APPEAL NO. 92359

This appeal arises under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A benefit contested case hearing was held in (city), Texas, on May 27, 1992, (hearing officer), presiding, to determine whether appellant was injured in the course and scope of his employment on (date of injury), and whether he gave timely notice of a work-related injury to his employer as required by Article 8308-5.01 (1989 Act). At the hearing, appellant also asserted that respondent had waived its right to contest the compensability of his claim by not timely filing its notice disputing the claim. Respondent replied that appellant had waived such issue by not having raised it at the benefit review conference (BRC). The hearing officer, upon determining that appellant failed to provide timely notice of his injury to his employer, decided appellant was therefore not entitled to benefits. The hearing officer also determined that appellant had not waived his right to object at the hearing to respondent's alleged failure to timely contest the claim, and that respondent's contest of the claim was timely. The hearing officer went on to find that respondent's grounds to contest the claim, however, were limited to appellant's untimely notice of injury to employer and did not include whether appellant was injured in the course and scope of his employment. In his request for review, appellant first concedes that "[t]here was probably some evidence to support the decision of the hearing officer [that appellant was not entitled to benefits] and because he is the sole judge of the weight and credibility to be given to the evidence, his factual findings must be upheld." Appellant goes on to state that his appeal "is not on factual grounds, but for the sole purpose of determining the singular legal issue of whether the carrier timely filed its Notice of Dispute;" and, that "[t]he question for decision by this panel is whether a carrier which admits that it had actual notice of claim for compensable injury and then fails to file a controversion within the required 60 day period, waives its right to controvert the claim." Appellant further asserts that his appeal "is to determine whether the carrier, which received actual notice of the claim, has waived its right to contest the claim by failing to timely controvert." Respondent did not appeal from the determination that its grounds to contest the compensability of the claim were limited to appellant's untimely notice of injury to the employer. In its reply, respondent urges support for the hearing officer's decision contending that it "timely filed its controversion," fully complied with the requirements of Article 8308-5.21(a) and (b), and did not waive its "right to controvert the claim."

DECISION

Finding the evidence sufficient to support the decision of the hearing officer, we affirm.

As above recited, appellant makes clear that his appealed issue is the correctness of the hearing officer's determination that respondent timely contested the compensability of the claim, and that he doesn't quarrel with the factual underpinnings of the hearing officer's determination concerning the issue of timely notice of injury. Accordingly, even though appellant says he "disagrees" with Findings of Fact Nos. 4-8 and Conclusions of Law Nos. 2-5, we will address the appealed issue as appellant has limited it and will only review the

sufficiency of the evidence to support the findings which relate to the appealed issue.

The evidence established that appellant was hired early in (month) 1991 by (employer) to work as a traffic "flag person" on a road bridge construction site. Appellant testified that on (date of injury), after flagging cars for six hours, he was directed, along with coworker (Mr. W), to break out individual telephone wire conduits from a strapped bundle. He said this job was accomplished by (Mr. W) positioning a board at the end of a conduit and appellant's hitting it with a sledgehammer to knock it out of the bundle. He said that after swinging the sledge- hammer for a while, his right shoulder "popped," "went limp," and he thought he had pulled a muscle. He said he then became very ill and sat down under a bridge until the end of his shift. He said (Mr. W), who worked with him at the task, knew he was injured, and that he told his supervisor, (Mr. H), that day that his shoulder hurt. He testified he went to the job site the next day but had to stop work after about two and one-half hours because of his shoulder pain and that he again told (Mr. H) about his shoulder injury. He did not work for employer after that date, but picked up his check on the second day after the injury and again advised (Mr. H). (Mr. W) denied having worked with appellant at the task. He said he was unaware then, or later, of appellant's having injured his shoulder, and that appellant was sick to his stomach that day. (Mr. H) said he hired appellant in early (month) as a flag person, had control over his tasks, had no knowledge of his using a sledgehammer on (date of injury), and denied appellant advised him of a shoulder injury on that date and again on the following two days. The time sheet showed that when appellant signed off work on (date of injury), he checked the "not injured" block. (Mr. H) testified that appellant quit his job at that time because he feared the heights involved.

Appellant testified that he visited (Dr. P), whom he had seen for a prior injury to the shoulder, on the Monday following his (date of injury) injury and was told that "the insurance wouldn't pay." He said he had previously filed three workers' compensation claims for injuries to his back and shoulder. An exhibit of respondent showed appellant had a prior right shoulder injury (fracture and a growth) in August 1988 for which a worker's compensation claim was opened with respondent's parent corporation (Aetna Life & Casualty), and a back injury in July 1989 for which a workers' compensation claim was opened with Crum & Forster, Inc. Appellant said he wanted to try to get medical treatment authorized by respondent under his prior shoulder injury claim since he understood the future medical benefits under that claim were still open. He said that on or about (date), he called respondent, spoke to (Mr. L), a claims supervisor, and advised he had reinjured his shoulder. He said (Mr. L) asked if the problem was his bone "tumor" (prior injury) to which appellant responded that he didn't know. Appellant said he was unsuccessful in getting respondent to authorize treatment under the prior claim, and that (Mr. L) told him he would have to file "a new E-1." He also said he spoke to (A H) with respondent in his efforts to obtain authorization for treatment under the prior claim but was told he had a new injury because of the different location of the tumor.

Appellant testified that he called (Mr. H) on or about (date) and was advised he had not worked for employer long enough to qualify for employer's health insurance, and that he

had not given employer notice of his injury. He said (Mr. H) told him he had to file an E-1 and that he picked up the form and filed it in August. The "Employee's First Notice of Injury or Occupational Disease and Claim for Compensation," introduced by respondent, was signed by appellant on "9-16-91," and stated the nature of his (date of injury) shoulder injury as a "fracture." (Mr. H) denied receiving phone calls from appellant in (month). He said he first learned of appellant's injury when appellant called him not earlier than September and said he had a tumor in his shoulder, unrelated to his job, for which he wanted treatment under employer's health insurance. After advising appellant of his ineligibility for such insurance, appellant asked him to fill out an E-1 and he responded he couldn't do that unless the injury was work related. (Mr. H) said appellant later called him back to state he wasn't going to pursue obtaining an E-1.

Appellant said he spoke to (Mr. L) several times after the July call and could not recall the dates, but he may have spoken to (Mr. L) in September. (Mr. L) testified that respondent's records showed that appellant called on September 6th leaving a message concerning his obtaining medical treatment for his shoulder. Appellant's prior claim file for a shoulder and back injury (settled and closed in November 1989) was retrieved from storage and given to (Mr. L) who returned appellant's call on September 10th. Appellant asked (Mr. L) to authorize treatment for his shoulder under a Compromise Settlement Agreement (CSA) which had remained open for future medical treatment until May 17, 1992. He asked (Mr. L) to call (Dr. P). (Mr. L) called (Dr. P's) office and was advised appellant had received treatment for a [back] injury on (previous injury) for which claim the carrier was Crum & Forster, and that because the future medical expenses period for the back injury had closed on August 30, 1991, appellant wanted to get the treatment for his shoulder under his prior claim with respondent. (Mr. L) said he advised that this sounded like an "intervening accident" which respondent would have to investigate. (Mr. L) testified that appellant called him on September 11th and stated that if he couldn't change it (shoulder treatment) to his old CSA, then, since his CSA with Crum and Forster had expired, that he may file a new claim with employer. (Mr. L) said appellant "in an uncertain tone of voice" stated: "I might have an injury with [employer]." (Mr. L) said he informed appellant that if he intended to file a new claim based on his employment with employer, he needed to report his injury to employer and get an E-1 filed so respondent could set up a file. (Mr. L) said he didn't know then whether appellant was going to file a claim for an injury with employer and he didn't set up a new claim file but gave appellant's file to an adjustor to investigate the relationship between appellant's respective prior claims. (Mr. L) said respondent's first knowledge that appellant filed for the (date of injury) injury was respondent's receipt on October 28, 1991 of a facsimile copy from the Texas Workers' Compensation Commission (Commission) of appellant's September 16th Notice of Injury. He said he talked to appellant on October 28th; advised him that if he had an injury with employer, he needed to report it to employer and have them file an E-1 so that a file could be opened; and that appellant said he would do so. (Mr. L) stated that when he received the copy of appellant's Notice of Injury from the Commission on October 28th, he set up a claim file. He also requested employer (Mr. E) to file an employer's report of injury.

(Mr. E), employer's safety director who handles employer's workers' compensation

claims, testified that employer's first awareness of appellant's claim of a (date of injury) injury was the notification by respondent on November 8th that appellant had filed a claim for a fractured shoulder. Employer then filed the Employer's First Report of Injury or Illness (TWCC-1) which (Mr. E) signed on November 11th. (Mr. E) testified employer had not received any correspondence from the Commission concerning this injury.

On November 13, 1991, respondent prepared its Notice of Refused/Disputed Claim stating that its first written notice of injury was received on October 28th, that while it had commenced benefits in good faith, employer disputed the claim because it was never reported as an on-the-job injury, and that investigation continues.

The hearing officer made the following pertinent factual findings and legal conclusions:

FINDINGS OF FACT

6.Claimant did not report a work-related injury to his supervisor or any other official of the Employer.

7.The Employer first had knowledge that Claimant was alleging a work-related injury on (date of injury), when it received an inquiry from the Carrier in early November, 1991.

8.The Carrier had a telephone conversation with Claimant on September 10, 1991, and it advised Claimant his prior workers' compensation claims would not provide medical coverage for treatment of his shoulder.

9.Claimant filed Employee's Notice of Injury and Claim for Compensation (TWCC-41) on September 16, 1991, and the document was received by the (city) Field Office on September 18, 1991.

10.Carrier received written notice of injury on October 28, 1991.

11.Carrier filed Notice of Disputed Claim on November 13, 1991.

CONCLUSIONS OF LAW

3.The Employer and the Carrier did not have actual knowledge that Claimant was alleging a work-related injury on (date of injury), until after September 16, 1991.

5.Carrier filed Notice of Disputed Claim within the 60 days required by Article 8308-5.21 of the Texas Workers' Compensation Act and such notice provided sufficient grounds for the Carrier to dispute this claim based on the failure of Claimant to timely notify the Employer of a work-related

injury.

The hearing officer further concluded that respondent's timely dispute of the claim had not, however, contested on the ground that appellant wasn't injured in the course and scope of his employment and thus respondent waived its right to contest on that ground. The hearing officer went on to conclude that appellant had not waived his right to object to respondent's having failed to comply with Article 8308-5.21 by not having raised such objection prior to the hearing.

Article 8308-5.21(a) provides, *inter alia*, that "[i]f the insurance carrier does not contest the compensability of the injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability." Article 8308-5.21(b) provides that "[n]ot later than the seventh day after the date on which the insurance carrier receives written notice of the injury," it shall either begin the payment of benefits or notify the Commission and the employer in writing of its refusal to pay and advise the employee of the right to request a BRC. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6c (TWCC Rule 124.6c) provides that "[i]f a carrier disputes compensability after payment of benefits has begun, the carrier shall file a notice of refused or disputed claim, on or before the 60th day after the carrier received written notice of the injury or death." *And see* TWCC Rule 124.1 which defines written notice of injury. Respondent's Notice of Refused/Disputed Claim, dated November 13, 1991, stated it had begun paying benefits but was disputing the claim. The BRC report stated that as of the date of the BRC on March 27, 1992, respondent had paid temporary income benefits for 20 weeks.

We find the evidence sufficient to support the hearing officer's conclusion that respondent filed its Notice of Refused/Disputed Claim within the 60 days required by Article 8308-5.21. He found, with support in the evidence, that respondent received written notice of injury on October 28th and filed its notice disputing the claim on November 13th. Further, the hearing officer found that in the telephone conversation respondent had with appellant on September 10th, appellant was advised his prior claims would not provide medical coverage for treatment of his shoulder. The hearing officer concluded that neither employer nor respondent had actual knowledge that appellant was alleging a work-related injury on (date of injury) until after September 16, 1991, the date of Appellant's Notice of Injury sent to the Commission. Thus, the hearing officer obviously believed the testimony of (Mr. L) that he had not had any conversation with appellant before September 10th, and that he did not have actual knowledge from their telephone conversations of September 10th and 11th that appellant was claiming he sustained an injury on (date of injury) while working for employer. (Mr. L) testified that what appellant said was that after being informed he could not obtain treatment for his shoulder under his prior claim, appellant said that he might have an injury with employer and may file a new claim. (Mr. L) told appellant that if indeed he had sustained a new injury, he would need to report it to employer and get employer to file an E-1. (Mr. L) said he had no reason to set up a file after these conversations and didn't do so until receiving a copy of appellant's Notice of Injury on October 28th which he said was respondent's first notice of appellant's claim. *Compare* Texas Workers' Compensation

Commission Appeal No. 92022 (Docket No. redacted) decided March 11, 1992, where the insurance carrier was found to have waived its right to contest compensability for failing to dispute the claim within 60 days after receiving written notice; and Texas Workers' Compensation Commission Appeal No. 92313 (Docket No. redacted) decided August 28, 1992, where the hearing officer found that the insurance carrier, which apparently had not begun to pay benefits, had been notified more than 60 days before disputing the claim and thus waived its right to contest compensability. Article 8308-6.34(e) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. He was entitled to believe M. H, E, and L and was not bound to accept appellant's testimony at face value. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

The findings of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
ppeals Judge