APPEAL NO. 92468
FILED DECEMBER 9, 1992

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.01 (Vernon Supp 1992). On July 1 and July 27, 1992, a contested case hearing was held in [City], Texas, with [hearing officer] presiding. He determined that the claimant, appellant herein, was not compensably injured and denied the claim. Appellant asserts that he was compensably injured and that respondent, by failing to comply with Article 8308-5.21, 1989 Act, could not defend on the issue of compensability.

DECISION

Finding that the respondent was limited in its defense of compensability to the grounds specified in its initial notice of refusal and that those grounds do not state a basis of defense, we reverse and render.

Appellant prepared tile imported from Mexico before it was marketed in the United States. On [date of injury], he states that a box of tiles weighing over 40 pounds slipped as he was lifting it. In his attempt to grab it as it fell, he hurt his back. No one saw the injury but there was testimony that appellant would have been noticed if he had quit working for 20 minutes after the event as he said he did. It is not clear that the statements appellant made about his back related it to the work. Appellant saw Dr. W on December 23, 1991, who diagnosed degenerative joint disease, a fracture of the cervical spine, and sprain and strain. The medical history shows the injury occurred at the job site through repetitive trauma. Appellant had settled two prior back injury workers' compensation claims, and there was some testimony that appellant approached other employees with the request to help him in regard to this incident. While not discussed in the decision, evidence of record indicated that the employer may have had actual knowledge of the claimed injury on January 16, 1992, within the 30 day statutory requirement. Respondent introduced notes from a paralegal of appellant's counsel's law firm that indicate on January 16, 1992 the paralegal talked with an E.A. at the local workers' compensation office. The notes show that E. A. called employer that day and spoke to "Reuben" about whether the employer was aware of a claim by appellant. E.A. testified that she could not remember that specific incident but that she commonly does make such calls and responds thereafter to the claimant or claimant's representative as is recorded.

The above summary of the facts regarding the injury sufficiently provides the background for the issue upon which this case turns. Suffice to say that the hearing officer had before him sufficient evidence on which to base a decision of no compensable injury, as he held. The evidence would also have supported an opposite determination. Except for the issue that arises under the criteria of Article 8308-5.21, 1989 Act, it would have

been a factual determination within the judgment of the hearing officer based on how he weighed the evidence and viewed credibility.

The evidence of record shows that respondent introduced a letter from appellant's counsel's law firm that was dated January 21, 1992. That letter stated that it enclosed a copy of the Notice of Injury, referred to the workers' compensation claim, and provided its authority to represent. Appellant introduced a copy of the Notice of Refused/Disputed Claim, dated February 5, 1992, which shows that respondent received written notice of the injury on January 31, 1992, by letter from the appellant's attorney. The notice is date stamped at the Texas Workers' Compensation Commission on February 10, 1992; the form shows that a copy was sent to the appellant but not to his representative. The reasons specified for refusal to pay were:

> Our investigation reveals no medical to support on the job injury; No E-1 from insd. Compensability will be determined following further investigation you have the right to request a Benefit Review Conference by contacting the local Texas Workers' Compensation Commission. Additional information can be obtained by calling (number).

No additional Notice of Refused/Disputed Claim was filed within the seven days allowed by Article 8308-5.21 (b) 1989 Act when a carrier refuses to pay benefits. In addition, no additional Notice of Refused/Disputed Claim was filed within the 60 days provided in Article 8308-5.21 (a), 1989 Act. The refusal dated February 5, 1992, provides the "only basis for the insurance carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date." *See* Article 8308-5.21 (c), 1989 Act. As the respondent shows on this Refusal, the time periods for providing notice of refusal began not later than January 31, 1992.

Texas Workers' Compensation Commission Appeal No. 92038, decided March 20, 1992, affirmed a hearing officer's decision that the carrier had "limited itself to contesting compensability only on the notice issue . . ." since the appellant had refused to pay benefits within seven days notice of injury and set out the grounds as "employee failed to report on-the-job injury within 30 days . . ." This opinion refers to the grounds specified as the "only basis for the insurance carrier's defense on the issue of compensability . . . unless based on newly discovered evidence . . ." It concludes that the only defense in that case was on a timely notice basis and noted that the notice question was determined against the carrier. The appeals panel has also considered when evidence is discovered and has said that no question of "reopening" occurs when the new evidence is received within the 60 days. *See* Texas Workers' Compensation Commission Appeal No. 91035, decided November 7, 1991. That appeal dealt with medical evidence received

approximately 45 days after notice. It rejected the assertion that a new 60 day period ran from the time the evidence was received.

Unlike the ground for refusal stated in Appeal No. 92038, *supra*, none of respondent's reasons for refusal provides a defense even if any were answered in a way favorable to the respondent. There is no basis for a defense stated; there may be administrative or even evidentiary questions raised by the refusal, but no defense to compensability can be used in any subsequent proceeding from the statements made therein.

When the question of whether respondent had adequately stated a defense, under the provisions of Article 8308-5.21, 1989 Act was raised at the hearing on July 1, 1992, respondent objected to the issue. The issue had not been reported out of the benefit review conference (BRC), and an issue under Article 8308-5.21 can be waived. In this instance, there was voluminous argument, and evidence in the record shows that appellant did not raise the issue through any portion of Tex W. C. Comm'n, 28 TEX. ADMIN. CODE §142.7 (Rule 142.7). The evidence also showed that appellant's counsel did not receive a copy of the Notice of Refusal as required by Rule 102.4(b) and that a subsequent Notice of Refusal dated May 1, 1992, was not made until after the BRC. Appellant's response to respondent's interrogatories dated April 28, 1992, did, however, state that an issue under the Notice of Refusal existed. The hearing officer decided to formulate issues with both parties and send the matter back to a BRC to look at those issues in the dispute resolution process. That decision was not met with objection. The hearing reconvened on July 27, after the added issues were considered in a BRC. Respondent continued to object to consideration of issues based on the Notices of Refusal it filed. The hearing officer as part of his consideration of all the issues, allowed testimony in defense based on both no injury in course and scope and unsatisfactory notice to the employer within 30 days. He then made findings on the Notices of Refusal, the injury issues, and also found that the appellant did not lose the right to complain of a defective Notice of Refused or Disputed Claim. The hearing officer's decision that the issues related to the Notices of Refusal could be raised was reasonable in the circumstances and was not arbitrary. Respondent did not appeal this decision and in its response to appellant's request for review does not object to Finding of Fact 13 which stated that appellant could complain concerning the Notice of Refused Claim.

Respondent maintained, and the hearing officer's findings agreed, that it had the right to "amend" its Notice of Refusal on a form dated May 1, 1992. The statements made on the subsequent notice may or may not be sufficient to state a basis for defense on the issue of compensability; we do not have to decide that question because the form was dated more than 60 days from the time respondent received notice of the claim. While an issue of compensability may be reopened "if there is a finding of evidence that could not

have been reasonably discovered earlier," the hearing officer made no finding as to such evidence and its time of discovery. Rather, a finding was made that "good cause" existed for the latter notice because the respondent left the question of compensability open in its first Notice of Refusal and the Notice of May 1 recited factual circumstances for disputing compensability.

The provisions of Article 8308-5.21, 1989 Act contain no good cause option. They provide very specifically that the discovery of evidence, only, may be considered in determining whether to reopen the issue of compensability. In the response filed, "newly developed evidence" was cited as statements taken on February 7, 1992 (after the initial Notice of Refusal). At the hearing, respondent referred to appellant's unavailability to give respondent a statement until the BRC, but neither referred to nor introduced any evidence that was not reasonably discovered earlier that it then used in providing the subsequent Notice of Refusal. As stated in Appeal No. 91035, *supra*, the question of reopening under Article 8308-5.21 does not occur while the period for asserting a defense to compensability is still running, and the 60 day period does not begin again from the date evidence is received. The appeals panel has never held that a carrier can unilaterally indicate on a Notice of Refusal that compensability has not been determined and in so doing provide a mechanism for taking longer than the statutory time provided to reach its position of defense as to compensability.

The respondent's Notice of Refusal dated February 5th did not state a basis to defend against compensability. As a result, the findings of fact that found no injury, the implied finding that the employer did not have sufficient notice under Articles 8308-5.01 and 5.02, 1989 Act, and the findings that the Notice of Refusal of February 5, 1992 was sufficient are in error. The findings that the Notice of Refusal dated May 1, 1992, could be considered were also in error because that Refusal did not meet the provisions of Article 8308-5.21, 1989 Act and that Refusal was not found to have complied with the requirements of that article.

With no basis on which to defend against the issue of compensability, the respondent is liable for workers' compensation benefits that are due. The decision and order are reversed and rendered.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders
Chief Appeals Judge

_____
Lynda H. Nesenholtz
Appeals Judge