APPEAL NO. 92313

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 June 11, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that claimant, respondent herein, was entitled to benefits because appellant did not timely contest compensability. Appellant asserts that it controverted within seven days of receipt of notice and then amended its reason for so doing based on good cause; it added that respondent was not injured as claimed.

DECISION

Finding that the decision was sufficiently supported by the evidence, we affirm.

Respondent was a laborer working for (employer). Employer provides oil field maintenance work for different drillers and respondent said he did all types of labor, including digging and lifting. He had injured a leg in (date), and stated that on (date of injury), he hurt his back while lifting an engine. In describing the back injury, he referred to his recently injured leg as making it more difficult for him to lift. He said that one of the owner's, (Mr. W), was there when he tried to lift the engine into a truck over some pipe. (The engine was described as weighing "over 100 pounds" and was said to be used with a pump to take water out of heaters.) He said he told Mr. W that day that he hurt his back, but he did not think that Mr. W heard him.

He did not go back to work and picked up his last check approximately two weeks later. Although the testimony at times flows without basis back and forth between the (month) injury and the (month) injury, it appears that respondent went to a hospital about his back after (date of injury). In February 1992, respondent first went to see (Dr. T) about his back. Dr. T found soft tissue damage and pinched nerves, adding that respondent was "totally incapacitated for an indefinite length of time."

Mr. W testified that he never saw respondent injured, that no engine was lifted on (date of injury), and that respondent has never told him that he hurt his back. He acknowledged that he personally did not contact the carrier, but that the employer heard of the allegation of back injury by respondent by early December 1991. He added that he was sure that the appellant had been contacted about the back injury during that December time period.

The hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34(e) of the 1989 Act. He may believe that respondent told the truth about injuring his back on (date of injury). *See* Texas Workers' Compensation Commission Appeal No. 92167 (Docket No. redacted) decided June 11, 1992, for a discussion regarding the ability of testimony by the respondent alone to support a finding of injury and disability.

Similarly, the hearing officer may believe that an owner of the employing company,

uncontradicted, knew approximately when the employer notified the appellant of the injury and apply the standards set by Article 8308-5.21 of the 1989 Act based on that date. Once the hearing officer found that the employer had notified the appellant of the injury in early December 1991, then his finding that appellant did not timely controvert was based on sufficient evidence since the first notice of controversion was dated February 28, 1992, and was not received until March 2, 1992.

There was no evidence that the appellant discovered new evidence that could not reasonably have been discovered earlier, although the appeal does refer to confusion because of the earlier (month) claim. The hearing officer's determination as to whether good cause has been established will not be disturbed by the Appeals Panel unless found to be an abuse of discretion. *See* Texas Workers' Compensation Commission Appeal No. 92038 (Docket No. redacted) decided March 20, 1992.

As stated previously, the hearing officer was provided sufficient evidence upon which to make Findings of Fact Nos. 4, 5, and 6, which state that appellant received notice of the injury in early December, that appellant did not contest compensability within 60 days thereof, and that respondent did injure his back as claimed. Conclusion of Law No. 5 follows the above findings of fact, and Conclusion of Law No. 4 is supported by the absence of a showing that newly discovered evidence provided the basis for contesting compensability beyond the time limits of Article 8308-5.21 of the 1989 Act.

In addition, the appellant acknowledged that it received written notice of injury on February 24, 1992 and reported its refusal to pay benefits on a TWCC Form 21 dated February 28, 1992 (received by the commission on March 2, 1992). However, the basis for that denial--that respondent no longer worked for employer--was abandoned at the hearing when it was stipulated that the respondent worked for employer on (date of injury), the day of injury. Appellant also amended the basis for its refusal to pay in a report it sent to the commission on March 9, 1992 (received March 12, 1992) to question whether notice of injury was made within 30 days. A determination that the appellant failed to meet the seven day period for refusal to pay, set forth in Article 8308-5.21(b) was unnecessary because a finding was made that the 60 day period to controvert compensability was not met.

The hearing officer's determination that good cause had not been established for failure to timely contest compensability appears to have been directed solely at the finding that the 60 day rule was not met. Since no finding was necessary as to the seven day limit applicable to identification of a basis for refusal to pay benefits [article 8308-5.21 (b) & (c)], a determination whether newly discovered evidence provided cause to refuse to pay, after seven days had passed, also was not necessary.

Finding that the decision is not against the great weight and preponderance of the evidence, we affirm.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge