APPEAL NO. 92078

On January 30, 1992, a contested case hearing was held in (City), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, the respondent in this appeal, sustained a compensable injury in mid-_____, in the course and scope of his employment with ("employer"). The hearing officer further determined that respondent did not have disability within the meaning of the Texas Workers' Compensation Act ("1989 Act"), TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon's Supp. 1992), for purposes of payment of temporary income benefits. The insurance carrier, the appellant herein, was ordered to pay past and future medical benefits, as well as future income benefits should the respondent become disabled in accordance with the 1989 Act.

The appellant has asked that we review this determination, and find that the appellant did not sustain an injury in the course and scope of employment, based on contentions that there was either no evidence, or insufficient evidence, to support the hearing officer's determination. Appellant further complains that the finding that respondent suffered a compensable injury, coupled with a finding that respondent is currently under no disability, is an irreconcilable conflict.

DECISION

We find sufficient probative evidence to support the decision of the hearing officer, and affirm her decision. We further reject appellant's argument that the findings relating to compensability of the injury, and the lack of present disability, are irreconcilable.

Briefly, the facts developed at the hearing are as follows. We would first note that the specific involvement and relationship of (AI employer), described in pleadings and the appeal in this case as employer along with (MM employer), is not explained in the record of this case. Because the carrier has not disputed that it would not be liable because it is not the proper carrier in this case, or disputed the hearing officer's findings that (MM employer) is the employer and was covered by appellant on the date of injury, we will use the description "employer" in our discussion of the facts to refer to (MM employer).

Employer was in the business of manufacturing small utility trailers and employed about 20 people. Trailers were assembled by three or four person crews, who were compensated on a "piecework" salary basis. Respondent stated that in mid-_____, he injured his back while lifting a 200 lb. brake axle. He stated that he went immediately to his supervisor, ("Mr. R"), who told him he wasn't hurt but directed him to change his activity to drilling. Respondent complained that Mr. R would not send him to a doctor, and he had no money on his own to see one. Respondent acknowledged he was covered by a company health insurance plan but did not know the amount of the deductible. Respondent said he eventually went to ("Dr. B"), a chiropractor, on a promotional special that allowed him a free visit the first time. Respondent worked at his job until September 13, 1991, when he was terminated because of excessive absence. Respondent disputed the amount of absence

claimed by the employer, and argued that he always produced excuses for being out, which generally related to seeking medical care for his children, who were covered by Medicaid. After he was terminated, the respondent filed claims for unemployment insurance (which was denied) and workers' compensation benefits.

Respondent testified that he had three previous eye injuries on the job, and had been sent to the company doctor for treatment of those injuries. He stated that after the third injury, the manager, ("Mr. M") told him and other employees that he was tired of injuries so that the employees could forget about being sent to a doctor. Respondent testified that on another occasion he experienced problems with his breathing from inhalation of buffing dust, and that he went to a hospital about this. He stated that he was told by the hospital that before they took x-rays, they would need permission from his employer. Respondent stated that when he went to Mr. M about this, Mr. M. told him that he'd see him in three days, if he still wanted his job, and put him on three-day leave without pay. Respondent also asserted that he complained about his back daily, and that he told Mr. M he had hurt it. Mr. M stated that he had never been told that respondent had suffered an on-the-job back injury until after he was terminated.

A letter from Dr. B indicates that he examined respondent on September 20, 1991, and diagnoses "lumbar disc displacement, lumbar radiculopathy, cervical segmental dysfunction, and lumbar ligament instability." Dr. B notes that x-rays of the cervical and lumbar spine had been taken at his clinic. The letter further notes that healing time could be several months. The letter notes the present complaints, and states "past history did not contribute to present discomfort."

Mr. M's testimony and a disciplinary action form indicate that respondent was given three days off July 9, 1991 for excessive absenteeism. There are three other "no show" dates indicated on the form, and termination for excessive absenteeism is cited as the basis for the action. Mr. M stated that the conversation he had with respondent and employees following the third eye injury was to the effect that employees found working without wearing safety goggles wouldn't have to worry about seeing a doctor because they would be terminated. He testified that he was tired of sending employees to the clinic for injuries resulting from failure to wear safety goggles.

A linchpin of appellant's evidence and argument that an accident did not occur had to do with whether respondent followed the company policy on reporting such injuries, as he had when his eyes were injured. Some policy provisions are not entirely parallel to provisions in the Workers' Compensation Act. For example, although Art. 8308-4.62 secures to the employee his or her own choice of doctor, the employer's policy is not subtle in directing injured employees to the company doctor, the Medical Facility. Supervisors are told that they "should" accompany the injured person to the company-approved medical facility and have medical personnel at the facility complete a medical treatment report to distribute to the employer. Employees are instructed that they must be released to work by

the Medical Facility. Although the 1989 Act, Article 8308-3.09, indicates that an agreement by an employee to waive his/her right to compensation is void, the employer nevertheless reserves to itself the determination, on the basis of findings of its Medical Facility, "whether any further treatment of the individual will be handled under Worker's Compensation or under the individual's medical benefits plan."

The provisions on Safety in the employer's policies include the statement that "the safety program is based on the premise that accidents do not simply happen, they are caused. Only through the conscientious elimination of the causes of accidents can the frequency be reduced. The Company believes that all personal injuries can be prevented."

The policy requires that an employee must report an accident on the day of occurrence. While a concern for safety, and provision of on-site medical care, are commendable, it is possible to read the policy and come away with an impression that supports the substance of respondent's testimony: that reporting of accidents was not welcomed by employer, and that respondent's ability to seek medical treatment was controlled by the employer. Of course, respondent's uncontroverted testimony indicates that he reported the injury to Mr. R the day it happened. Any failure of respondent to follow other procedures in this policy was apparently not regarded as relevant by the hearing officer on the issue of whether an injury occurred in the course and scope of employment. As appellant has not raised a defense that it was not notified within 30 days of the injury, a complaint that there was "delayed" reporting of the accident was only marginally relevant to determining whether an injury occurred.

The medical evidence of an injury was essentially uncontroverted by appellant, as was respondent's recitation of how the injury occurred, and his repeated contention that it was reported to Mr. R the day it happened. As noted by the hearing officer, Dr. B's statement that the past history did not contribute to the injury is reasonably interpreted as a comment that events prior to the injury had no bearing. The claimant has the burden of establishing that an injury in the course and scope of employment occurred. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). That burden may be met solely through the testimony of the claimant. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). Although the record does not contain evidence of the specific date the injury occurred, the testimony sufficiently ties the injury to a specific time (mid-August 1991), place, cause, and event. *See* Texas Employers' Insurance Ass'n. v. Murphy, 506 S.W.2d 312 (Tex. Civ. App.-Houston [1st Dist.] 1974, writ ref'd n.r.e.]. In light of respondent's testimony and Dr. B's letter, appellant's contention that there is "no" evidence establishing a compensable injury must be rejected.

On its "insufficient" evidence point, we would note that the hearing officer is the sole judge of the weight, credibility, relevance, and materiality of the evidence offered. Art. 8308-6.34(e). Her decision should not be set aside because different inferences and conclusions may be drawn on review even though the record contains evidence of

inconsistent inferences. Garza v. Commercial Insurance Co. of Newark, N.J. 508 S.W.2d 710 (Tex. Civ. App.-Amarillo 1974, no writ). The determinations made by the hearing officer on the course and scope and disability issues are not so against the great weight and preponderance of the evidence so as to be manifestly unjust.

Appellant's argument that the finding of compensable injury is irreconcilable with a finding of no disability indicates confusion on its part about applicable provisions of the 1989 Act. An insurance carrier is liable for compensation for injury of an employee who is subject to the Act if the injury arises out of the course and scope of employment. Art. 8308-3.01. Such an injury is, by definition, a "compensable injury" Art. 8308-1.03(10). "Compensation" means the payment of medical, as well as income, benefits. Art. 8308-1.03(11). "Disability" means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Art. 8308-1.03(16). In other words, a claimant must be able to show a causal connection between his diminished wages and the compensable injury. Disability, however, is not the same as impairment. *See* 8308-1.03(24). The hearing officer made no finding on impairment, as appellant asserts, as this was not an issue in the case.

Contrary to what appellant argues, the only benefit for which entitlement accrues upon disability, as that term is defined by the 1989 Act, is the temporary income benefit. *See* Art. 8308-4.22; 4.23(a). The appeals panel has previously held that if wages after an injury are diminished because an employee is terminated for cause, and not because of the injury, temporary income benefits cannot be paid until the claimant can establish that he is unable to find another job within the physical limitations (if any) set by his doctor. *See* Appeals Panel Decision No. 91027 decided October 24, 1991. By contrast, medical benefits do not depend upon disability. Because he was found to have suffered a compensable injury, the respondent is entitled to all health care reasonably required for his back injury, subject to the commission's medical fee guidelines and policies as well as other laws regarding second opinions or pre-authorization (such as 8308-4.67 or 8.28). The hearing officer's order is consistent with the entitlement to benefits described in Article 8308-4.23(a) and 4.61, and is not irreconcilable.

Based upon the hearing officer's decision, the respondent may instruct his chosen health care provider to bill appellant for treatment of his compensable injury. Medical bills relating to the back injury must be paid subject to medical fee guidelines unless specifically disputed in accordance with 8308-4.68 and applicable rules of the Texas Workers' Compensation Commission. These disputes are not resolved through the dispute resolution provisions set forth in Article 6 of the 1989 Act. To the extent that the second point of error can be interpreted as a dispute over payment of medical bills, past or future, it is rejected.

The hearing officer's decision is affirmed.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Joe Sebesta
Appeals Judge