

## APPEAL NO. 92028

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 December 16, 1991, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The employee, (employee), the respondent herein, was employed as a laborer for (employer) ("employer"), while working at a project for (company) ("client company"), on (date of injury), the contended date of injury. The carrier for employer has appealed the decision of the hearing officer.

The hearing was held to determine three issues: 1) whether the carrier had waived its right to contest respondents' claim, by operation of Art. 8308-5.21 of the 1989 Act; 2) whether the respondent suffered a compensable injury on (date of injury), in the course and scope of his employment; and, 3) whether the respondent gave timely notice of injury to the employer within 30 days of the date of injury.

The hearing officer determined in his conclusions of law that the respondent did suffer a compensable injury within the course and scope of his employment. The hearing officer found as fact that client company had actual knowledge of the injury the day it occurred, and attributed that knowledge to employer. The hearing officer concluded as a matter of law that appellant had waived its right to controvert the compensability of respondent's claim because it did not show that it filed its notice specifying its grounds for refusal with the commission within 60 days after May 28, 1991, the date it had actual knowledge of respondent's claim. The hearing officer further found that appellant made no showing that it should be allowed to contest the claim based on evidence that reasonably could not have been discovered within the 60 day period.

The appellant has appealed the determinations that its defense has been waived, and that respondent was injured within the course and scope of his employment on (date of injury). The appellant also asks the appeals panel to consider whether adequate notice was given to employer as required by Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE. Section 122.1 (Texas Workers' Compensation Commission Rule 122.1, effective January 11, 1991), and whether the evidence supports a finding that employer had actual knowledge of the injury based upon the notice given. However, the appellant has not appealed the finding on notice to the extent that actual knowledge of injury by client company is imputed to employer.

## DECISION

We reverse the determination of the hearing officer that the appellant waived the right to contest the respondent's claim, and remand this case for the purpose of including in the record the notice of disputed/contested claim, form TWCC-21 ("TWCC-21") that was received by the Texas Workers' Compensation Commission on July 15, 1991. We further remand for consideration of the evidence in light of this document, and development of additional evidence by the hearing officer as deemed appropriate.

The parties stipulated that (employee), the respondent, was an employee of (employer). ("employer") on (date of injury), and that the appellant was the insurance carrier for employer. Respondent, who was 68 years old, testified that on (date of injury), a Sunday, he was working for employer's client, (client company) ("client company"), for whom he had worked off and on for three years. He stated that he was working at a construction project at an apartment complex in (city), Texas, and had worked about 10 hours. He stated that (Mr. E.W.), the supervisor, instructed him to pick up a door and discard it in a dumpster. Respondent stated that the dumpster was high above his head and, as he lifted the door up, he lost his balance and fell back hard on his buttocks. The door fell across his legs. He stated that Mr. E.W. saw this happen and helped him up, and that he said, "[E.W.], that hurt bad." E.W. replied, "Papa, you'll be alright" and said that it was quitting time. Respondent's claim for compensation indicates that the accident occurred at 4:30 in the afternoon. He said that the next day, (date), he showed up for work, but had rectal pain and bleeding. He was unable to pick up a ladder. At that time, he asked E.W. if he could go home. He stated that he went home to (city) and did not immediately see a doctor because he was not the type of person to "run and see a doctor" for every physical ailment. He took hot baths, and went on for two or three weeks in pain. He went to the emergency room of (hospital) where he consulted with a few doctors. He said that he was told by a [Dr. L] that he had more problems than he realized. He was admitted to the hospital immediately, underwent rectal surgery, and was in the hospital about a week. The medical documents in the record indicate that respondent was diagnosed with an anal fissure, perirectal abscess, and hemorrhoids. The records also indicated evidence of cardiac problems, but respondent asserted that this was not part of his claim.

Respondent stated that he gave the hospital evidence of insurance coverage through the employer. He stated that he was informed by the staff prior to his discharge that the employer told the hospital he was no longer employed by them. Respondent said that he was never informed that he was terminated or would not be covered by workers' compensation. He stated in direct testimony that he was aware that Mr. E.W. and the client company owner, ("Mr. S.W."), disputed his testimony, and claimed that Mr. E.W. was not working on (date of injury). Respondent was adamant that Mr. E.W. was there. He stated that one matter that "proved" this was that his wife was sick with pneumonia at this time, and that her stepdaughter called him at the job site the Saturday before he was injured, and it was Mr. E.W. who answered the telephone, and gave the telephone to him. He stated that he decided not to travel to (city) at this point to be with her.

Respondent stated that he met with Mr. E.W. and S.W. in a cafe sometime after the accident, but before his surgery; that they discussed his medical problems; and he told them he was not feeling all that great but would like to return to work. He testified that he had not worked for wages since (date), when he returned to (city) because he was injured. He stated that he did not have rectal problems prior to the accident on (date of injury). He stated that he went to a livestock show with Mr. E.W. and Mr. S.W. the weekend before the injury.

As part of respondent's case in chief, his attorney asked that the hearing officer take

notice of the lack of the carrier's notice of disputed/contested claim, a form TWCC-21 ("TWCC-21") in the claims file. The hearing officer announced that he was taking notice of the contents of the file, and in his examination of the file could not locate the TWCC-21. He stated that he was taking notice of this "for whatever it was worth."

Respondent entered into the record a copy of a letter from his attorney dated May 28, 1991, to the appellant, forwarding the respondent's claim for compensation. The claim indicates, under the provision asking how the accident happened, "While in the course and scope of my employment I injured my leg, buttocks, spine, and other parts of my body causing indefinite incapacity under the law." As pointed out by appellant in his cross-examination, the claim form does not repeat the occurrence involving the door.

Appellant's adjuster, ("Mr. T.L.") testified that he was employed by a third-party adjuster, (adjuster), who managed workers' compensation claims for appellant. He stated that his company's claim file indicated that the TWCC-21 had been sent out on July 10, 1991. He agreed that it had not been mailed by certified mail and that he was not the original adjuster on the file who mailed out the form. He indicated that the employer filed notice of injury on July 3, 1991. (A copy of employer's notice of injury was entered into the record by respondent, although it refers to an attachment that is not included with the exhibit). Mr T. L. stated that he was employed by the Industrial Accident Board for four years as a resident reviewer and was personally aware of occasions where claims documents were not included in a claims file. Under cross-examination, Mr. T.L. agreed that the written notice of injury to the appellant was the May 28th letter from respondent's attorney. He further agreed that the TWCC-21 contained mistakes. He identified one of respondent's exhibits as a cover letter that his company sent along with documents to a claimant or claimant's representative. It indicated that on September 6, 1991, respondent's attorney was mailed a copy of the TWCC-21 as well as the Employer's First Report of Injury. He stated that he personally passed around the TWCC-21 at the Benefit Review conference on November 4, 1991.

Mr. E.W. testified that he was employed by client company as a working foreman. He knew respondent, whom he called "Papa," and stated respondent had worked off and on for client company as a laborer for three years. He states that he was off work the weekend of (date of injury) because he went home to (city) that weekend. He later testified that he had been at home the weekend before, but during the weekend of the injury taught a Sunday school class and attended an outing on (lake). He said that he knew that respondent's wife was sick before that weekend, on the Thursday or Friday before he left. He stated that he saw respondent the morning of (date) at the job site, and that respondent told him that he felt he was needed at home because his wife was sick. Mr. E.W. said that respondent did not mention he was injured. He stated that he met with his son, Mr. S.W., and respondent on February 17th at the coffee shop in (city) and respondent talked like he was coming back to work. He also said that on a Monday morning after (date), on a date he could not recall, respondent came back to the job site and had an argument with Mr. S.W. Mr. E.W. said that, by then, respondent had been gone from the job site for quite sometime and they had to replace him with another employee. He stated that he

"absolutely" never witnessed respondent putting a door into a dumpster, and that the client company would put the doors out for daily pickup by a man who sold them. Under cross-examination, Mr. E.W. testified that his company did not have a financial interest in the outcome of the case because employer wasn't his company, that respondent was a good worker and he had never caught him in a lie. He stated that he felt that he first heard that respondent was claiming a work-related injury when his son told him, which he testified occurred a week to three weeks after (date of injury), although this testimony was later modified that he did not know exactly when his son told him.

("Mr. S.W."), the son of Mr. E.W. and the owner of client company, stated that he first became aware that respondent was claiming a work-related injury in May, when contacted by employer. He stated that his wife works for employer and was given a copy of the letter from respondent's attorney. Mr. S.W. stated that he met with respondent several times prior to this. He said he was at the job site on (date of injury), because his father had a church outing to go to. Mr. S.W. stated that client company did not work a full day on (date of injury) because it was raining, and only worked about four hours in the morning. He stated that he became aware the previous Friday that respondent's wife was ill because his own wife called him to say that she was contacted by respondent's stepdaughter. Mr. S.W. stated that respondent called his wife Friday, as well as Sunday at 3:57 p.m., a time he verified from his telephone records of the job site telephone. He stated that he recalls that respondent told the person he was talking to that there was nothing he could do. He stated that he did not observe respondent working that afternoon and that no one worked that afternoon.

Mr. S.W. testified that after this weekend, there was a message on his telephone recorder from respondent stating that his wife was still ill; respondent called him that night and stated that his wife was still ill and they talked about when he could come back to work. Respondent did not mention that he had been hurt. Mr. S.W. said that two weeks later, respondent showed back up at the job site, that they argued because respondent had not called since February 12th, and that respondent got mad and left. Mr. S.W. then called employer from his office and informed him that respondent had been terminated. On redirect, Mr. S.W. indicated that this occurred on February 17th.

Mr. S.W. testified that two weeks after the argument, his father called and said that respondent contacted him about going back to work. Mr. S.W., Mr. E.W., and respondent met at the (city) diner on a Saturday morning. The substance of the conversation was that they would put the past and the fact that respondent had not called behind them, that he could return to work, and that Mr. S.W. needed to sit down and line out a work schedule. Respondent was asked to call Mr. E.W. the next day to get work, but never did. Respondent did not tell them he had been injured nor did they discuss his medical condition. Under cross-examination, Mr. S.W. noted that his company was not affected if the claim was compensable because he leased employees through employer, and wasn't rated on the number of workers' compensation claims he had.

The insurance carrier has up to the 60th day after receiving notice of injury to contest

compensability of the injury, and is not precluded from contesting compensability within that time if it has initiated payment of benefits. The consequence of failure to contest compensability within 60 days is that the carrier waives its right to do so unless there is a finding it is disputing compensability based on evidence that could not have been reasonably discovered earlier. Art. 8308-5.21(a).

The respondent's waiver objection to appellant's defense was based upon the failure to file such notice with the commission within 60 days. The hearing officer also based his finding that appellant waived its right to contest compensability upon this apparent omission.

The hearing officer stated that he examined the claims file and took "judicial" notice of the absence of a written notice in that file, although no notice was taken of the computerized claim file which logs in dates that significant documents are received. "Judicial" notice having been taken of the Commission's claim file, we note that this agency did receive a TWCC-21 form from Lindsey & Newsom postmarked July 11, 1991, and dated-stamped by the Commission on July 15, 1991. However it happened that this document was not in the claim file available to the hearing officer at time of hearing, the responsibility for that is clearly the Commission's and not that of either party.

The hearing officer erred in concluding that appellant had waived its right to contest compensability. However, we cannot assume that this is harmless error as applied to this case, because we cannot determine from the face of the hearing decision the extent to which the hearing officer affected his finding of waiver by excluding from his consideration any of appellant's evidence.

Accordingly, we reverse the hearing officer's determination that appellant had waived its right to contest compensability, and remand this case back to the hearing officer for consideration of the evidence in light of appellant's notice contesting compensability which was received July 15, 1991, as well as for development of additional evidence as deemed appropriate by the hearing officer.

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Susan M. Kelley  
Appeals Panel

CONCUR:

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Robert W. Potts  
Appeals Panel

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Philip O'Neill  
Appeals Panel