APPEAL NO. 92410

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 July 7, 1992, (hearing officer) conducted a contested case hearing in (city), Texas, and determined that claimant, appellant herein, was not injured in the course and scope of employment. Appellant asserts that the decision was against the great weight of the evidence and that the hearing officer committed reversible error in allowing the employer's representative to testify.

DECISION

Finding that the evidence sufficiently supports the decision, we affirm.

Appellant had worked for his employer as a landscaping site supervisor for two months when he alleged that he hurt his back. He testified that prior to (date of injury), he had no pain in his back and had not been treated for back pain; he acknowledged seeing a doctor for pain in his leg and hip in the past. On (date of injury), appellant unloaded PVC pipe (six 20-foot pieces and three 10-foot pieces) from a truck, carried it approximately 15 feet, and felt pain in his back. He made no report that day. He testified that he told another site supervisor on (date) or (date) that he injured his back and was going to the doctor. During his testimony appellant stated that the notice to the other supervisor on (date) or (date) included notice that the injury was work related. While the record contains references to other dates in regard to notice and assertions that notice referred to pain but not to an injury on the job, the hearing officer's finding that notice was given on (date) or (date) was not appealed and requires no more discussion.

There were no witnesses to the unloading of the PVC pipe on (date of injury). Medical records, introduced by the appellant, show that appellant had surgery to fuse a segment of his back in December 1991. Those medical records also show that appellant on October 23, 1991 had his back x-rayed which showed moderately severe degenerative changes, bony outgrowths, narrowing of spaces between joints, and spondylolisthesis with spondylolysis at the L4-L5 level. Then on November 13, 1991, Dr. E, an orthopaedic surgeon, wrote a letter to another doctor about appellant that said, in part:

> (Appellant) has progressing degenerative spondylosis mainly at L-3, L-4 related to an old spondylolisthesis. His symptoms are appropriate for that problem being pain that radiates to the left buttock and then into the lower extremity--in this case from the knee to the foot (emphasis added). In examining the back I found an exquisitely tender area which with pressure gave him the pain down his extremity.

Appellant's history recorded in the discharge summary from the hospital at the time of his back surgery in (date), states:

This patient was a 60-year-old white male with a greater than one year history of low back pain and pain radiating down to the lower left leg and foot. The pain had been getting progressively worse. His endurance and exercise tolerance at work has been becoming progressively less and less, limited by leg pain. Progressively the left leg and foot have become numb. The patient had great difficulty sleeping at night due to the back pain.

No medical record notes an event of any type on or about (date of injury) that impacted the development of the degenerative process or caused a separate injury to the back.

The hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34(e), 1989 Act. Even though no one witnessed the events of (date of injury) or contradicted the story told by the appellant of the onset of pain, the hearing officer, as trier of fact, does not have to believe the appellant as an interested party. Presley v. Royal Indem. Ins. Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). The hearing officer could believe that appellant's back caused pain, but that he did not injure it on the job. *See* Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer may resolve inconsistencies in the testimony of the appellant. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). There was sufficient evidence before the hearing officer to support his finding that the appellant was not injured in the course and scope of employment on (date of injury).

The hearing officer sustained appellant's objections to the testimony of several witnesses called by respondent and to respondent's documentary evidence because the respondent did not timely provide the materials or a list of the witnesses in response to the written interrogatories timely delivered. The hearing officer, when the president of the company was then called, identified him as the employer representative and asked for argument as to his separate right to testify. The hearing officer then ruled that the employer, per Article 8308-5.10, 1989 Act, had the right to be present and to present relevant evidence at all proceedings. He added that the employer could testify notwithstanding that he was not listed as a witness by the respondent. Appellant objected to that decision at the hearing and has raised that issue on appeal.

Appellant points out that the employer representative was not identified prior to the hearing so that appellant was unable to prepare for a particular person's testimony. Recent opinions were cited (Smith v. Southwest Feed Yards, 35 Tex. Sup. Ct. J. 963 (June 24, 1992), and Henry Miller Co. v. Bynum, 35 Tex. Sup. Ct. J. 1021 (July 1, 1992)) to show that a party, not named as a witness, was only allowed to testify when identity was certain. Both cases turned on the court's application of the Texas Rules of Civil Procedure to the facts presented. This Appeals Panel has previously noted that the Texas Rules of Civil Procedure do not control contested case hearings. *See* Texas Workers' Compensation Commission Appeal No. 92079 (Docket No. redacted) decided April 14, 1992. In addition, the Appeals Panel has specifically held that Rule 215, Texas Rules of Civil Procedure, quoted by appellant in this appeal, does not apply and that a claimant always has a right to

testify at a contested case hearing. *See* Texas Workers' Compensation Commission Appeal No. 91088 (Docket No. redacted) decided January 15, 1992.

The employer is provided certain rights by statute (Article 8308-5.10 of the 1989 Act) including the right to present evidence at the hearing. This right is set forth without any condition and, as written, does not require that the employer be contesting compensability (when the carrier has accepted liability) in order to be able to present evidence. As such, the employer has the right to be a participant and to present evidence without first being made a party to the case. *See* Texas Workers' Compensation Commission Appeal No. 92110 (Docket No. redacted) decided May 11, 1992. Even though the Texas Rules of Civil Procedure do not apply to contested case hearings under the 1989 Act, the cases cited by appellant are still looked to for guidance. Smith stated "[a] party cannot disregard procedural rules and still insist upon an absolute right to testify in all circumstances." While the employer was not a party, this language indicates that procedural rules can be imposed, when applicable, upon a right to testify.

Procedural requirements, relevant to introduction of evidence at a contested case hearing, are found in Articles 8308-6.33 and 6.34, 1989 Act, as implemented by Tex. W. C. Comm'n, 28 Tex Admin Code § 142.13 (Rule 142.13). Article 8308-6.33(a) provides for "interrogatories as prescribed by the commission." Article 8308-6.33(b) then says "[t]he commission shall by rule prescribe standard form sets of interrogatories to elicit information from claimants and insurance carriers (emphasis added). These interrogatories shall be answered by each party . . ." (emphasis added). Similarly, Rule 142.13(b) says "[p]arties shall exchange documentary evidence . . ." (emphasis added), and more particularly, Rule 142.13(d) states:

> Interrogatories as prescribed by § 142.19 of this chapter (relating to Interrogatories) may be used to elicit information from claimants and insurance carriers. (emphasis added)

The above articles and rules that govern interrogatories specify that they apply to "parties" and to "claimants and insurance carriers;" they do not apply to the employer's right in this case to present evidence under Article 8308-5.10 of the 1989 Act. While we seek to harmonize sections of a statute, the court in Smith v. Baldwin, 611 S.W.2d 611 (Tex. 1980) said "[w]hen the Legislature has carefully employed a term in one section of a statute, and has excluded it in another, it should not be implied where excluded." The only commission rule found that refers to the employer's right to present evidence imposes no procedural condition upon the employer and relates only to benefit review conferences; Rule 141.5(a)(3) defines as one of the "participants" at a benefit review conference "the employer exercising the right to present evidence relevant to the disputed issue or issues. . . ." Others identified therein as "participants" include the "parties." This rule does not make an employer a party.

Since neither procedures set forth in the 1989 Act nor rules implementing the act

impose any conditions on the right of the employer to present evidence under Article 8308-5.10, the hearing officer committed no error in permitting the employer representative, the president of the company, to testify, even though the respondent was precluded from presenting other evidence. We note that the hearing officer did not sustain the objection when the employer representative was called to testify by the respondent. The hearing officer allowed the employer to then testify under Article 8308-5.10, 1989 Act, by answering questions asked by respondent. Bynum, *supra*, allowed an appellate court based on the record before it to find good cause on the record for testimony even when the trial court did not make an express finding. In the case before us, the right specified in Article 8308-5.10 can be viewed as good cause for the testimony.

Absent an applicable rule, the hearing officer would have been more consistent with other rulings he made pursuant to Article 8308-6.33(e) concerning respondent's evidence, and with the provisions of Article 8308-5.10, if he had sustained the appellant's objection to the respondent's use of this witness. After respondent rested, the employer representative could then be allowed to testify. As it was presented, it appeared as if the respondent was able to circumvent rules applicable to it as a party and put forth at least part of its evidence through the testimony of the employer's representative, who was not identified prior to the hearing. If the method of presenting this testimony was error, it was not reversible error under the circumstances of this case. The thrust of the employer's representative's testimony concerned to whom appellant could report an injury. This issue of notice was found for the appellant. The employer's representative did state that appellant once told him that the injury was not work related. The hearing officer in his "Discussion" bases his decision that no injury occurred on the medical evidence that the condition predated the alleged accident. To obtain a reversal of a decision based on error at the hearing in admitting evidence, the appellant must show that there was error and that the error was reasonably calculated to cause and probably did cause an improper decision. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ).

Absent a rule providing otherwise, a hearing officer may inquire at any time, to include a prehearing conference or the opening moments of a hearing, whether there will be an employer representative at the hearing, who will so act, and whether that representative wishes to exercise its right to present evidence. Further, the hearing officer can have any such evidence identified and give the parties fair opportunity to address it.

The decision of the hearing officer that the appellant was not injured in the course and scope of employment was not against the great weight and preponderance of the evidence. The decision of the hearing officer to allow the employer to present evidence was consistent with the provisions of the 1989 Act and not contrary to any applicable rule of the commission.

The decision is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

CONCURRING OPINION:

I concur with the decision and reasoning of the author judge. I would only emphasize that while an employer's representative can testify pursuant to Article 8308-5.10 separate and apart from the carrier's case, that article does not give a carrier the right to call, as a part of its case, the employer's representative particularly when the carrier's evidence has been properly excluded for failure to comply with discovery procedures. As I view this issue, there is a delicate balance involved where an employer may wish to testify over and above the matters presented by a carrier or may desire to bring forth a different perspective in a given case. However, there is nothing to indicate to me in Article 8308-5.10 that it can be used by a carrier to circumvent procedural restrictions imposed on it in the presentation of its case.

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Stark O. Sanders, Jr.
Chief Appeals Judge