APPEAL NO. 92195

On April 14, 1992, a contested case hearing was held at (city), Texas, (hearing officer) presiding as hearing officer. The issue from the benefit review conference was whether appellant, claimant below, has a disability resulting from an alleged injury occurring on (date of injury), entitling appellant to temporary income benefits. By agreement of the parties, an additional issue was considered which had not been raised at the benefit review conference: whether appellant actually sustained an injury on (date of injury), while employed by the (Employer 1) to provide janitorial services to a public school. The hearing officer held that no injury was sustained on (date of injury); that from (date of injury), through the date of the benefit contested case hearing appellant possessed the ability to obtain and retain employment at wages equivalent to the wages earned by him prior to (date of injury); that appellant sustained no disability as a result of the injury alleged to have occurred; and that appellant was not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq*. (1989 Act) (Vernon Supp. 1992).

Appellant, a Cuban with limited use and understanding of English who appeared pro se at the hearing and who communicated through an interpreter, alleges through counsel on appeal that his lack of counsel and his lack of understanding of adversarial and evidentiary procedures caused him to make "fatal errors in judgment and in strategy" at the hearing, including the agreement to consider the issue of whether or not he had sustained an injury on (date of injury) while working for Employer 1. He also contends that the existence of an injury as well as disability from that injury is readily apparent from a cursory review of the medical records, and urges once again that his lack of adequate representation left him unable to adequately present evidence to establish his claim. He requests a reversal and remand for a second hearing wherein he will be represented by an attorney.

DECISION

We reverse the decision of the hearing officer insofar as it allowed consideration of the issue of existence of an on-the-job injury based on consent of the parties. We remand, however, to give respondent the opportunity to request the addition of this issue, based on a showing of good cause as alleged at the hearing.

Appellant was employed by Employer 1 as a custodial employee in the public school system in (city), Texas. On (date of injury), while working in that capacity at an elementary school, he claimed to have injured his back and lower abdomen while loading trash into a dumpster. The injury was reported to his supervisor and appellant was seen by a doctor on that date. No one directly observed the injury, but two other employees at the school observed the appellant slumped over and apparently in pain. The physician who treated appellant on (date of injury) found lumbar and inguinal strain and released him to light duty work until (date). At the (date) recheck the physician at first did not release appellant for work, but later released him for light duty work after being informed that such was available, specifying a sedentary job with no lifting over five pounds. On October 29th appellant was placed on no-work status until an October 30th recheck. On October 31st he was returned

to light duty work. On November 5th and 8th he was again placed on no work until released status. Employer 1 transferred appellant to a high school with a large custodial staff and changed his work hours from the early shift (6:30 a.m. to 3:00 p.m.) to the late shift (3:00 p.m. to 11:30 p.m.). Following such transfer, whenever appellant showed up for work he left early, claiming he was in pain.

During the time appellant was working for Employer 1, he was also employed by (Employer 2), a janitorial service, as a supervisor. His hours at that job were 5:30 p.m. to 10:30 or 11:00 p.m., and his place of employment was (Employer), which had contracted with Employer 2 for cleaning. His hourly pay was $5.25, compared to the $4.75 per hour he earned from his job with Employer 1.

There was disputed evidence regarding whether or not appellant continued to work for Employer 2 following his alleged injury. Such evidence had bearing both on the issues of existence of injury and on disability.

Appellant's first point of appeal concerns "fatal errors" allegedly made at the contested case hearing in agreeing to the inclusion of the issue of injury. The benefit review conference report, dated February 25, 1992, identified a single disputed issue, whether or not appellant's injury resulted in disability, to which respondent carrier filed no response. Article 8308-6.31 provides that issues not raised at the benefit review conference may not be considered except by consent of the parties or unless the Texas Workers' Compensation Commission (Commission) determines that good cause existed for not raising the issue at the earlier proceedings. Commission Rule 142.7 sets out procedures by which these exceptions may be effectuated. Rule 142.7(d) provides that parties may, by unanimous consent, submit for inclusion in the statement of disputes one or more disputes not identified as unresolved in the benefit review officer's report. That subsection further provides that additional disputes submitted by consent shall be made in writing, identify the dispute, explain the party's position on it, be signed by all parties, be sent to the Commission no later than 10 days prior to the hearing, and explain why the issue was not raised earlier.

Laying aside the issue of whether appellant's impediments at the hearing (appearing pro se and lack of understanding of language and procedures) prevented informed consent to the inclusion of another issue, the record does not reflect that the procedures sent forth in Rule 142.7(d) were complied with. Respondent (carrier below) stated on the record that no such written request had been filed prior to the hearing; while respondent offered to submit a written request, none was included in the record.

In an off-the-record discussion, the hearing officer discussed with both parties the addition of the second issue by consent. The possibility of a continuance to allow the filing of a statement of disputes may have been discussed at that time, as the hearing officer stated back on the record that appellant wished to go forward with the hearing, not only on the question of existence of disability, but also on existence of injury.

While matters of procedure in a hearing generally may be waived, Hipp v. Donald, 220 S.W.2d 268 (Tex. Civ. App.-Fort Worth 1949, writ ref. n.r.e.), for a waiver to be effective there must be an actual or constructive knowledge of the right or privilege involved, along with an intention to relinquish such right. Braugh v. Phillips, 557 S.W.2d 155 (Tex. Civ. App.-Corpus Christi 1977, writ ref. n.r.e.). "Intent is the key element in establishing waiver. The law on waiver distinguishes between a showing of intent by actual renunciation and a showing of intent based on inference. In the latter situation, it is the burden of the party who is to benefit by a showing of waiver to produce conclusive evidence that the opposite party unequivocally manifested its intent to no longer assert

its claim. The burden is particularly onerous." FDIC v. Attayi, 745 S.W.2d 939 (Tex. Civ. App.-Houston, no writ).

Because the discussion of the additional disputed issue took place off the record, it is impossible to determine from the record to what extent any waiver by appellant was made with actual knowledge and intent. Because appellant was both pro se and communicating through an interpreter, informed waiver cannot be presumed under these circumstances. That being the case, the issue of existence of injury should not have been considered, and the decision below is reversed as to this finding. However, as mentioned earlier, additional issues may be added upon a determination of good cause. Article 8308-6.31, Rule 142.7(e). Respondent indicated at the hearing that he had recently discovered evidence bearing on the issue of injury, although that matter was not addressed by the hearing officer based on the parties' purported consent. Therefore, the case will be remanded to allow the opportunity for this ground to be considered.

While a finding of no injury would not have required any further holdings on the issue of disability, the hearing officer made the following findings of fact and conclusions of law:

FINDINGS OF FACT

5.From (date of injury), through the date of the Benefit Contested Case Hearing, the Claimant . . . possessed the ability to obtain and retain employment at wages equivalent to the wages earned by him prior to (date of injury).

CONCLUSIONS OF LAW

2.Claimant . . . did not sustain a compensable injury on (date of injury).

3.Claimant . . . did not sustain disability as a result of the injury claimed to have occurred on (date of injury).

Appellant in his second point claims that the issue of whether he possessed the ability to obtain and retain employment at wages equivalent to those earned prior to (date of injury), was not properly addressed, since the hearing officer, after finding no injury, failed to

adequately review appellant's medical records. Appellant also raises

issues regarding his inability to understand the proceedings and claims he was not adequately admonished with respect to self-representation.

The latter issue will be addressed first. It is true, as appellant states, that Article 8308-6.04 allows for legal representation at hearings. However, that provision is permissive only ("[a] claimant may be represented at a contested case hearing . . . by an attorney or may be assisted by an individual of the claimant's choice who does not work for an attorney or receive a fee . . ." (emphasis added)). The general rule is that "may" is given a permissive construction, Inwood North Homeowners' Assn. v. Meier, 625 S.W.2d 742 (Tex. Civ. App.-Houston 1981, no writ). However, in determining whether the Legislature intended a particular provision of law to be mandatory, consideration should be given to the entire act, its nature and object, and the consequences that would follow from each construction. Chisholm v. Bewley Mills, 287 S.W.2d 943 (Tex. 1956). A review of the 1989 law as a whole indicates a movement toward reduced lawyer involvement in, and related costs to, the dispute resolution system. *See* Montford, A Guide to Texas Workers' Comp Reform, Volume 1 § 6.2, Butterworth Legal Publications, Austin (1991). Despite the foregoing, or perhaps because of it, the statute imposes certain duties on benefit review officers with respect to unrepresented claimants. Article 8308-6.13(2) requires benefit review officers to "thoroughly inform all parties of their rights and responsibilities under this Act, especially in cases in which the employee is not represented by an attorney or other representative." Although no such requirement is imposed on contested case hearing officers, they are required to ensure the preservation of the rights of the parties and the full development of facts required for the determination to be made. Article 8308-6.34(b). However, the record demonstrates that the hearing officer below clearly informed appellant of his right to an attorney, and explained that the hearing was a legal proceeding which would have legal effects or ramifications. He also explained that as hearing officer he would be the sole judge of the evidence and could not act as appellant's attorney. Thus it appears that appellant was adequately "admonished" as to the effect of his election to proceed without an attorney, and was given the opportunity to change that decision.

The record below indicates that the issue of disability turned not on appellant's medical reports, which were admitted into evidence, but instead on the fact issue of whether appellant continued to work at his second job after (date of injury). As the trier of fact, the hearing officer can assign weight to be given medical reports that are in evidence, and make a contrary ruling. *See* Texas Workers' Compensation Commission Appeal No. 92072 (redacted Docket No.) decided April 9, 1992.

The 1989 Act defines "disability" as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). The existence of disability is key to an award of income benefits for a compensable injury. Section 4.22 of the Act states that "weekly income benefits may not be paid under this Act for an injury that does not result in disability for a period of at least

one week . . ." Article 8308-4.22. With regard to temporary income benefits, the statute provides: "An employee who has disability and who has not attained maximum medical improvement is entitled to temporary income benefits . . ." Article 8308-4.23.

The record contains controverted evidence as to whether appellant was able to, and actually did, continue to work at his second job following the alleged injury. Appellant testified that he had not worked subsequent to the injury; that he showed up at the bank following (date of injury), to talk to someone there about money he was owed and vacation time; and that on one occasion he helped a friend unload a buffer from a truck but did not receive pay for this act. The coworker who asked for assistance with the buffer testified that appellant was not on duty when he provided this assistance, and confirmed that he was not paid. He also testified that appellant was not wearing a uniform at the time, which he said was a requirement of the job. However, on cross-examination he acknowledged that when he was working outside the bank he would not be aware if appellant were working inside the building.

Appellant's employer at the second job--the owner of the company--testified that he did not see appellant working after (date of injury), but that appellant's time cards reflect that he worked at the bank on (date of injury), (dates). The same card that contained those dates showed appellant working on "October" 1st, 4th, and 5th, which the employer said probably represented the same days in November and was in error due to a failure to change the time clock. Subsequent time cards showed appellant working at the bank on other dates in November, although the employer testified that his company lost the contract for the bank at the end of November and that appellant was terminated for that reason. The employer also testified that the vacation time he had granted appellant would not be reflected on the time cards, because his company did not create a time card for vacation time. While the time cards purport to bear the signature of appellant, the latter testified that he never signs the cards because it would confuse him to do so, and that another coworker signed for him. The employer testified that he does not know who signs the cards.

Also admitted into evidence were summaries of the Employer 2's payroll records. The employer testified that these show appellant was paid for time worked at the bank for the payroll periods including (date of injury) through November 25, 1991.

Appellant's Employer 1 supervisor at the high school where he was transferred for light duty work testified that he and another coworker went to the bank on an evening after appellant had been put on modified duty and observed him vacuuming. He also testified that on the evening of October 31st he and another coworker observed appellant at the bank vacuuming, although they could not tell whether he was wearing a uniform because he was some distance away. Appellant testified that he was not at the bank on that date, and that he never ran the vacuum cleaner.

With these facts before him, the hearing officer made a conclusion of law that appellant did not sustain disability as a result of the (date of injury) injury. This conclusion

may have been based in part on a pre- and post-injury wage comparison and in part on record evidence showing that appellant continued to work and hence suffered no disability "because of a compensable injury." The latter finding is very similar to the issue of injury, for which the hearing officer made a finding based, we have concluded, on improper procedure. Thus, the only finding of fact to support the conclusion of no disability was that appellant possessed the ability to obtain and retain employment at wages equivalent to his preinjury wage. There were no findings, conclusions, or even discussion in the decision as to whether he was considering a mere comparison of hourly pay as enough to support this conclusion, or whether hours of employment was taken into consideration, especially in a case as here where the pay of a preexisting part-time job is apparently being compared with a full-time job.

This case is being reversed and remanded to allow further consideration on the addition of the issue of injury. If injury has been appropriately added as an issue, it may be dispositive of all remaining issues. If it is not added, the hearing officer must make appropriate findings and a determination, based on evidence in the record, on whether any inability to earn equivalent wages was because of the alleged injury.

We are not deciding in this opinion the question of whether or not, under the particular circumstances of this case, the wages of a preexisting part-time job is an appropriate factor to consider or apply in determining disability concerning an employee's primary employment where the compensable injury is sustained.

This case is reversed and remanded for consideration of the issue noted above. Pending resolution of the remand, a final decision has not been made in this case.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge