he hoped that this injury would also be transitory.

On the Monday following the accident, he went to a doctor and tests showed he had a urinary tract infection. This infection, claimant stated, diverted the doctor's attention for a short period and resulted in the first off-work statement reflecting an infection rather than a back injury; claimant added that because of this, he also was not sure for a period of time as to what was wrong with him and this delayed his reporting of a job injury. The carrier introduced a doctor's statement from February 15, 1993, which indicated that claimant's lower back had been hurting for six months; it also noted that he had pain in the pelvic area. Claimant saw (Dr. C) (Dr. W) D.O., and (Dr. L) D.C. Dr. C referred to a "back strain"; Dr. W referred to a "lumbar strain"; and Dr. L referred to "lumbar plexus disorder, lumbar facet syndrome, paresthesia, sciatica, cervical plexus comp syndrome, cervical brachial syndrome, kinesalgia intercostal neuriti, cervical radiculopathy, and lumbar radiculopathy". Each has taken claimant off work.

SW testified that she had been claimant's supervisor at the time of the injury in February. She said that claimant first reported an injury at work to her on (date). She added that after claimant's fall from the ladder the year before, which another employee reported to her, she had made it clear to claimant that he was to report any injury immediately.

Carrier takes issue on appeal with the introduction of claimant's exhibits three and four. The record reflects that the carrier objected to page three of exhibit two and exhibit three. Despite an initial objection to exhibit four, after a lengthy examination of exhibit four (statement of (EM) in regard to claimant's earlier fall from a ladder), carrier did not object to admission and exhibit four was admitted. Carrier's assertion on appeal in regard to exhibit four is without merit since it did not object at the time of admission. Since the carrier does not address exhibit two on appeal, exhibit two will not be discussed.

Claimant's exhibit three, three pages of doctor's records, was contested by carrier at the hearing primarily on the ground that a proper exchange had not taken place. The hearing officer then asked the claimant, through the interpreter, whether he had exchanged

that exhibit within 15 days of the benefit review conference, and if he did not, asked further if he had good cause for his failure to exchange. The claimant explained that the person in charge of handling insurance in the doctor's office assured him that copies of these documents were being sent to the carrier and that the copies he was given were for him personally. The hearing officer then asked claimant if he had provided the address of the carrier to the person in the doctor's office who handled insurance, and the claimant replied that he had. The hearing officer also asked if claimant was certain that he gave the address of the carrier, not the employer; again claimant replied that he had given the address of the carrier. Claimant could not offer any other evidence to show that the carrier received copies of the three pages in question but pointed out that pages 2 and 3 thereof are addressed to the carrier. The carrier argued at hearing that these records should have been sent to the attorney, not just the carrier. The hearing officer then found that exhibit three was not exchanged timely but that there was good cause for failure to exchange and admitted claimant exhibit three.

The hearing officer in admitting claimant's exhibit three did not abuse his discretion, and the carrier's assertion, "(t)here was no evidence presented and the Hearing Officer failed to find good cause for Claimant's failure to exchange Exhibits 3 and 4.", is without merit. *See* Texas Workers' Compensation Commission Appeal No. 92409, decided September 25, 1992, in which the Appeals Panel found that the hearing officer abused his discretion in not admitting documents. In that appeal, objection was also made that a timely exchange had not been made; the party offering the record testified that he had been told by the doctor that such doctor had already sent the same records to the other party.

While the testimony and medical records in this case do not provide the strongest evidence of compensability and disability, these are factual decisions for the hearing officer to make. *See* Section 410.165 of the 1989 Act. The claimant's description of the circumstances of his injury was substantially corroborated by the carrier's witness, CR, who stated that claimant helped him take the refrigerators up the stairs. While one doctor's report does refer to treatment for an infection, others refer to treatment for a back strain. Carrier argued that claimant only pushed up from beneath the refrigerator and wore a support belt so no injury could have occurred; no evidence to support such an opinion was offered, however. While claimant could have been injured at a time previously to the injury of (date of injury), there was no showing that a prior condition was the sole cause of claimant's problem. *See* Texas Workers' Compensation Commission Appeal No. 93339, decided June 16, 1993. The hearing officer as trier of fact not only judges credibility, but also resolves conflicts and inconsistencies. *See* TEIA v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

Finding of fact three, that claimant injured his back in the course and scope of employment, and finding of fact seven, that claimant has been treated by Dr. L and remains in an "off-work" treatment program, are sufficiently supported by the evidence. Finding of

fact four, also appealed, is not necessary to the decision since there was no issue as to notice not being made within the statutory 30 days of the injury; while not necessary, this finding, that claimant did not think his injury was serious, is also sufficiently supported by the evidence. The findings of fact and evidence of record sufficently support
conclusions of law that say claimant was injured in the course and scope of employment and has disability.

The decision and order are sufficiently supported by the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge