APPEAL NO. 91117
FILED FEBRUARY 3, 1992

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act) TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On November 8, 1991, after being continued from September 17 and October 30, a hearing was held. He (hearing officer) found claimant (respondent herein) was disabled by an injury to his back incurred in the course and scope of employment on _____. Appellant asserts that the injury of _____ did not cause disability, that the sole cause of disability was a sneeze on April 30, 1991, and that the hearing officer erred in admitting two of claimant's exhibits that were not timely provided to the appellant.

DECISION

The decision is sufficiently supported by the evidence and is affirmed.

Respondent is a paper handler at the _____. He loads and unloads trucks and in doing so, drives a forklift. On _____, he was driving a forklift over a metal dockplate used to bridge the gap between the lip of a trailer bed and the dock. The plate slipped causing the forklift to fall approximately four inches. Respondent was bent over at the time and felt pain in his back. There is no dispute that the incident occurred or that timely notice was given.

Respondent did not miss work until April 30. Between _____ and April 30, he testified that he had pain but kept working. His wife rubbed his back at night and he lay on the floor at times. At work he would lie down on the floor when work was slow. He at times had to slide off the seat of the forklift because his legs and back were stiff. He took Advil for pain. His wife constantly told him to go to the doctor but he hesitated, thinking it would get better. She finally made an appointment, prior to April 30, for respondent to see their health plan physician, Dr. G on May 4.

On April 30, 1991, as respondent prepared to go to work, he bent over to tie a shoe and sneezed, causing unbearable pain. He went to (Hospital) where he was seen by Dr. N in the emergency room. His history reflected that he had back pain off and on for a month but had just sneezed causing severe pain. It also noted that he had an appointment "Sat" (Saturday) with his physician. Respondent was given medication, told to stay off work for the week and advised to keep his appointment with Dr. G. The diagnosis at that time was lumbar sacral strain.

Respondent testified that on May 4 he saw Dr. G who did a CAT scan and recommended he go into the hospital. Thereafter the health insurance stopped paying because it appeared to be a workers' compensation injury. Respondent then told a supervisor of the insurance problem and was sent to Dr. F on May 6th. Respondent was told the CAT scan by Dr. G showed a ruptured disc; he was started on physical therapy and medication. On June 11, 1991, an associate of Dr. F referred respondent to Dr. J, an

orthopaedic surgeon, for an appointment on June 13, 1991.

Claimant's Exhibit 1, duly admitted, is a letter from Dr. J to "Hartford Insurance," with a copy to Dr. F, dated June 13, 1991. It is labeled "Consulting Physician Report." That report recites the history of an _____ injury followed by a sneeze and treatment at (Hospital No. 1). After viewing x-rays, Dr. J writes that a lumbar disc appears ruptured but acknowledges that he has not received a copy of the CAT scan. He noted that respondent was to be treated "to avoid surgery if possible" and was to "remain off work."

Also duly admitted at claimant's request was a report of CAT scan, showing "evidence of a grade III-H herniated disc, midline L4-5," and a letter from Dr. F to an employee of Hartford Insurance Company. That letter, dated June 27, said "Obviously, a sneeze when in an upright position can aggravate or increase low back pain." It also mentioned the referral to Dr. J.

The only evidence introduced by appellant was the Hospital report, referred to on page 2 herein, and "Employer's First Report of Injury or Illness." Neither addresses the question of whether the sneeze of April 30 was the sole cause of disability. Appellant cites Liberty Mutual Ins. Co. v. Peoples, 595 S.W.2d 135 (Tex. App.-San Antonio 1979, writ ref'd n.r.e.) in its appeal and that case plus Washington v. Aetna Cas. and Surety Co., 521 S.W.2d 313 (Tex. Civ. App.-Fort Worth 1975, no writ) at the hearing. These cases only provide that evidence of a subsequent injury may be the basis for a sole cause defense to liability. A sole cause defense may be based on a subsequent injury; appellant's problem is a paucity of evidence indicating that the subsequent sneeze was the sole cause.

Appellant objected at hearing to claimant's Exhibits 3, 4, and 5. All were admitted after respondent argued good cause. On appeal, appellant does not question Exhibit 5 (physical therapy) but continues to assert that Exhibits 3 and 4 (both documents of Dr. J were not admissible. While Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13) requires a timely exchange of medical documents, the evidence was sufficient for the hearing officer to find good cause for providing them on November 8, the day of the hearing.

(1) The documents were obtained from the doctor's office on November 6 - two days before this hearing.

(2) Respondent had requested all medical records from appellant on September 23 but did not get a copy of Exhibit 3.

(3) There was some evidence that personnel in the doctor's office told respondent that the documents in question had previously been provided to appellant.

(4) One document in question (Exhibit 3) was addressed to appellant and dated July 11; the other (Exhibit 4) was dated November 4, 1991.

(5) The doctor who generated both documents was a referral doctor from the doctor that the employer had recommended to respondent.

See Texas Workers' Compensation Commission Appeal No. 91009 decided September 4, 1991 and Appeal No. 91064 decided December 12, 1991, generally as to whether good cause was shown for the exchange of documents on the date in question.

We do not say here that Article 8308-6.33(e) or Rule 142.13 does not apply to this fact situation, but simply that facts presented enabled the hearing officer to use his discretion as to whether good cause existed for not exchanging earlier. See generally Texas Workers' Compensation Commission Appeal No. 91088 decided January 15, 1992. The hearing officer's discretion should not be set aside except when arbitrary or an abuse of discretion. Gerst v. Nixon, 411 S.W.2d 350 (Tex. 1966). Abuse of discretion has been found when one of the following occurs: (1) the decision omits from consideration a factor the legislature wanted the agency to consider in the situation, (2) the decision included in its consideration an irrelevant factor, or (3) the decision reached a completely unreasonable result based on weighing only relevant factors. Stateside Convoy Transports v. Railroad Commission of Texas, 753 S.W.2d 800 (Tex. App.-Austin 1988, no writ). The hearing officer did not abuse his discretion in finding good cause to admit Claimant's Exhibits 3 and 4.

Even if he had erroneously admitted Exhibits 3 and 4, there was sufficient evidence outside these exhibits to support his findings and conclusions that the _____ accident caused respondent's disability and that the April 30 sneeze was not the sole cause of disability. Therefore, in any event, no reversible error occurred since the case did not turn on the evidence admitted. Atlantic Mutual Ins. Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The hearing officer's findings and conclusions in regard to disability were sufficiently supported by the testimony of respondent (both as to his continuing pain and as to what his doctors planned for him); by Claimant's Exhibit 7 in which Dr. F said that a sneeze can aggravate or increase back pain; by Dr. J's reference to a possible lumbar disc rupture, his emphasis on what a CAT scan might say, and his recommendation that respondent stay off work (Claimant's Exhibit 1); and by the report of CAT scan showing a herniated disc (Claimant's Exhibit 6).

The decision and order of the hearing officer are affirmed.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge