

APPEAL NO. 92634
FILED JANUARY 14, 1993

On September 30, 1992, a contested case hearing was held in Austin, Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the appellant, claimant herein, is not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). Claimant appealed contending the hearing officer misapplied the law and requests we reverse the hearing officer's decision and render a decision finding the claimant's injury is compensable under the Act. The carrier filed a response and requests we affirm the hearing officer's decision.

DECISION

The decision of the hearing officer is affirmed.

The facts are not so much in dispute, but rather the interpretation and inferences drawn from them. It is undisputed that claimant began working for (employer) Austin (TX employer) on December 9, 1990. Claimant worked for the TX employer until January 7, 1991, when his wife in (spouse) became ill. Claimant wanted to go to Florida and after inquiring about a job opportunity in Florida, he was told he could call and see if there was a vacancy in the (city), Florida store. Claimant was able to obtain employment with (employer) in (city), Florida (FL employer) beginning February 1, 1991. The hearing officer found, and is supported by the evidence, that there was no connection between the TX employer and the FL employer other than they were both grocery stores in the same chain. On (date of injury) claimant was injured in a fall on FL employer's premises. Claimant reported the fall and injuries to his left shoulder and back to the FL employer.

The hearing officer found, and is supported by the evidence, that although the FL employer used a form that referred to a "transfer," it was clear that the job change was at the instance of claimant and for his convenience, with neither the TX employer or the FL employer initiating any action to request or encourage a move by claimant from one store to the other.

Claimant filed a Florida workers' compensation notice of injury and received medical care and medical benefits in Florida under the Florida Workers' Compensation system which allows the carrier/employer to choose the health care provider. The claimant missed no time from work. Claimant continued to live in Florida although expressing some intention to return to Texas at some time. The ex-husband of claimant's wife objected to the removal of his son from Florida to Texas and the claimant decided to stay in Florida. Claimant continued to live and work in Florida, even after his divorce in September 1991. Claimant moved back to Texas in January 1992. Claimant went to see a chiropractor in Austin, Texas and testified that he apparently received some sort of verbal approval for medical care from the servicing agent for the FL employer. The hearing officer found, and is supported by the evidence, that further care would apparently result in a delay of six weeks

for approval, and claimant did not wish to wait that long. Claimant's testimony was that there was a dispute with the servicing agent and claimant did not request additional medical care through the servicing agent. On January 22, 1992, claimant filed a TWCC-1 with the Texas Workers' Compensation Commission (Commission) to report the (date of injury) injury in Florida.

The issues framed at the benefit review conference and the contested case hearing (CCH) were:

- a. is the injury the claimant sustained on (date of injury), during the course and scope of employment with (employer) in (city), Florida, compensable under the Texas Workers' Compensation Act; and,
- b. if so, had the Claimant made an election to receive workers' compensation benefits under the laws of Florida, thereby barring his recovery under the Texas Workers' Compensation act as contemplated in article 8308-3.19 of the Act?

The claimant's position is that the move to Florida was a "transfer" citing the employee status report (Claimant's Exhibit 3) which refers to a "transfer" and the "Anniversary Date" letter (Claimant's Exhibit 5) as authority that the FL employer considered the original December 9, 1990 date as the hire date and listed the move to Florida as a transfer. Claimant is not asking for any benefits other than having the Texas medical bills paid.

No evidence or testimony was introduced whether the two stores were separate legal entities, or if not, whether the parent corporation provided direction or control on hiring and transfers. From the evidence it would appear that (employer) was treated as the employer with the two locations in Texas and Florida, being two of many sites where (employer) did business. It is unknown what, if any, joint hiring, personnel or other policies the two stores or any possible corporate headquarters had. It is clear that the TX employer had a workers' compensation carrier while the FL employer was self-insured under Florida law.

As noted previously, the hearing officer found the (date of injury) injury was not compensable under the Act, and claimant is not entitled to benefits. Claimant appealed disputing Findings of Fact Nos. 1, 9, 10, 17, 18, 19, 20, and Conclusion of Law No. 2.

At issue is the interpretation of Articles 8308-3.14 and 3.15. These provisions state:

Art. 8308-3.14. Extraterritorial coverage

If an employee, while working in a foreign jurisdiction, suffers an injury that would be compensable had it occurred within this state, the employee or the

employee's legal beneficiary is entitled to all rights and remedies under this Act if:

- (1) the employee has had significant contacts with this state; or
- (2) the employment was principally located in this state.

Art 8308-3.15. Significant contacts

An employee has significant contact with this state if the employee was hired or recruited in this state and the employee:

- (1) was injured not later than one year after the date of hire; or
- (2) has worked in this state for at least 10 working days during the 12-month period preceding the date of injury.

Claimant asserts he has met all the requirements of these sections.

There are no court cases, Commission rules or appeals panel decisions which interpret the above cited sections of the 1989 Act. Evidence and testimony which indicates this to be a Florida case includes: claimant made his own contact with the Florida store; claimant's Florida work application listed a Florida address; the FL employer categorized claimant as "rehire;" claimant's Florida notice of injury gave a Florida address; benefits were paid by the FL employer/self-insured; and claimant continued to live and work in Florida after his September 1991 divorce.

Because the employment was not principally located in Texas, the key point in Articles 8308-3.14 and 3.15 is whether claimant had "significant contacts" in Texas. The prior statute on this point is Article 8306, § 19, which states "[i]f an employee, who has been hired in this State sustain injury in the course of his employment he shall be entitled to compensation according to the Law of this State even though such injury was received outside of the State, and that such employee . . . shall be entitled to the same rights and remedies as if injured within the State of Texas." Commenting on this section of the prior statute, Southers and Koriath, Texas Workers' Compensation Desk Book, p. 33 states "[o]bviously, the purpose of the extraterritorial provision is the protection of transient workers temporarily out of the state and whose employment is periodically outside of the state." As with the current law, the prior law "coverage of a Texas employee for an out-of-state injury required hiring and some work or intention of work in Texas before the out-of-state injury occurred." Citing TEIA v. Dossey, 402 S.W.2d 153 (Tex. Sup. 1966). Dossey, supra, held "[a]n employee has the status of a Texas employee when he has been hired in this state to work in this state and in another state as the circumstances of his employer may require." There are several other cases involving extraterritorial jurisdiction under the prior law with all having a common thread that the employee was hired in Texas and worked in Texas before being sent to work out of the state at the employers request. See Hale v. Texas Employers Insurance Association, 239 S.W.2d 608 (Tex. 1951).

However, in American States Insurance Company v. Garza, 657 S.W.2d 522, (Tex. Civ. App.-Corpus Christi 1983, no writ), the court in applying the 1977 amendment to the extraterritorial provision in the statute held that an employee may occupy the status of a "Texas employee" even though he never worked in Texas, "so long as he was hired here, and it was contemplated that he would perform work here under the contract." Claimant in enunciating his position at the CCH cited Texas Employers Insurance Association v. Miller, 370 S.W.2d 12 (Tex. Civ. App.-Texarkana 1963, writ ref'd n.r.e.) as an election of remedies authority. Because it involved the extraterritorial provision of the prior Texas Workers' Compensation Act, we note it states, "[t]he extraterritorial provision of the Texas Workmen's Compensation Act is mainly to protect Texas employees temporarily out of the State of Texas, whose employment takes them periodically out of the State." That proposition would tend to contradict claimant's position on the extraterritorial portion of his claim.

The hearing officer found, and is supported by sufficient evidence, that claimant in the instant case went to Florida, not because of his employment, but for claimant's personal convenience. All of these cases, and others not cited, stand for the proposition that to be considered a Texas employee under the prior law, one must have been hired in Texas and would be periodically working outside Texas in the course and scope of his employment.

Article 8308-3.14, quoted above, requires "significant contacts with this state" which as defined in section 3.15, requires the employee to be hired or recruited in this state. There is no evidence in this case that FL employer hired or recruited the claimant in Texas or that the TX employer hired or recruited claimant to work in Florida. The undisputed facts in the instant case do not fall into these parameters. The hearing officer found that the claimant's change in jobs was at the request of the claimant and for his convenience only, with neither store initiating any action to request or encourage a move by claimant from one store to the other. Claimant, in asking about employment with the FL employer, was told by the TX employer to see if the FL employer had a vacancy, which it apparently did because claimant was eventually hired there. Based on the testimony and evidence, the hearing officer clearly found that the claimant had accepted employment with the FL employer purely for personal reasons rather than any furtherance of the employers' business. The evidence shows the TX employer and the FL employer had different workers' compensation coverage, and the hearing officer found "[t]here was no connection between what the Employer corporation was doing in Texas and what it was doing in Florida, except that in both states it was selling groceries."

Claimant disputes Finding of Fact 1, that the hearing was not held with 75 miles of claimant's "residence" at the time of injury. Claimant alleges ". . . at all times he was a resident of Texas. . ." Claimant is confusing the concept of domicile (Black's Law Dictionary, Sixth Edition, "a person's legal home") with residence, the "place where one actually lives" (Black's Law Dictionary, Sixth Edition). Article 8308-6.03 in requiring a hearing within "75 miles from the claimant's residence at the time of the injury" clearly was

referring to where the claimant was actually living rather than where the claimant was legally domiciled. The hearing officer, in saying that the hearing was being held more than 75 miles from where claimant was actually residing in (city), Florida at the time of the injury, was factually and legally correct.

Claimant disputes Finding of Fact No. 9 which states there was no connection between what the employer corporation was doing in Texas and what it was doing in Florida. If there are two separate employers, the TX employer and the FL employer, clearly there is no connection. If (employer) is treated as one employer doing business at different locations, then the hearing officer found that employer did not recruit or hire claimant in Texas to work at its Florida location. The hearing officer's finding is supported by the evidence.

Claimant disputed the hearing officer's Finding of Fact No. 10 that claimant's work in Florida was not temporary or incidental to claimant's work in Texas. Claimant disputes this by saying "[t]he only evidence was that the work in Florida was considered at all times to be temporary, due to problems being experienced by [claimant's] then spouse." The hearing officer, as the trier of fact, and sole judge of the weight and credibility of the evidence (Article 8308-6.34(e)) could, and obviously did, find that claimant stayed in Florida after claimant's then wife was no longer ill and even after claimant was divorced. The hearing officer's finding that the Florida work was not temporary or incidental to claimant's work in Texas is supported by the evidence.

Claimant disputes Finding of Fact No. 17 that "[c]laimant did not occupy the status of a Texas employee at the time of his injury" to be both factually incorrect and actually a conclusion of law. The hearing officer as the sole judge of the weight and credibility of the evidence could make this finding based on the claimant's Florida notice of injury, Florida address, acceptance of Florida benefits and claimant's own contact with the FL employer. Claimant is correct that this finding is actually a mixed finding of fact/conclusion of law. However, even if this constituted error, the finding was not reasonably calculated to cause, and probably did not cause, rendition of an improper decision. See Texas Workers' Compensation Commission Appeal No. 91074, decided December 30, 1991, citing Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). The hearing officer's finding was consistent with the evidence and used the language of cited cases under the prior law.

Claimant objects to Finding of Fact 18, which holds that claimant was not hired within Texas and sent to Florida incidentally or temporarily, without specifying any reason. The hearing officer is supported by the evidence regarding reasons for claimant's move to Florida in his finding on this point.

Claimant objects to Finding of Fact No. 19, which finds that "claimant cannot claim protection under the Worker's Compensation Act just because the contract was made or entered into in Texas" on the basis it is a conclusion of law. Claimant is correct, but as stated previously, this miscategorization of a conclusion of law as a finding of fact did not cause the rendition of an improper decision and therefore is harmless error. Hernandez v. Hernandez, *supra*.

Claimant objects to Finding of Fact No. 20 which states claimant left his Texas job voluntarily. This finding is certainly supported by the claimant's own testimony and the evidence.

Claimant objects to Conclusion of Law No. 2 alleging claimant's "injury is compensable under Sections 3.14 and 3.15 of the 1989 Act. We have previously discussed the extraterritorial coverage of the 1989 Act as set forth in Articles 8308-3.14 and 3.15 and determine that the hearing officer's decision is supported by the facts and law.

The claimant observes that the hearing officer made no findings on election of remedies, but does not assert error. We agree with the carrier's position that the hearing officer need not make such a finding, because his decision on the basis that this claim is not cognizable under the 1989 Act is dispositive and the matter is moot. However, because the issue was framed at the CCH, even though moot, we would note some relevant points regarding election of remedies.

The governing section of the 1989 Act is Article 8308-3.19 which states:

Art. 3808-3.19. Effect of compensation paid in other jurisdictions

- (a) An injured employee who elects to pursue the employee's remedy and recovers compensation under the workers' compensation laws of another jurisdiction is barred from recovering under this Act.
- (b) The amount of benefits accepted under the laws of the other jurisdiction without an election under Subsection (a) shall be credited against the compensation that the employee would have received had the claim been made under this Act.

It is undisputed that claimant filed a claim in Florida and recovered medical benefits under the Florida Worker's Compensation Law. Under Article 8308-1.03(11) of the 1989 Act "Compensation' means payment of medical benefits . . ." The issue under Article 8306-3.19 becomes whether claimant made "an election under Subsection (a)." If not, the benefits received in Florida would "be credited against compensation" that claimant would receive under the Texas 1989 Act. In Texas Workers' Compensation Commission Appeal No. 92273, decided August 17, 1992, citing Bocanegra v. Aetna Life Insurance Co., 605 S.W.2d 848, (Tex. 1980), a workers' compensation case, which dealt with a different issue, but discussed the test for election of remedies, held:

The election doctrine . . . may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of facts (3) which are so inconsistent as to (4) constitute manifest injustice. *Id.* at 851.

We believe this to be an appropriate test for the election of remedies. Texas Employers Insurance Association v. Miller, *supra*, cited by claimant in support of his position on the election of remedies issue is some authority for the instant case. In Miller, *supra*, the court held "[t]he doctrine of election of remedies is not a favorite of equity, and it has been said '[i]t is a harsh, and now largely obsolete rule, the scope of which should not be extended'." The court in Miller distinguished a previous ruling in James v. Texas Employers Ins. Ass'n., 98 S.W.2d 425 (Tex. Civ. App.-Eastland, 1936) where James had elected to claim compensation under Pennsylvania law ". . . and settled in full . . . and in compliance with, the laws of that State." In those cases supporting an election of remedies, the courts apparently place great reliance on filing a claim in the foreign jurisdiction and settling that claim. A more recent case is Wasson v. Stracener, 786 S.W.2d 414 (Tex. App.-Texarkana, 1990, writ denied), which held "[t]he doctrine of election of remedies is not looked upon with favor by the court when it results in harsh consequences and generally Texas courts do not favor its extension." *Id* at 417. The court further held:

The doctrine of election of remedies is conditioned on the existence of two valid, available, and inconsistent remedies, and a mistaken belief that a party has a particular remedy and his efforts to enforce it is immaterial and does not constitute an election unless the remedy in fact existed. (Citations omitted)

The acceptance of medical benefits in Florida is not inconsistent with the acceptance of further medical benefits in Texas, particularly so where Section 3.19(b) provides for a credit against compensation that the employee would have received under the 1989 Act. The purpose of the doctrine is to prevent a party who has obtained a specific form of remedy from obtaining a different and inconsistent remedy for the same wrong. Using this test it would appear that there was no election of remedies in the instant case.

The decision and order of the hearing officer are thus affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge