APPEAL NO. 93921

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* (formerly V.A.C.S. art. 8308-1.01 *et seq.*). On July 6, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The record was held open until September 23, 1993, to allow the submission of additional medical evidence. The issues determined at the contested case hearing were: 1) whether claimant's neck condition was causally related to his injury of (date of injury), sustained while claimant, TA, who is the respondent, was working for. (employer), and 2) whether the claimant had disability between October 9, 1992, and January 26, 1993. At the hearing, this time frame was amended by the parties to be October 9, 1992, through January 5, 1993. The hearing officer determined that the neck was injured on (date of injury) (when claimant sustained an undisputed injury to his lower back), and that he had disability for the period in question from both his neck and lower back.

The carrier has appealed, arguing that the evidence was against the finding that the neck was causally related to the back injury. The carrier asserts it was prejudiced by admission into evidence of medical reports that were not timely exchanged, and it disputes the hearing officer's ruling regarding good cause. The carrier further argues that the effect of infectious hepatitis is "analogous" to incarceration as a factor that will override the carrier's obligation to pay temporary income benefits (TIBS) for a period of inability to obtain and retain employment equivalent to the pre-injury wage. The claimant responds that the decision of the hearing officer is correct.

DECISION

We affirm the hearing officer's decision.

The claimant stated that he was injured on (date of injury), as he delivered and moved two refrigerators without assistance. Initially, he sought treatment for his lower back and pain radiating down his leg, which he indicated was severe to the extent that it probably masked any neck pain he may have experienced.

Although questioned several times by the hearing officer about when he first noticed or experienced neck pain, the claimant was unable to specify a date. The closest that claimant (or his wife, who also testified) testified to a time frame was that neck pain became severe around the time he first attended a pain management clinic for treatment of his lower back injury. A physical therapy note dated September 8, 1992 (the date that claimant said he was initially evaluated for entry into the pain management clinic), documented that claimant had severe neck pain during the previous week.

Claimant stated that he first thought his lower back pain might be related to his prostate, confirmed by a July 29, 1992 note in the records of his family doctor, (Dr. T). Claimant was thereafter treated by (Dr. L), a neurosurgeon and referred to the pain management clinic. Lumbar spine studies performed in August 1992 reported a probable herniated disc. An August 5, 1992, letter from Dr. L recites the history of claimant's injury

and indicates complaints of pain "from his hip down to his right toes."

A September 25, 1992, letter from (Dr. S), whom claimant identified as associated with the pain clinic he attended, stated a chief complaint of right hip and leg pain as well as left shoulder and neck area pain. The history further noted that claimant complained of neck pain beginning three weeks before while he was riding in a car.

A note written by the claimant on August 24, 1992, which details his injury does not complain of neck pain. Claimant's theory was that his back pain was his primary concern, and masked his neck pain.

Results of a cervical MRI conducted February 3, 1993, are reported as showing congenital spinal stenosis, along with a small cervical disc herniation at C5-6. The first record from Dr. L indicating his awareness of claimant's neck problems is a January 26, 1993, letter that recites complaints of neck pain. In a March 1993 letter to Dr. T, Dr. L notes the cervical disc herniation and further stated that the pain management clinic was of no benefit to the claimant.

The claimant was diagnosed with infectious hepatitis B in early October 1992, with the result that he was suspended from the pain management program from October 9, 1992, through January 5, 1993, when he returned. Claimant confirmed that he was punctured by a needle in a May 1992 scuffle with a relative. However, claimant did not know the cause of his hepatitis. He agreed that for at least two weeks of his infectious period he would not have been able to work his regular job. He also stated, however, that he could not work during this time because of neck and back pain. The record indicated that the carrier did not dispute the lower back injury and actually paid TIBS until the time when claimant was diagnosed with hepatitis.

WHETHER THE RECORD SUPPORTS THE HEARING OFFICER'S CONCLUSION THAT CLAIMANT INJURED HIS NECK 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. Section 410.165(a). 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). A carrier that wishes to assert that a pre-existing (or subsequent) condition is the sole cause of an incapacity has the burden of proving this. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992.

A claimant's testimony alone is sufficient to establish that an injury has occurred. 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 carrier argued at the contested case hearing that the Appeals Panel has "required" that there be a prompt onset of symptoms, it is more accurate to state that we have listed this as a factor that a trier of fact may consider in determining whether an injury that is not manifested until later is causally related to a compensable injury. Although there were conflicting portions of the evidence in this case, these were for the hearing officer to weigh. He evidently believed that claimant was primarily concerned with his lower back injury such that he did not complain until later of neck pain. He further believed that six weeks passage of time was apparently not an inordinate delay for claimant to seek treatment for another portion of his already-injured spinal column. His determination that a compensable injury to the neck occurred is sufficiently supported by the record. We will not substitute our judgment for that of the hearing officer, and his decision as to the neck injury is affirmed.

WHETHER THE HEARING OFFICER ERRED BY FINDING THAT CLAIMANT HAD DISABILITY DURING THE TIME HE HAD INFECTIOUS HEPATITIS

The carrier argues that cases that the Appeals Panel has decided that relate to incarceration in prison are "analogous" to the case here. We disagree, and decline to expand our rulings regarding unavailability for employment due to incarceration to circumstances affecting injured workers who are not imprisoned.

The carrier argues that it should not be "punished" for the effects of an ordinary disease of life, hepatitis. Of course, the liability of a carrier for TIBS does not emanate from the compliance provisions of the 1989 Act, but from Sections 406.031, 408.081, 408.082, and 408.101. The hearing officer evidently viewed the facts herein as presenting the converse question: whether the carrier may be absolved of its liability for TIBS to which an injured employee is entitled for the effects of a job-related injury because fate intervenes to infect the worker with a disease that also might have kept him from work.

In our opinion, if the trier of fact finds that effects of a compensable injury result in the inability to obtain and retain employment at the pre-injury wage, then the claimant has disability, as defined in Section 401.011 (16), notwithstanding that an illness occurs in the period of disability which, standing alone, might also prevent work. (The only "evidence" that the hepatitis may have prevented claimant from working was his conjecture that he could not have worked for the first two weeks of his infection). Although the carrier argues that claimant's condition had gotten better in pain management, this is contradicted by some of the medical evidence, including records presented by the carrier, including Dr. L's letter stating that pain management was of no benefit to claimant. The hearing officer's determination that claimant had disability due to his compensable injury for the period from October 9, 1992, through January 5, 1993, is sufficiently supported by the evidence.

WHETHER THE HEARING OFFICER ERRED BY ADMITTING MEDICAL REPORTS OVER OBJECTION OF THE CARRIER AS TO TIMELY EXCHANGE

The carrier argues that the hearing officer harmfully erred in admitting two medical reports that it objected to at the hearing as not timely exchanged. The crux of this is not necessarily that the documents weren't exchanged, because one exhibit had been given to the carrier two weeks before the hearing, but that those exhibits weren't exchanged within 15 days of the benefit review conference.

Tex. W.C. Comm'n Rules, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)) provides for exchange of evidence no later than fifteen days after the benefit review conference. It is also set out in Rule 142.13(c)(2) that the parties shall exchange additional documentary evidence as it becomes available. Rule 142.13(c)(3) indicates that the hearing officer is required to make a good cause finding as to documentary evidence not exchanged prior to the hearing.

Claimant's Exhibit No. 1 was a letter from Dr. S dated July 3, 1993, and was given to the carrier immediately before the hearing (on the day of the hearing). As such, a finding of good cause was required by Rule 142.13(c)(3), and was found by the hearing officer.

Claimant's Exhibit No. 2 is a physical therapy note made September 8, 1992, which the carrier agreed it had received in exchange from the claimant two weeks before the hearing. The claimant's wife stated that the note was exchanged to the carrier by facsimile transmission when it was received by them from the pain management clinic. The hearing officer overruled the objection that this document was not timely exchanged, and he further recited his obligation to fully develop the facts necessary to making a decision. Section 410.163(b). The carrier was offered a continuance or a chance to ask that the hearing officer hold the record open to meet such evidence. The record was in fact held open, and the carrier submitted a post-hearing exhibit and indicated it was availing itself of the offered opportunity to follow up with Dr. S.

Section 410.160 regarding exchange of information prior to a hearing, except for the identity and location of witnesses, clearly focuses on documents. The carrier cites no authority for the proposition that a party will run afoul of the exchange requirement if the party does not, early on, cause a document to be created that can then be exchanged. Given that Section 408.025 requires a health care provider to supply requested treatment information to either an injured employee or the carrier, it is not clear that either party has superior "control" over such information so as to consciously elude the exchange requirements. The hearing officer did not abuse his discretion by finding good cause for late exchange of Exhibit No. 1, especially as he also held the record open to allow a response. Further, under the facts brought forward at the hearing, and Rule 142.13(c)(2), the hearing officer was correct in overruling carrier's objection to Exhibit No. 2, as it appears that a timely exchange was made within the parameters of Rule 142.13(c)(2).

Regarding the assertions that the hearing officer effectively became an advocate for the claimant, we do not find the hearing officer's questions to exceed the authority given to him under Sections 410.163(b) or Rule 142.2. As we commented in Texas Workers' Compensation Commission Appeal No. 92589, decided December 14, 1992, we regard appeals which disparage the fairness of the hearing officer, with no support for same in the

record, as generally unpersuasive.

As the record does not indicate that the great weight and preponderance of the evidence is against the hearing officer's determination, we affirm his opinion.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge