APPEAL NO. 92090
FILED APRIL 24, 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 January 15, 1992, a hearing was held in _____, Texas, with (hearing officer) presiding. He found appellant, claimant herein, failed to show that he was injured in the course and scope of employment on (date of injury). Claimant asserts that the decision is against the great weight and preponderance of the evidence citing several cases that have called for a liberal interpretation of workmen's compensation law.

DECISION

Finding that the appeal in this case was timely made, and the decision was not against the great weight and preponderance of the evidence, we affirm.

I.

Carrier challenges claimant's request for review as not timely filed. Issue is taken with the assertion by claimant that the hearing officer's decision was "received by counsel for the Claimant on February 24, 1992." Carrier points out that it received the decision, under cover letter dated January 30, 1992, on February 3, 1992.

The cover letter that sent the hearing officer's decision is addressed to three individuals, counsel for carrier, claimant, and claimant's attorney. The address to claimant's attorney is the same as that provided in the appeal. In this instance the date that carrier states it received a copy of the hearing officer's decision, February 3, 1992, is consistent with the date of the cover letter, January 30, 1992. Each addressee's copy of such a cover letter is mailed at the same time as that of each other addressee.
Since we understand that one addressee received a copy of the decision on February 3rd, there is no doubt that the decision was put into the mail no later than February 3, 1992. The Commission has addressed date of receipt of decisions through adoption of Rule 102.5(h), Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h), which says, "the Commission shall deem the received date to be five days after the date mailed." A rule
is to be construed like a statute. City of Lubbock v. Public Utility Comm., 705 S.W.2d 329 (Tex. App.-Austin 1986, writ ref'd n.r.e.). Words in a statute, when not defined therein, are presumed to carry the meaning given to them by courts in reviewing the same subject matter. Texas Emp. Ins. Assn v. Haunschild, 527 S.W.2d 270, (Tex. App.-Amarillo 1975, writ ref'd n.r.e.). Words in a statute are also said to be used in the sense in which they are ordinarily understood. Calvert v. Austin Laundry & Dry Cleaning Co., 365 S.W.2d 232 (Tex. Civ. App.-Austin 1963, writ ref'd n.r.e.). The only Texas case found defining the word "deem" is State v. Clements, 319 S.W.2d 450, (Tex. Civ. App.-Texarkana 1958, writ refused). In that case a constitutional amendment gave power to the legislature to grant compensation to a person who was not guilty but was penalized under a criminal statute.

In the phrase, "may deem," the court said that "deem" means "decide". Since this was not the same subject matter as addressed by Rule 102.5, the ordinary understanding of the word should be considered. Webster's Ninth New Collegiate Dictionary defines "deem" to mean "hold" when "deem" is used as a verb transitive.

Whether we view the case interpretation or the dictionary interpretation appears to make little difference. Rule 102.5(h) would read "the Commission shall (decide/hold) the received date to be five days after the date mailed." Since the mailing date was no later than February 3, 1992, the date of receipt, per Rule 102.5, would ordinarily be construed as February 8, 1992. However, in this instance, the Commission mailed the decision of the hearing officer to claimant's attorney twice. The first mailing did not reach claimant's attorney (although it reached carrier) and the postal service returned that communication to the Commission on February 20, 1992. On February 20, 1992, the Commission again mailed a copy of the hearing officer's decision to claimant's attorney. Claimant states it received a copy of the decision on February 24, 1992--within the five days of mailing deemed by Rule 102.5. Since the postal service was chosen by the Commission to send the decision, and since the reason for return of the first notice to claimant's attorney is not shown, we believe that this failure of such notice should be borne by the Commission. *See* Ward v. Charter Oak Fire Ins. Co., 579 S.W.2d 909 (Tex. 1979). The claimant's assertion of receipt on February 24, 1992, is accepted. Claimant's appeal dated March 9th was properly received on March 10th, which complies with the 15-day limit set by Article 8308-6.41(a) of the 1989 Act. The appeal was timely filed.

II.

On (date of injury), claimant had worked as a laborer for (employer) for approximately three weeks. At that time employer had two construction sites that were near each other. Claimant testified that he and another laborer were moving stones (described as large and flat) for masons to use when he heard a "crack" and felt pain in his neck and shoulder. He said he told his foreman, DA, who was nearby and who then replaced him with another laborer and assigned him to sweeping/clean-up duties on another floor of the building. He worked the rest of the day, a Friday, and returned to work after the holiday weekend on a Tuesday. He worked that day and was laid off at the end of the day. He then went to see a lawyer who sent him to a doctor (the K clinic). Medical records after (date of injury), show a diagnosis of strain or sprain of the neck and shoulder, but no observations of recent trauma were noted.

For carrier, DA testified that he had supervised claimant at times but on (date of injury) was not at the same job site as claimant. He stated claimant did not, and has not, notified him of any injury. He produced time cards of each to show that they were at different sites that day. Mr. B is the superintendent of the construction for employer. He testified that he had helped claimant with his application to work on May 7, 1991. He asked claimant questions and wrote down the answers on a form and claimant looked at the result and signed. One question asked whether claimant had any prior workman's compensation

claims. The form showed that there were none. Mr. B said he entered what claimant told him. Claimant said he told Mr. B that there had been two prior claims but Mr. B entered the wrong information. Claimant did sign the form and could find nothing else incorrectly entered on it. Claimant was adamant during repeated questioning that he had two prior claims and had told Mr. B of them. Carrier then offered three authenticated IAB records in which claimant recovered under Workmen's Compensation in 1987, 1990, and 1991. Each in some way affected the same areas (neck and shoulder) as were complained of in this claim.

The hearing officer had the responsibility to act as sole judge of the weight and credibility of evidence. Article 8308-6.34(e) of the 1989 Act. He is to judge credibility and resolve conflicts; he may believe some but not all of claimant's testimony or of any other evidence. Bullard v. Universal Underwriters Ins. Co., 609 S.W.2d 621 (Tex. App.-Amarillo 1980, no writ). In determining that no compensable injury was shown on (date of injury), he considered the following:

(a)The site at which claimant said he worked on the alleged date of injury, was controverted by testimony and documentary evidence.

(b)Notice claimant said he gave his supervisor was controverted by the supervisor.

(c)Claimant continued to work that day.

(d)Testimony and a document showed claimant represented that he had not received workmen's compensation when he applied for work on May 7, 1991.

(e)Exhibits duly admitted showed that claimant had received workmen's compensation benefits on three occasions.

(f)Medical documents relative to the (date of injury) allegation indicate a strain or sprain of the neck and shoulder but no observations of recent trauma were noted.

The hearing officer could also consider the fact that claimant saw an attorney before he saw a doctor.

Claimant also cites cases interpreting the workmen's compensation law prior to the 1989 Act as liberally construing that law and urges such an interpretation of the 1989 Act. While certain provisions of the 1989 Act were similar to prior statutory law and case law thereunder can be used for guidance, the 1989 Act makes many significant changes. No court has considered whether the 1989 Act should be given a "liberal" interpretation. To date we have found no sound basis for this panel to apply that doctrine. (We also note that

such doctrine usually refers to interpretation of law, not to factual decisions.)

The decision of the hearing officer is not against the great weight and preponderance of the evidence. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied).

We affirm.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge