APPEAL NO. 92490

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing with (hearing officer) presiding as hearing officer was held on July 31, 1992, to consider the two issues agreed upon by the parties as the unresolved disputed issues. The issues are (1) whether appellant (claimant) sustained an injury in the course and scope of his employment with respondent (County), the self-insured employer (carrier), on (date of injury), and (2) whether claimant gave timely notice of his injury to his employer. Following a prior contested case hearing held on May 6, 1992, the hearing officer determined that carrier had timely filed its notice of disputed claim with the Texas Workers' Compensation Commission (Commission) pursuant to Article 8308-5.21(a) (the timely dispute issue) and the Commission's Appeals Panel affirmed the hearing officer's decision in Texas Workers' Compensation Commission Appeal No. 92279, decided August 6, 1992.

In this hearing, the hearing officer, finding that claimant did not slip and fall on the ice in employer's parking lot while walking to his work location on (date of injury), and that he did not inform his supervisors before June 7, 1991 that he sustained a work-related injury on (date of injury), concluded that claimant did not sustain an injury in the course and scope of his employment on (date of injury), and that he did not timely notify employer of his alleged injury. Claimant challenges the sufficiency of the evidence to support these and certain other findings, and the conclusions. He also urges error in the hearing officer's admission into evidence of an unsigned, unsworn statement, and in his conducting the hearing in violation of "agreements and Commission orders" to the effect that this hearing "on the merits" would not go forward until the Commission's Appeals Panel had decided the timely dispute issue. In its response, carrier supports the decision below and urges our affirmance. Carrier also objects to the conclusion that claimant was in the course and scope of his employment while walking from his vehicle to his work location on (date of injury), and asks that same be set aside.

DECISION

We find no reversible error by the hearing officer, find the evidence sufficient to support both legal conclusions and all but one of the factual findings challenged by claimant, and find carrier's appeal of Conclusion of Law No. 3 untimely. Accordingly, we affirm the decision below.

In its response to claimant's request for review, carrier asks us to set aside the hearing officer's Conclusion of Law No. 3 to the effect that claimant was in the course and scope of his employment when he walked from his vehicle to his assigned work location on (date of injury), asserting such conclusion was unsupported by evidence and that claimant was not then in the course and scope of his employment as a matter of law. The parties had taken opposing positions at the hearing on the question whether claimant was in the course and scope of his employment while walking from his vehicle across his employer's parking lot to the building where he was to commence his work. Because carrier's assertion

of error was filed later than the 15th day after the date on which the hearing officer's decision was received from the division of hearings, it was untimely and will not be considered. *See* Article 8308-6.41.

Claimant urges as error the hearing officer's convening the hearing below on July 31st before the resolution of the timely dispute issue. The parties had earlier agreed to a resetting on July 31st anticipating the Appeals Panel decision in Texas Workers' Compensation Commission Appeal No. 92279, decided August 6, 1992, would be filed by that date. Claimant asserts that the convening of the hearing violated "agreements and Commission orders." While no orders were offered into evidence in support of claimant's contention, carrier introduced a benefit review conference (BRC) agreement of March 12, 1992, which stated that "[t]he parties agree that the contested case hearing on April 8, 1992, on the merits of this case will be postponed until the contested case hearing on the procedural timely filing issue is held or until the timely filing issue is resolved." Carrier urged that since the contested case hearing on the timely dispute issue was held on May 6, 1992, and since claimant's request for review of the hearing officer's adverse determination of that issue by the Appeals Panel was then pending, the literal terms of the BRC agreement were met. Claimant urged that the hearing be continued until the Appeals Panel decision was issued because if he prevailed, a hearing on the remaining disputed issues would not be necessary. The 1989 Act envisages the resolution of disputed issues by agreement (Article 8308-6.11(3)), and provides for the reduction to writing of mutual agreements resolving disputed issues (Article 8308-6.15). *See also* 28 Tex. W.C. Comm'n, TEX. ADMIN. CODE § 141.5 (Rule 141.5); *and see* Rule 140.1 which defines a "benefit dispute." We are not here called upon to determine the validity of the Commission's having permitted the bifurcation of the timely dispute issue from the two issues decided below, nor must we here decide whether the BRC agreement was valid given that its subject matter was not a benefit dispute issue as such. However, our refraining from making such determinations should not be seen as an approval of those procedures. Typically, all disputed issues between the parties existing at the time are taken up at the BRC and are further pursued, as necessary, at a subsequent contested case hearing. Claimant cites no authority, nor are we aware of any, which constrained the hearing officer from convening the hearing below, notwithstanding that the Appeals Panel decision on the timely dispute issue had not then issued.

The hearing officer stated that on the day before the hearing below he received and denied claimant's motion for a continuance. Claimant then reurged the motion apparently seeking to continue the hearing for one week because the Appeals Panel decision was due to be issued by that time. From the argument of the parties it was apparent that the Appeals Panel decision due date had been miscalculated by about one week. The hearing officer again denied the motion noting that carrier was prejudiced in that it was continuing to pay temporary income benefits to claimant. Claimant has not specifically appealed from the hearing officer's denial of his motion for a continuance unless the foregoing assertion of error be seen as encompassing such. Article 8308-6.42(b) provides that a request for appeal must clearly and concisely rebut the decision of the hearing officer on each issue on which review is sought. Even were we to treat claimant's assertion as a request for our review of

the hearing officer's denial of his motion for a continuance, the ruling would only be overturned for abuse of discretion. Texas Workers' Compensation Commission Appeal No. 91041, decided December 17, 1991. On August 6, 1992, the Appeals Panel issued its decision on the timely dispute issue in Appeal No. 92279 and affirmed the hearing officer's determination that carrier timely disputed the claim. Under the circumstances of this case, we do not find that the hearing officer abused his discretion in denying the continuance. Even were we to find otherwise, however, claimant suffered no prejudice since a hearing on the remaining disputed issues was ultimately necessitated by the Appeals Panel decision.

Claimant's medical records revealed a history of multiple right knee injuries and surgical procedures prior to (date of injury), the date he said he slipped and fell on ice in employer's parking lot and injured that knee. The records of (Dr. V) contained a questionnaire completed by claimant which stated that he first injured his right knee playing ball on July 7, 1976; he reinjured the knee in July 1978 while working; he reinjured the knee on July 9, 1979 when he bumped it on an air conditioning unit; and he further injured the knee on July 10, 1979 when he stepped in a hole while carrying a drum of freon. According to other medical records in evidence, claimant sustained two work-related injuries to his right knee. He testified to two prior workers' compensation claims. Dr. V's records indicated that a July 27, 1979 arthrogram revealed a complex tear of the medial meniscus and, on August 10, 1979, claimant underwent a medial meniscectomy on his right knee. Dr. V's record of February 29, 1980 stated that claimant had a 10% permanent partial impairment to his right knee as a result of his July 1979 injury.

In February 1989, claimant visited (Dr. B) complaining of right knee pain and related a history of a meniscectomy operation many years previously. An MRI exam showed osteoarthritic changes and Dr. B diagnosed varus deformity, secondary to degenerative arthritis. Dr. B performed a valgus upper tibial osteotomy on the right knee on February 10, 1989. That procedure was followed by surgery to remove one of the staples on June 1, 1989, and by an arthroscopy procedure on September 8, 1989 after which Dr. B diagnosed degenerative arthritis. Dr. B's records indicated his opinion that claimant would eventually require a total knee replacement.

Claimant saw (Dr. R) in November 1989 for another opinion complaining that his knee was then worse than it was before the three recent operations. According to Dr. R's records, claimant gave a history of a job-related knee injury about 10 years earlier, which he settled. Claimant reinjured the knee in 1985 and again in 1986 while working for another employer. Dr. R's impression on November 2, 1989 was a delayed or non-union of the proximal tibial osteotomy. He immobilized the knee in a cast for several months and also apparently used electrical stimulation to encourage healing of the osteotomy site. Dr. R's records indicated that he too felt claimant would require a total knee replacement at some future time. Claimant was taken out of the cast in March 1990 and, on a May 10, 1990 visit was felt by Dr. R to be doing extremely well.

Claimant, a 56-year-old building maintenance employee who commenced employment with employer in October 1990, testified that on (date of injury), he drove to

work and after exiting his personal vehicle in employer's parking lot, having parked in a slot assigned to maintenance employees, he took a few steps and slipped on the ice falling forward onto both knees. He got up and continued on to the building where he worked the remainder of the day. Later that day, when claimant felt more pain, he told his supervisor, (Mr. P), about the fall. He said that Mr. P replied that it wasn't a workers' compensation claim and there was no need for employer to fill out a form or do anything about it. The next day, claimant said he again told Mr. P about his fall and said he was going to make a doctor's appointment for his knee. He said he then called Dr. R from Mr. P's office, advised that Dr. R needed to check the knee again, and obtained an appointment for January 10th. Mr. P testified that claimant did not tell him of any such injury in January, recalled no telephone call to Dr. R from his office, and said that it was not until June 6th that he first learned that claimant was claiming he sustained an injury on (date of injury).

Claimant said he had neither an appointment nor surgery scheduled with Dr. R prior to the (date of injury) fall, and that his last visit with Dr. R had been in May 1990. When claimant saw Dr. R on January 10th, he said he told Dr. R of the fall and that he had reinjured his knee. He conceded that Dr. R's records of his January 10th visit, his February 15th arthroscopic surgery, and his follow-up visits on March 7th and May 7th contained no mention of the fall. Dr. R's record of the January 10th visit stated that claimant was having continued problems with his right knee complaining of pain and intermittent swelling, and that an x-ray showed a healed osteotomy. Dr. R's impression was medial compartment osteoarthritis with synovitis, and he recommended a total knee replacement at some future date. A Report of Medical Evaluation (TWCC-69) signed by Dr. R and referencing a date of injury of "(date of injury)" reflected a "0"% whole body impairment rating and contained the notation "preexisting." Attached to the TWCC-69 were Dr. R's records of claimant's visits on January 10, March 7, and May 7, 1991. There were no issues concerning maximum medical improvement or impairment rating and the apparent purpose for admitting the TWCC-69 was to show Dr. R's notation "preexisting."

On February 15, 1991, Dr. R performed an arthroscopy and debridement on the knee. Claimant had earlier agreed with employer to delay that surgery until after a new building was opened. Dr. R's record for the March 7th follow-up visit stated that claimant has "early medial compartment osteoarthritis with a failed tibial osteotomy," and that his only salvage would be a total knee replacement. Dr. R's May 7th entry indicated only minimal improvement, and a December 12, 1991 entry stated that claimant had not worked since June 1991 and really cannot work. Claimant was seen by Dr. V on January 6, 1992, and the record of that visit reflected a history of "improved a bit" after the three operations until his fall on (date of injury), increasing pain since that fall, and that claimant worked until June 1991 despite the pain. Dr. V's impression was Genu Varum, right knee, with advanced degenerative arthritis. He recommended eventual total knee replacement and felt claimant was 100% impaired for all work.

Claimant testified that on January 11th he again talked to Mr. P about his fall. Mr. P insisted that claimant never told him of a slip and fall injury in January and that his first

knowledge of claimant's claimed injury came on or about June 7, 1991 when he was called by claimant's attorney and asked if he knew of the injury. He said he responded in the negative. About 30 minutes later on that same day, Mr. P was called by employer's personnel office and told to fill out an injury report. This report, on employer's form, was introduced by appellant and reflected that Mr. P first knew of the injury on June 7, 1991. Mr. P said he had to call claimant to get the information for that report. Claimant also introduced a memorandum dated June 10, 1991, from Mr. P to his supervisor, Mr. Davis (Mr. D), stating that claimant informed Mr. P on June 7th that he had injured his knee in January going to work and that Mr. P did not recall the occurrence of that injury. Claimant testified that he worked until June 12th and that Mr. P had called him around that time. Mr. P stated he knew right after claimant was hired that he had some knee problems and, before January 1991, he had to assign another building engineer, Bryan Burcie, to some jobs with claimant to climb the ladders. He also testified that claimant discussed with both he and Mr. D the best time to take off for the knee surgery.

Claimant testified at one point that he did not recall approaching Mr. D and telling him he fell on (date of injury), but said Mr. D became aware of his knee problem on January 11th and later asked about his knee after the surgery. At another point, claimant testified that about two weeks before his February 15th surgery he did tell Mr. D about his knee soreness being due to his fall. According to the transcript of a telephone interview with Mr. D, employer's manager of construction, claimant complained of pain when going up and down ladders in December 1990, and said he was going to see a doctor. Mr. D asked him if he could postpone surgery until the new building was opened and claimant agreed. Mr. D's statement said that claimant never told him of a slip and fall injury.

Claimant stated that he filed a claim for the February 15th surgery with employer's group health insurance carrier (SANUS/NYLIC) because he had understood from Mr. P's comments that his injury was not covered by workers' compensation insurance. He also testified that a lady in employer's personnel office advised him sometime between (date) and (date) that employer was not treating his knee problem as a workers' compensation matter. Claimant conceded that on a form sent to SANUS/NYLIC he responded "no" to the question "is condition related to employment," but explained that he derived that understanding from Mr. P's comment. According to claimant, SANUS/ NYLIC denied his claim contending he had a work-related injury, and eventually his personal medical insurance carrier paid the bills. He said he became aware he needed to file a workers' compensation claim when SANUS/NYLIC refused his claim and that is when he initiated the claim. In June, claimant discovered that Dr. R's records contained no mention of his fall and on June 25th he went to Dr. R's office to try to "refresh his memory" and requested that his records be annotated to reflect that history. Dr. R's record of that visit stated that claimant "came in the office today upset about the medical records in that they did not show his date of injury was (date of injury) and he would like me to put this in the medical records. Apparently this was a fall as per his recollection."

We find the evidence sufficient to support the hearing officer's findings that claimant did not slip and fall on the ice while walking to his assigned work location on (date of injury),

and that he did not inform his supervisors of such claimed injury until June 7, 1991. The evidence is also sufficient to support all but one of the other challenged findings. These findings are sufficient to support the two challenged legal conclusions. Claimant's testimony about his apparently unwitnessed slip and fall incident was not directly controverted. However, in reaching his finding that claimant did not slip and fall on the ice as he contended, the hearing officer could consider all the other evidence including the abundant evidence of claimant's prior knee problems, the difficulties claimant had previously manifested at work, the absence of any mention of the slip and fall incident in Dr. R's records, particularly that of January 10th, claimant's efforts in June to get those records corrected, the reference in the January 10th record to claimant's "continuing problems" with his knee, and Mr. P's testimony that claimant never mentioned any such incident to him until their discussion in June.

Similarly regarding claimant's testimony that he did notify Mr. P of his injury on (date of injury) and again on (date) and (date), the hearing officer was free to believe Mr. P's testimony to the contrary, as well as Mr. P's memorandum of June 10, 1991.

Article 8308-6.34(e) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of the weight and credibility it is to be given. Claimant had the burden to prove by a preponderance of the evidence that he sustained an injury in the course and scope of his employment and that he notified employer of his injury not later than the 30th day after the injury occurred, as required by Article 8308-5.01(a). Texas Workers' Compensation Commission Appeal No. 92411, decided September 28, 1992. The hearing officer may believe all, part, or none of the testimony of any one witness, including claimant, and may give credence to testimony even where there are some discrepancies. Taylor v. Lewis, 553 S.W. 2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). As the trier of fact, it was for the hearing officer to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W. 2d 701 (Tex. Civ. App.-Amarillo 1974, no writ.). We will not substitute our judgment for that of the hearing officer where the findings

are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ).

We agree with claimant that the hearing officer erred in admitting over objection the unsigned, unsworn, typewritten transcript of what purports to be a telephone interview of Mr. D on June 24, 1991. Carrier objected on the grounds of hearsay and lack of authentication noting that not even the person ostensibly conducting the interview verified the accuracy of the transcript. The hearing officer recognized the document was not signed but nonetheless admitted it stating that "under our informal rules we are constrained to receive into evidence almost anything that has any relation or materiality with regard to any of the issues at hand." He went on to say he would not be able to give the document much weight, however. In Texas Workers' Compensation Commission Appeal No. 91021, decided September 25, 1991, we considered an appealed issue concerning the hearing officer's admission of several signed but unsworn written statements of employees and noted that

pursuant to Article 8308-6.34(e), contested case hearings are not bound by formal rules of evidence. We went on to note that Article 8308-6.34(e) also provides that the hearing officer may accept written statements signed by a witness, and we further observed that while Rule 142.8 provides for the use of summary procedures, including sworn witness statements, it did not limit the provisions of Article 8308-6.34(e). While we determined that admitting those unsworn statements was within the hearing officer's discretion, our review of his decision indicated he did not give weight to nor predicate his decision upon them. In Texas Workers' Compensation Commission Appeal No. 92319, decided August 26, 1992, though not called upon to decide an appealed issue on the matter, we expressed our concern with the admission of a purported transcript of a telephone interview of a coworker not signed by either the interviewer or interviewee. We noted that Article 8308-6.34(a)(5) provides that the hearing officer shall allow the presentation of evidence by affidavit; that Article 8308-6.34(b) permits the hearing officer to use summary procedures, "including witness statements;" and, that Article 8308-6.34(e) provides that the hearing officer may accept written statements signed by a witness. We said that a hearing officer is on firm ground in refusing to admit unsigned witness statements, even when using summary procedures. Notwithstanding that conformity to the legal rules of evidence is unnecessary in contested case hearings, the obvious problem with the particular exhibit objected to in this case--an unsigned, unsworn, typewritten transcript not self-authenticating under traditional rules of evidence--is the absence of any indicia of authenticity or identification; that is, that the document is what its proponent claims it is. No witness testified to its authenticity nor was there any other extrinsic evidence of its authenticity. We do not read other references to "witness statements" in the 1989 Act as inconsistent or in conflict with the reference in Article 8308-6.34(e) authorizing the acceptance of signed witness statements.

Although we find error in the admission of this document, such error was not reversible. Not only did the hearing officer state he couldn't give it much weight, but it is apparent from our review of the record that the exhibit was not pivotal to the outcome of the case nor did its admission probably result in an improper decision. *See* Texas Workers' Compensation Commission Appeal No. 92409, decided September 25, 1992. The hearing officer did state in Finding of Fact No. 6 that "as a result of the continued deterioration of his right knee, the Claimant determined to return to Dr. R for further evaluation after January 1, 1991." While support for this finding can be found, inferentially, in the testimony of Mr. P and in Dr. R's records, the primary evidence for this finding was found in the unsigned telephone interview transcript of Mr. D. When disregarding that document as well as Finding of Fact No. 6, we nonetheless find the evidence sufficient to support the remaining challenged findings and the two challenged conclusions. They 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.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge