APPEAL NO. 92501

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On August 18, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He found that respondent, claimant herein, had a compensable heart attack and that the appellant, carrier herein, did not properly raise the issue of notice. Carrier asserts that the heart attack was not compensable and that since it raised the question of notice at the benefit review conference (BRC), the hearing officer should have addressed it as an issue at the hearing.

DECISION

Finding that the conclusion of law that claimant suffered a heart attack in the course and scope of employment is supported by sufficient evidence, we affirm that portion of the decision. We reverse and remand based on the determination that no good cause was shown for seeking to add an issue.

Claimant is a truck driver who worked for a (employer) from March 1991 to (date), when hospitalized after having a heart attack. Claimant is 56 years old and has a history of smoking cigarettes, but according to his family physician, Dr. C, has, "(n)o history of chest pain/hypertension/etc. No treatment for any heart related complaints in this office." He is 5'9" tall and weighs 180 pounds.

On (date of injury), claimant testified he arrived at the truck yard where he worked at 6:30 a.m. After making a trip, he was told by his dispatcher to change trailers in (city), which he began to do at 11:00. To change trailers, he had to free a pin that held the truck and trailer together and pull the "fifth wheel" down. He stated that the fifth wheel on this rig was "semi-froze." "You had to get up on the tires, get both hands on it, and put everything you had into it." But he said that on (date of injury) it didn't even work that easily. It took him two hours and 15 minutes to change trailers when it normally took 10 to 15 minutes. He described crawling under the truck and jerking and lifting and pulling to try to free the fifth wheel during that period of time. During that time he vomited, but did not have chest pains like those he had the next day when he went to the hospital. His shoulders and arms did feel weak though, and he had trouble breathing, describing this as a tightness in his chest or a smothering feeling. "I had to sit down and rest a while before I could get my feeling back." He did not go to the doctor that day, but called his wife to meet him and drive him home. That night he complained twice of a tightness in his chest. The next day he felt better and went to work. When he got to his truck, he could see that it had a fuel leak. He was told it was drivable and went to (city) to get loaded. He then drove to a garage near (city) at about 1:30 p.m. where the truck could be repaired. As the truck was being worked on, he got sick, vomiting twice. When the truck was ready, the cashier he paid said that he did not look good, and claimant remarked that his chest hurt. He drove to a drugstore and got Maalox, thinking it might be a reoccurrence of a hiatal hernia he had previously experienced. After he drank some Maalox, he again vomited. He drove to (city) and at a

truck stop had a lady there call EMS. He had severe chest pain. At this time he was taken to a hospital in (city) where he was diagnosed as having had a myocardial infarction.

The carrier pointed out through claimant's two telephone statements, to which there was no objection even though neither was signed, that claimant did not say he had chest pain on (date of injury). On one dated April 14, 1992, claimant said, "(a)lright when I went down to change trailers, one thing we have a fifth wheel on the truck that does not pull right, the lever on it is very hard to pull and I strained on that thing for about well all total I worked about two hours, I finally got out from under the trailer I was tied to, got under the other one and the brakes were locked on it, I worked about two hours trying to get the brakes freed up and then finally changed trailers back again and that made me sick, now it did not cause me chest pains, I did not have severe chest pains but I was sick and I messed around a little bit and got to feeling better;" then on April 17, 1992, claimant said, "(s)ick at my stomach, I just got sick at my stomach, like I said the other day I did not have the chest pain, I got sick at my stomach and I couldn't breathe, my breathing wasn't coming well and I sat down, this took about two hours, two hours and a half." The carrier also pointed out that claimant's original claim stated (date) as the day of the attack. That was subsequently amended to (date of injury).

His physician in the hospital was a cardiologist, Dr. L. Claimant testified that Dr. L told him that (date of injury) was the day he had his heart attack, when he had the weakness in his shoulders. In the discharge summary, Dr. L describes only the pain that caused claimant to be taken to the hospital on (date). He notes that claimant received thrombolytic agents which may have restricted the damage done by the infarction. Before he was released, claimant was catherized which found a 50 percent obstruction of the right coronary artery and 90 percent obstruction of the left anterior descending artery. Angioplasty reduced the latter to a 10-15 percent obstruction. No preexisting heart condition or disease, other than the reference to the above obstructions was mentioned in the summary, but one risk factor for a heart attack, smoking, was described as long and heavy. On June 22, 1992, Dr. L provided a statement in the form of a letter which referred to onset of symptoms while trying to release the fifth wheel on his truck. He adds that claimant ignored the pain in his shoulders and arms at that time, but was hospitalized when his pain became severe. While this doctor does not use the words of the 1989 Act regarding medical evidence criteria, he does take into account both the underlying condition and the work preceding onset when he says, "(a)lthough it is true that his work did not cause build-up of fat and cholesterol in his coronary arteries, the severe physical exertion he was doing at the time of onset was undoubtedly the precipitating factor to his myocardial infarction."

The carrier introduced one statement from an internal medicine physician, Dr. J, who summarized the facts with emphasis on the events of (date) as shown in the history in the discharge summary rather than the labor of (date of injury). He concluded that the myocardial infarction occurred on (date). He then said "(i)n all probability, the course of events the day of the myocardial infarction simply represent the natural progression of preexisting coronary atherosclerosis as it is described in the attached review articles."

(emphasis added)

In regard to the issue of heart attack, appellant only asserts error, in findings of fact, in regard to the day it occurred and the basis for it. The findings of fact in question are 4 and 5, which read as follows:

Claimant suffered a heart attack on (date of injury) while attempting to free the semi-frozen fifth wheel.

Claimant's heart attack on (date of injury) was caused by the extreme physical exertion expended in attempting to free the fifth wheel.

Both of these findings relate to the requirement found in Article 8308-4.15(1) of the 1989 Act. That subsection does not limit the hearing officer's consideration of evidence only to medical evidence as does subsection 4.15(2). As a result, the hearing officer could weigh both the evidence provided by claimant in his testimony and prior telephone statements plus all documents of Dr. L, along with the opinion of Dr. J, who thought the attack occurred on (date). In addition to the hearsay testimony of claimant that Dr. L told him the heart attack occurred when he had the pain in his shoulders ((date of injury)), the hearing officer could base his determination that the attack came on (date of injury) in large part on Dr. L's Letter of June 22nd which referred to "onset of symptoms" on (date of injury). Dorland's Illustrated Medical Dictionary, twenty-sixth edition, states that a "symptom" is "any subjective evidence of disease or of a patient's condition." Claimant's testimony of the abnormal exertion put forth on (date of injury) and the results thereof was not in conflict with his prior statements of sickness, breathing, and weakness problems.

Appellant also takes issue with the hearing officer's conclusion of law that states:

On (date of injury) Claimant suffered a compensable heart attack while acting within the course and scope of his employment because the attack was caused by his extreme physical exertion in attempting to free the semi-frozen fifth wheel; the preponderance of the medical evidence regarding the attack indicates that Claimant's work, rather than the natural progression of Claimant's pre-existing heart condition or disease, was a substantial contributing factor of the attack; and the heart attack was not triggered solely by emotional or mental stress.

It is apparent that the hearing officer has applied the three criteria set forth in Article 8308-4.15 of the 1989 Act and has made a determination that correctly addressed each standard.

The first of the three criteria was discussed previously in light of assertions of error in Findings of Fact Nos. 4 and 5. Those findings were sufficiently supported by the evidence and support the conclusion as to causation. The last of the three criteria addresses stress, but the appellant did not assert error in the hearing officer's Finding of Fact No. 9 which said

that the heart attack was not triggered by emotional or mental stress. With no dispute as to this criterion, it needs no discussion. The second criterion is specific in setting forth that "the preponderance of the medical evidence regarding the attack indicates that the employee's work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack;". Appellant did not assert error in regard to the finding of the hearing officer that Dr. L considered the claimant's work to be the precipitating factor.

The second criterion is comparable to both the first and third in that all set forth criteria for the trier of fact to address in making a determination. This criterion does two things: it limits the hearing officer to considering the preponderance of medical evidence and from this, the officer must decide whether the work, rather than the natural progression of a disease or condition, was a substantial factor. It does not require that the medical evidence must be in the form of a statement from a medical doctor using the words of Article 8308-4.15(2) of the 1989 Act to recite, not just indicate, that "work rather than the natural progression . . ." is a substantial factor. This comparison was described in Texas Workers' Compensation Commission Appeal No. 91009, dated September 4, 1991, which said "(w)hile we do not hold that the 1989 Act places a burden on a claimant of proving the negative, that is that a preexisting heart condition was not a substantial contributing factor, such preexisting condition must be weighed or compared with the employee's work preceding the attack." Thereafter in Texas Workers' Compensation Commission Appeal No 91046, dated December 2, 1991, the majority said that the only things to be weighed in Article 8308-4.15(2) are "employee's work" and "natural progression of a preexisting heart condition or disease," not just preexisting heart condition. Risk factors for heart disease, such as family history, gender, smoking, cholesterol count, and hypertension were noted as not being a part of that equation. Some could contribute to a preexisting heart condition or disease, but they did not, per se, equate to a preexisting heart condition or disease. That opinion also noted that the 1989 Act did not define "substantial" and so looked to Skyview Cooling Co. v. Indus. Comm'n of Arizona, 691 P.2d 320 (Ariz. App. 1984) which was cited in Appeal 91009, *supra*. That opinion defined substantial as meaning "more than insubstantial or slight."

Appeal No 91046, *supra*, also is helpful in regard to the facts of this case since it too dealt with a doctor's opinion that heavy work was "the precipitating factor" in a heart attack. In upholding the hearing officer's determination of compensability, that opinion said the medical evidence, in using that language, could be viewed as ruling out any other "substantial contributing factor." In the case before us, Dr. L uses the same language, "the precipitating factor" (emphasis added), and reaches that conclusion after first considering that there was damage to the coronary arteries. Dr. L's statement contained sufficient medical evidence on which the hearing officer could base his conclusion that the work, rather than the natural progression of Claimant's preexisting heart condition or disease, was a substantial contributing factor of the attack. The hearing officer could choose to weigh Dr. L's evidence, as a treating doctor and as a cardiologist, more than that of Dr. J, who did not treat the claimant and was not indicated to be a cardiologist. The hearing officer's

conclusion of law, previously quoted, is sufficiently supported by the evidence, including the medical evidence where required.

The carrier also asserts that the hearing officer erred in not considering as an issue the question of whether claimant gave timely notice of a work-related injury. The carrier presented an affidavit that indicated the BRC was held in two stages. At the first, the carrier raised the issues of compensability of the heart attack and whether timely notice was given to the employer. The second BRC was held to consider medical evidence the claimant did not have at the first. Claimant agreed that the parties discussed whether adequate notice was given of a work related injury at the first BRC. Claimant also said that the "referee" at the BRC agreed with him that notice was given. He added in his response to carrier's appeal that the carrier raised the issue of notice, but he said that the carrier did not pursue it as an important point. The benefit review officer, after the second conference, issued an interlocutory order to pay benefits and only reported the issue of compensability of the heart attack. The report of the benefit review officer was issued on July 8, 1992, through the Division of Hearings and Review and called for a contested case hearing on August 18, 1992. A letter requesting that the issue of notice be considered was dated August 14, 1992. That letter pointed out that the issue of timely notice had been raised at the BRC and stated that it therefore should be considered as an issue at the hearing. The hearing officer held that the request was not received at least 15 days before the hearing [*See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7), which addresses additional disputes that were "not identified as unresolved in the benefit review officer's report."] and that the carrier did not show good cause for not providing the issue sooner. (We note that, at best, the carrier could be inferred to argue good cause through its evidence that an issue had been raised at one point in the BRC.) Since the hearing officer deferred his decision (that notice of injury was not an issue because it was raised too late) until after the hearing, the carrier was not given the opportunity to offer evidence of good cause for delay. On the other hand, the carrier did not object to the hearing officer's statement that evidence of notice would be taken but that he would not decide at that time whether there was an issue as to notice of injury.

The decision of the hearing officer that good cause was not shown is unreasonable in this case when no opportunity was given the carrier to present evidence as to why it did not comply with the requirements of Rule 142.7. In remanding for the hearing officer to consider evidence of good cause, we note that an argument was made by the carrier that the notice of injury issue, raised at the BRC, is not an "additional" issue; as such, no good cause would need to be shown for requesting that it be "added" at least 15 days before the contested case hearing. If the hearing officer had made a decision to include the issue of notice under this theory, "good cause" would not be a factor. As stated, Rule 142.7 is written to provide for additions to "disputes not identified as unresolved in the benefit review officer's report." The thrust of that rule is not to consider whether the benefit review officer should or should not have included an issue; rather it is ministerial--if an issue is not there, it needs to be added. In this case, there was no understanding by both parties that a notice of injury issue would be litigated at the contested case hearing. The claimant, in admitting

that the issue was raised, thought it had been dispensed with since the "referee" agreed with him, regardless of the fact that the benefit review officer's decision making powers are limited to matters such as interlocutory orders. This misconception of the *pro se* claimant reinforces the need for a rule such as Rule 142.7(e) that says the issue is either listed or it must be added. In saying that this notice of injury issue is subject to Rule 142.7 and its good cause provision, we do not imply that the BRC discussion of the issue (as referred to by carrier's affidavit, claimant's testimony, and claimant's response to the carrier's appeal, as stated previously) is not relevant to the question of whether good cause is shown for seeking to add it as an issue. We note that if the hearing officer determines that good cause exists and the issue of notice of injury is before him, he can ask for additional evidence, under Rule 142.2 (10, 12, and 14) as to whether employer had actual knowledge of the job-related aspect of the injury when it was told to pick up the truck claimant was driving at a truck stop and then learned the condition of the truck as to its load, manifest, and recent repairs. *See* Article 8308-5.02(1), 1989 Act. In addition the hearing officer could consider claimant's statement in carrier's exhibit 7 that he told JS over the telephone that he had a heart attack when he was driving the truck. Either or both parties should be able to clarify whether JS is in management or holds a supervisory position, and, if needed in addition to evidence of record, should be able to testify when the telephone call took place. *See* Article 8308-5.01, 1989 Act. We note also that the appeals panel has said that the notice of injury should relate the injury to the work, not that the notice needs to say the work caused the injury. *See* Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991, and Texas Employers' Ins. Ass'n v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied).

The decision and order are affirmed in regard to the determination that the heart attack was suffered in the course and scope of employment, but reversed and remanded to develop the evidence as to whether the carrier could show good cause for adding the issue of notice of injury. If good cause is found, a determination of whether notice of injury was effected under the criteria of Article 8308-5.01 and 5.02 must also be made to determine whether benefits are due.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge