APPEAL NO. 93120

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. 1993). On October 8, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant in this opinion) was not injured in the course of his employment but that appellant (carrier in this opinion) waived its right to dispute the claim by doing so untimely. Claimant appealed the determination that he was not injured in the course and scope as being against the great weight of the evidence. Carrier appealed the determination that it had waived its ability to dispute stating that the 1989 Act and rules of the Commission require that the time period for disputing compensability begins upon written notice of injury.

DECISION

The decision is reversed in part and affirmed in part.

Claimant drove a delivery vehicle for a food service employer. He had worked for the employer for approximately two months at the time of the alleged injury, and he had worked for the same employer for approximately one year before this employment. Claimant testified that on (date of injury), while delivering food products to (restaurant), he slipped while pulling a dolly loaded with chicken up a ramp. The chicken weighed approximately 200 pounds. While claimant was consistent in saying he was pulling the chicken up the ramp when he fell, he also said repeatedly that the dolly landed on top of him. He added that he told an employee of the restaurant of the fall and that person helped him finish the delivery. He said that he and his wife (acting as his interpreter) went back to the restaurant on a later date to try to find out who the employee was that helped him. He said that he told his supervisor, (Mr P) the day of the accident and also told some other workers; he did not go back to work after (date of injury). He went to (Dr. A) on March 5, 1992; he has not worked since the accident; he cannot work now.

There was no issue in regard to timely notification by the claimant to the employer. Claimant was making the delivery in question alone, so there was no other employee of the employer who could have witnessed the incident. While an unwitnessed accident may be compensable (*see* T.E.I.A. v. Page, 553 S.W.2d 98 (Tex. 1977) which affirmed that even an idiopathic fall can be compensable and that claimant's own testimony of the fall creates a fact issue as to the injury), the testimony of the claimant does not have to be accepted since he is an interested witness. *See* Presley v. Royal Indem. Ins. Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). In this case claimant testified that an employee of the restaurant was told immediately and helped him, yet no employee so testified or provided a written statement to that effect. The owner of the restaurant testified consistently with the written statement of his brother, no longer a resident of Dallas, who indicated that he signed the invoice for the delivery in question, that no one was told of the accident at the time alleged, that no one helped the claimant, and that no one saw an accident. The owner of the restaurant also testified that claimant, through his wife, at a later date came to the

restaurant and said that the problem was not the restaurant's and told him to "just say yes" in regard to having knowledge of the accident. He also said that he asked, "do you want me to lie?," to which the reply was that "it was nothing, not your liability" or words to that effect. (Mr W), the employer, testified that claimant did work all day the next day, March 3, 1992. The chiropractor who has treated claimant, Dr. A, indicates in his chiropractic records that claimant related to him a history of falling on the job on (date of injury). Dr. A diagnosed lumbar facet syndrome, low back pain, and lumbar radiculopathy.

The facts as summarized do provide sufficient evidence upon which the hearing officer, as trier of fact, could find that no injury occurred on the job as alleged by the claimant. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. He could believe part or none of the testimony of the claimant; he could view the evidence as raising an issue of claimant's credibility. *See* Presley, *supra*. The Appeals Panel will not overturn the hearing officer on a decision based on factual issues unless it is against the great weight and preponderance of the evidence.

In regard to the timely dispute issue, the carrier called as a witness (Ms. R) who testified that her claims service investigates claims for the carrier and that it did not receive written notice of the injury until May 14, 1992. She testified that when she called the employer, it did not know of the injury. Notice that the claim was contested was prepared on May 19th when she was able to gather some information. She also testified that a file on this claim was not "set-up" until May 12, 1992 when she first received some indication of a claim. The carrier contends that Article 8308-5.21 of the 1989 Act and Tex W. C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6) allow it 60 days to dispute a claim after having received written notice.

The claimant offered into evidence, on the issue of whether the 60 day period was met by the carrier, the statement of Dr. A dated June 16, 1992, which said in part:

To Whom It May Concern

The following is a telephone log of conversations with [carrier] concerning [claimant] and his work related injury:

3/05/92Valerie/[carrier] verified coverage
3/24/92Joseph (?) calling ins co Will call back
3/31/92[Carrier] WC verification; have not received injury report

There was no other testimony or statement that provided more detail in regard to the entry, "3/05/92 Valerie/[carrier] verified coverage."

The hearing officer in Finding of Fact No. 4 stated:

On March 5, 1992, [Dr. A], a chiropractor providing treatment to the claimant, notified the carrier of claimant's alleged work-related injury of on or about (date of injury).

The hearing officer also found that written notice was received on May 14, 1992 by the carrier. No other findings were made that carrier received any other notice, written or otherwise.

Article 8308-5.21(a) of the 1989 Act allows the carrier 60 days to contest compensability "after the carrier is notified of the injury. . . ." Thereafter Article 8308-5.21(b), in imposing a seven day period for the carrier to begin payments of benefits or give notice of its refusal to pay, uses the phrase "after . . . carrier receives written notice of the injury. . . ." Rule 124.1 does not directly address the question of whether the 60 day notice must be in writing. It only gives a definition of "written notice of injury" but does not say that it applies to each subsection of Article 8308-5.21. It does, however, provide guidance for our use in this case. It provides that when written notice is used, that notice must include the name of the employee, identity of the employer, approximate date of injury, and facts showing compensability. Whether Article 8308-5.21(a) always requires a written notification to initiate the 60 day period does not have to be answered at this time because we find the evidence is insufficient to have put the carrier on notice. The 60 days provided for disputing compensability should not begin to run until the carrier is "fairly informed" of the four elements of information specified in Rule 124.1, as described above. The sole evidence in this case, the reference to a phone log in the letter of June 16th, above, does not supply any facts showing compensability and may not have given an approximate date of injury. As such, it cannot be said to give "notice of injury." The log of telephone calls showing an inquiry as to insurance coverage may cause a carrier to infer that a compensable claim is being or is about to be asserted, but it does not show that "facts showing compensability" were provided.

In addition, Rule 124.6(d) also addresses the need for a carrier to refute that medical benefits are due, if based on a non-compensable injury, within 60 days of "receipt of written notice of injury." In this case the carrier, as shown in Claimant's Exhibit No. 5, disputed the claim on a Commission Form TWCC-21 and said that it did so because:

Alleged accident was not reported within prescribed 30 days of occurrence.

Alleged accident did not occur within course and scope of claimant's employment.

Medical treatment being received would therefore be unnecessary.

This notice indicates that the carrier is contending that no medical benefits are due because the injury is not compensable. Rule 124.6(d) therefore applies and indicates that the 60 days for disputing medical benefits, based on no compensability, begins to run after written notice. The wording of Rule 124.6(d), which specifically calls for written notice, lends weight to the contention that a carrier's 60 days for contesting compensability under Article 8308-5.21(a) is triggered by written notice just as is the seven day time period under Article 8308-5.21(b) of the 1989 Act. Such a position is taken also in A Guide to Texas Workers' Comp Reform, Vol. 1, Sec. 5.21, Pages 5-52 and 5-53, Montford, Barber, Duncan. Under "Deadlines" therein, the following is provided:

> The carrier's deadlines for either beginning compensation or giving notice of refusal to pay, or for contesting compensability, are all keyed to the date the carrier receives written notice of the injury. (emphasis added)

* * * *

The conclusion of law that holds the carrier waived its right to contest compensability is not supported by the evidence. In this instance the carrier's ability to contest medical benefits does not appear to be waived because 60 days had not elapsed since it received written notice of injury as is required by Rule 124.6(d). In addition, the notice upon which Finding of Fact No. 4 is based, the telephone log of a March 5th communication, does not state sufficient information to provide notice of the injury. At a minimum, notice should include the information required in Rule 124.1 which sets requirements for written notice.

The decision of the hearing officer that the claimant was not injured in the course and scope of employment is affirmed. The decision that the carrier had waived its right to contest compensability is reversed. A new decision is rendered that the claimant is entitled to no benefits.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge