APPEAL NO. 950421

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (city), Texas, on October 24, 1994, with the record closing on November 30, 1994, with (hearing officer) presiding as hearing officer. The unresolved issues from the benefit review conference were: (1) did the respondent (claimant) sustain a compensable injury on (date of injury); (2) did the claimant have disability from February 2, 1994, to the present; and (3) what is the claimant's average weekly wage (AWW). The parties stipulated that the claimant's AWW is $238.27. The hearing officer determined that the claimant sustained a compensable injury to his neck and shoulder on (date of injury), and that the claimant had disability from February 21, 1994, through the date of the hearing. The appellant (carrier) requested review urging that the hearing officer erred in admitting Claimant's Exhibit No. 4, a statement of (Mr. OM); erred in not discussing all of the evidence presented and in failing to set forth an articulate discussion, that would be subject to review, of why one side should prevail in the contested matter with a large amount of conflicting evidence; and that the evidence is not sufficient to support the determinations of the hearing officer. The claimant responded urging that the hearing officer properly admitted the statement of Mr. OM and that the determinations of the hearing officer are based on all of the evidence.

DECISION

We reverse and remand the decision and order of the hearing officer.

The claimant testified that he worked for the employer, an asphalt paving company, driving a tractor and doing whatever was required. He said that on (date of injury), while working on a job in (City 1), Texas, he hurt his shoulder and neck while lifting a concrete car stop weighing about 150 pounds with Mr. OM. He said that he told (Mr. JR) and Mr. OM that his shoulder and neck felt bad. He said that he told (Mr. JD), the foreman that he was feeling bad and that his shoulder was hurting a lot. He said that he was told that he would be sent to a doctor when they returned to (City 2), Texas, that the workers returned to the yard in City 2, that the foreman did not return to the yard but went to his home, and that he was not sent to the doctor. He said that he worked until he was laid off on February 14, 1994, and that he did not mention the injury again until he was laid off. He said that he was told that he did not have work anymore and that he asked Mr. JD for papers so that he could get unemployment benefits and asked to be sent to a doctor. He said that Mr. JD told him that (Mr. RW) would talk with him. He said that he waited for about an hour, that Mr. RW did not meet with him, and that he went home. He testified that he went to (Dr. JG) about three days later. He said that Dr. JG took him off work, that the doctor never returned him to work, and that he was denied unemployment benefits. He said that he worked for (employer 2) for about three weeks in March 1994 because he needed the money. He said that he was seen by (Dr. RJ) at the request of the carrier about five months after the accident. He testified that he did not deny previously being shot. He said that Dr. JG sent him to therapy and that (Dr. GH) performed surgery on his shoulder on July 27, 1994. He said

that he told Dr. JG about his bullet wounds and that Dr. RJ did not ask about his bullet wounds.

On cross-examination he testified that in 1984 he was shot eight or nine times with a .38 and a .45. He said that he was shot in the stomach; in the left thigh, hand, and arm, but not in the left shoulder; in the right hand and arm; and in the left side of the neck. He denied knowledge of a bullet breaking a bone in his left shoulder and said that for several years he was able to do the work for the employer until he was hurt on the job. He said that as a result of the bullet wounds he was in the hospital for nine days and was treated for three months. He said that on the day he was hurt he and his coworkers moved about 50 or 60 concrete car stops that weighed about 150 pounds each and that it took them about three or four hours to move them. He said that it took about two or two and one-half hours for him to drive the employer's truck from City 1 to City 2. He said that after he was hurt he did his regular work until he was laid off and one of those weeks he worked a lot of overtime. He said that he wanted a raise and prior to being hurt had an interpreter help him ask for a raise several times but that he did not get a raise. He said that he told Mr. JR, his cousin, about the accident when it happened. He said that Mr. OM is his third cousin, that he asked Mr. OM to give a statement, and that he was in the lawyer's office when Mr. OM signed the statement. He testified that he never denied working for Employer 2, that he does not speak English, that he answered the questions of his lawyer's secretary when the interrogatories were answered, and that if the answers to the interrogatories say that he did not work after he was laid off they are wrong because he had told her that he worked for Employer 2.

Mr. JR testified that he worked for the employer in (month year). He said that the claimant told him that his arm and lower back hurt from lifting concrete car stops and that he told the claimant to tell the foreman. He said that they moved about 30 car stops that day and that it took less than half an hour to move them. He said that he rode back to City 2 in the truck with the claimant and that the claimant did not say anything about his arm during the trip. He said that he did not work on the same job with the claimant after that day. On cross-examination he said that the claimant hurt himself at about 9:00 a.m., that they worked until about 4:00 or 5:00 p.m. before departing for City 2, and that the claimant worked the remainder of the day on the tractor. He stated that he talked with (Ms. CM), an insurance adjuster, on the telephone. After being evasive, Mr. JR said that he told Ms. CM that he was with the claimant when he started feeling bad and that it happened while lifting car stops. He testified that he did not remember saying "I was not present" and "I did not see anything" and that he did not tell her that the claimant did not tell him anything about being hurt. He said that in March the claimant asked him to testify and that he did not speak with the claimant's attorney about his testimony. On redirect-examination he testified that when he spoke with the adjuster he used a telephone on a sidewalk, that he uses a hearing aid but does not use it when he works, and that he did not have his hearing aid when he talked to the adjuster on the telephone.

The carrier called Mr. JD, Mr. RW, and Ms. CM. Mr. JD testified that he has worked for the employer as a foreman for about five or six years. He said that he understands little Spanish and that (Mr. FR) interprets for him. He said that he fired the claimant at about 6:30 a.m. in the middle of February 1994. He said that the claimant returned about 30 to 45 minutes later and told him that his shoulder was hurt and that he wanted to see a doctor. He said that that was the first time that he was aware of any accident that the claimant said that he had. He testified that the day before he fired the claimant he told the claimant at about 1:00 p.m. that he and the claimant needed to do an emergency job and that the claimant left without helping on the job. He said that he used Mr. FR to interpret and told the claimant why he was fired. He said that after the claimant told him that he had been hurt that he, Mr. JD, had to talk with his supervisor, Mr. RW. He said that Mr. RW told him to have the claimant stay at the yard and that Mr. RW would come to talk with him. He said that he told the claimant this and left to go to his job site. He said that in (month year) he worked on a store parking lot in City 1 for one day and one night. He said that the claimant, Mr. FR, Mr. JR, and Mr. OM worked on that job, that no one told him that the claimant had a problem, that the claimant drove the truck back to City 2, that the claimant worked a regular schedule after that until he was fired, and that he saw the claimant daily and he did not say anything about being hurt. He said that if someone is hurt the person is taken to the hospital and an accident report is completed. He said that the claimant drove a tractor that required the use of shoulders to turn the steering wheel and to use two shifters. He said that the claimant had a problem with one hand but was able to do his work. He testified that the claimant asked for a raise for about two or three months and did not get a raise. On cross-examination he said that the claimant was a good worker and that he was real good on the tractor.

Mr. RW testified that he has worked for the employer since 1968 except for a short time when he worked for the police department. He said that he is vice-president and superintendent and oversees operations of the employer and is over all personnel in the field. He said that the employer has 70 to 80 employees, that 50% to 60% of them are Hispanic, and that interpreters are used to communicate. He said that the policy packet that includes instructions on reporting injuries is explained in Spanish to those who do not speak English, that the policy packet may be taken home so that a worker's wife can read it and explain it, and that the form may be signed later. He testified that he first learned of an injury to the claimant on the day that he was fired. He said that Mr. JD told him that he first heard of an injury the same day. He said that he told Mr. JD that he had some things to take care of and to tell the claimant to wait for about an hour until he got there to talk with him. He said that he called the shop to tell the claimant that he was on his way and was told that the claimant had already left. He said that was the last he heard until they got unemployment papers in the office. He said that the employer advised the Employment Commission that the claimant had been terminated for insubordination for not listening to his foreman. He testified that about two or three weeks before the claimant was terminated he was in the yard fueling a truck when the claimant, using Mr. FR as an interpreter, asked for a raise. He said that he explained that employees are evaluated for raises in March or April. He said that the claimant appeared dissatisfied and said that he might quit, and that

he did not want to drive the truck any more. Mr. RW said that he told the claimant that driving the truck was his responsibility and after the claimant repeated that he did not want to drive the truck and Mr. RW told the claimant that that was fine, that he could quit, and that the claimant should let him know if he was going to drive the truck or quit. Mr. RW said that the claimant and Mr. FR talked and that Mr. FR said to leave it like it is. Mr. RW said that the claimant did not mention any injury during this conversation. He said that the claimant's work was fairly satisfactory and that he was not aware of a shoulder or hand problem. On cross-examination he said that he did not have the claimant's records with him and did not know how many times the claimant did not listen to the foreman and that he authorized Mr. JD to fire the claimant.

Ms. CM testified that she has been a workers' compensation insurance adjuster for four years and that she speaks Spanish fluently. She said that she took statements from the claimant, Mr. JR, Mr. OM, and Mr. FR. She said that the statements from the three witnesses were taken on March 10, 1994, and that the witnesses were using a pay telephone. She said that she had no trouble taking the statement of Mr. JR and that there was no indication that he had any problem hearing or understanding. She testified that he kept saying that he did not see anything or know anything about an accident. She said that she asked him if he wanted to add anything and that he said no. She said that she listened to the tape, that the tape is not perfect, and that on a scale of one to 10, the tape is a seven. She testified that a vendor transcribed the statement, that she has reviewed the statement, and that the Spanish and English transcripts are accurate. She testified that she took a statement from Mr. OM in Spanish, that she had no problem understanding him, that he did not appear to have problem understanding her, that he said that he did not see or know anything, that the claimant is his second cousin, that they live in the same apartment complex and see each other on a regular basis, and that the claimant had not told him that he had been in an accident. She testified that she also took a statement from Mr. FR in which he said that he was not a witness to an accident of the claimant and that the claimant mentioned a shoulder injury after he was terminated. On cross-examination she testified that she and Mr. JR were carrying on a conversation clearly, that she could hear him and traffic, that he did not mention a problem hearing, that she got no indication that he had a problem hearing, and that the persons being questioned did not say "what," "huh," or "I can't hear you." The tapes of the three interviews in Spanish were admitted into evidence. The claimant questioned the quality of the tapes. The tapes can be clearly heard although on the tape of the interview of Mr. JR his voice is not as loud as is the voice of Ms. CM requiring that the volume control on the recorder be adjusted upward.

The claimant introduced medical records from Dr. JG, a sworn statement of Mr. OM, and records of wages from Employer 2. The medical report from Dr. JG dated February 21, 1994, indicates that the claimant's chief complaint is of right shoulder and arm pain, that he was lifting a concrete car stop when he felt a sudden sharp pain in his left shoulder with increased heat to the left shoulder and increased swelling and pain radiating into the left neck area. Dr. JG also reported that the claimant said that he had an appendectomy several years back and that he had a bullet wound to the abdomen in 1983. The doctor

diagnosed left shoulder and cervical strain and took the claimant off work. Records in evidence from Dr. JG indicate that he continued to treat the claimant and kept him off work through June 17, 1994. Mr. OM, in a sworn statement dated May 10, 1994, stated:

> I remember that on or about (date of injury), [claimant] and I were working for [employer], lifting cement car stops. We were about to finish when [claimant] stopped for a minute and told me that he had hurt his shoulder. We continued to work. At the time we finished, I stayed to sweep and [claimant] went to speak with our foreman, [Mr. JD].
>
> The next day, [claimant] was driving the tractor, but continued to complain about his shoulder. He told me that [Mr. JD] was going to send him to a Doctor, however, I never saw that [claimant] was given a day off to go see a Doctor. I left the company on or about March 28, 1994.

The pay statements from Employer 2 indicate that the claimant earned $316.50 for the period ending March 13, 1994; $294.00 for the period ending March 20, 1994; and $352.50 for the period ending March 27, 1994.

The carrier had 22 exhibits admitted into evidence. The translated record of the interviews of Mr. JR, Mr. OM, and Mr. FR by Ms. CM are consistent with her testimony concerning the content of those interviews. An MRI of the cervical spine done on June 2, 1994, revealed mild to moderate spondylosis with degenerative disc disease and small bulged discs at C3-C4 and C6-C7. An MRI of the left shoulder revealed small partial thickness tear of the rotator cuff, sizeable tendinitis, bursitis, degenerative arthritic changes, and a bullet and bullet fragments in the upper left arm and lower portion of the left lower neck. In a letter dated June 29, 1994, Dr. RJ reported that MRI studies suggest a possible rotator cuff tear of the left shoulder and only degenerative changes in the neck. Dr. RJ also reported that x-rays show multiple bullet fragments around and about the humerus, shoulder, and base of the neck but that the claimant denied that he had a gunshot wound. In a report of operation dated July 27, 1994, Dr. GH reported that the surgery on the left shoulder was successfully completed. On July 27, 1994, (Dr. H) reported that views of the left shoulder show a prior gunshot injury and that the left shoulder is otherwise unremarkable. In response to interrogatories dated June 2, 1994, the claimant responded "I have not work subsequent to (date of injury) for any other employer."

We first address the complaint of the carrier that the hearing officer erred in admitting the sworn statement of Mr. OM dated May 10, 1994. The report of the benefit review conference (BRC) indicates that a statement of Mr. OM dated May 10, 1994, was considered at the BRC. Ms. CM said that the statement was presented at the BRC, but that it was not exchanged, and that the attorney did not represent the carrier at the BRC. Following the BRC, the statement was not exchanged no later than 15 days after the BRC as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). In response to a request in the interrogatories to state the name of each individual known to have

knowledge of relevant facts, the claimant included the name of Mr. OM and in response to a request to state the individuals you plan to submit testimony in your behalf followed by the question "[s]ame as above???" the claimant responded "yes." Section 410.160 provides that within the time prescribed by Commission rule the parties shall exchange certain things including witness statements. Section 410.161 provides that if a party fails to exchange information as required by Section 410.160 the document may not be introduced at any subsequent proceedings before the Commission or in court on the claim unless good cause is shown for not having disclosed the document. Rule 142.13 provides that no later than 15 days after the BRC parties shall exchange with one another certain information including witness statements. Rule 142.13(c)(3) addresses evidence not previously exchanged and provides in part "[t]he hearing officer shall make a determination whether good cause exists for a party not having previously exchanged such information or documents to introduce such evidence at the hearing." In Texas Workers' Compensation Commission Appeal No. 92225, decided July 15, 1992, an affidavit of the claimant's father was admitted over the objection of the carrier that the affidavit was not exchanged as required by the rule. The claimant's father had been identified as a witness, the father was in the hospital, and it was not known until the Friday before the hearing on Monday that the father would not be able to testify. The Appeals Panel wrote:

> Thus, there was clearly good cause established in the record for admission of this affidavit, whether or not the hearing officer made an express finding. However, even if the hearing officer erred, such error would be harmless, as the affidavit, which is merely cumulative of facts brought out in the respondent's testimony, plainly was not the evidence upon which the hearing officer's decision is based, and was not even noted in the recitation of the facts.

In another case the carrier objected to the admission of an official telephone log from the Commission because it was not timely exchanged. The carrier's previous attorney reviewed the document at the BRC and was told to request a copy from the Commission if desired. The ombudsman obtained a copy shortly before the hearing and promptly exchanged it. The hearing officer found good cause based upon the review of the document by the parties at the BRC and that the document was not obtained by the claimant until shortly before the hearing. The Appeals Panel noted that the hearing officer could have taken official notice of the Commission-generated information, that lack of surprise alone does not constitute good cause, and that the hearing officer did not abuse his discretion in admitting the telephone log. Texas Workers' Compensation Commission Appeal No. 941326, decided November 10, 1994. In Texas Workers' Compensation Commission Appeal No. 92108, decided May 8, 1992, we held that exchanging the name of a witness was not good cause for not exchanging the statement of the person. In the case before us, the hearing officer admitted the affidavit of Mr. OM and stated "[a]nd for clarification, I believe the rule requires that the exhibits be exchanged prior to the BRC. It does not preclude exchange at the BRC." The hearing officer was apparently referring to Rule 141.4 that requires exchange of information 14 days prior to a BRC. He did not refer

to Rule 142.13 nor did he make a determination related to good cause for not timely exchanging the statement of Mr. OM after the BRC. While the statement was presented at the BRC, it was not exchanged after the BRC. The statement was in the possession of the claimant since May 10, 1994, and could have easily been exchanged. Under the facts of the case before us, we cannot infer a finding of good cause as was done in Appeal No. 92225, *supra*. The affidavit is in direct conflict with the oral statement that Mr. OM gave to the adjuster on March 10, 1994, and the hearing officer in his discussion in the decision and order wrote:

> Claimant's testimony regarding the (date of injury) injury is supported by the sworn statement of [Mr. OM], the testimony of [Mr. JR], the report of [Dr. RJ], the carrier selected physician, and by the existence of trauma induced injury to his left shoulder.

Given the absence of an express articulation of a rationale of good cause by the hearing officer, a lack of reference to Rule 142.13(c), and the critical issue of credibility; we cannot conclude that considering the affidavit of Mr. OM did not cause the rendition of an improper decision. *See* Texas Workers' Compensation Commission Appeal No. 931004, decided December 14, 1993. We reverse and remand for the hearing officer to make a determination of whether the claimant had good cause for not exchanging the affidavit of Mr. OM as required by Rule 142.13(c), and, if not, to not admit the affidavit and to make factual determinations without considering that affidavit. The hearing officer may permit the development of additional evidence on the admissibility of the affidavit of Mr. OM.

We next address the carrier's argument that the hearing officer erred in stating that he based his decision on the favorable testimony of Mr. JR and the affidavit of Mr. OM without mentioning the earlier statements made by them and making no comment on the testimony of Mr. JD or Mr. RW. The extent of the hearing officer's discussion of the evidence consists of the quotation set forth earlier in this decision and the following:

> Even though all of the evidence present was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

Section 410.168(a) provides that the hearing officer shall issue a written decision that includes findings of fact, conclusions of law, and a determination of whether benefits are due. The hearing officer included a statement of the evidence and a discussion in his decision and order even though neither is required by the 1989 Act. In Texas Workers' Compensation Commission Appeal No. 93955, decided December 8, 1993, we wrote that when the hearing officer chooses to set forth more information than is required by the 1989 Act, it should provide a reasonably fair summary of the evidence. That clearly was not done in the case before us. A hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence, Section 410.165, and is presumed to have complied with this statutory obligation in the absence of

a showing to the contrary. In the case before us, we do not specifically find reversible error in the hearing officer's failure to comment on certain evidence; however, if on remand the hearing officer includes a statement of the evidence it should be a fair summary of the evidence and if he includes a discussion of the evidence it should reflect how he made his determinations.

The record reflects that the hearing officer stated that he would issue a subpoena for employment records from Employer 2 and stated that he would leave the record open until November 30, 1994. The employment records of Employer 2 related to the employment of the claimant are in the hearing file forwarded to the Appeals Panel; however, the record does not contain an indication that they were admitted into evidence. The record and the decision and order of the hearing officer should reflect whether these records were admitted into evidence.

If the hearing officer determines on remand that the claimant was injured in the course and scope of his employment, the hearing officer should carefully review the evidence admitted to make his determination concerning disability. A claimant's exhibit reveals that after February 21, 1994, the date that the hearing officer determined that the claimant's disability began, the claimant worked for Employer 2 for three weeks and that each week he earned more than his AWW prior to (date of injury). If the employment records of Employer 2 are admitted, they should also be carefully reviewed.

We reverse and remand for the expedited development of additional evidence, as appropriate, and for the hearing officer to make findings of fact and conclusions of law not inconsistent with this decision. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge