APPEAL NO. 93263

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on February 22, 1993, (hearing officer) presiding as hearing officer. He determined that the respondent (claimant) was injured in the course of employment and awarded benefits accordingly. The appellant (employer) has appealed asserting that the interpreter did such a poor job of interpreting that the hearing officer did not receive a true or factual impression of the information and that several of the hearing officer's findings of fact and one of his conclusions of law are erroneous. No response was filed by the claimant. The carrier purported to file a separate request for review in this case but inasmuch as the carrier was not a party to the contested case hearing, the request for review is not properly before us and will not be considered. Article 8308-6.41; Texas Workers' Compensation Appeal No. 93133, decided May 6, 1993; Texas Workers' Compensation Commission Appeal No. 92137, decided May 20, 1992.

DECISION

Finding significant procedural flaws, but further finding no prejudice to employer, we affirm.

The record in this case is clear that the carrier did not contest the compensability of the claimed injury and began and continued to pay benefits under the 1989 Act. At the outset of the hearing, the carrier's attorney, who was present and representing the carrier, stated after the hearing office noted for the record that the carrier had accepted liability and was not contesting the compensability of the claim:

Let me just say at that point, [Mr. Hearing Officer], that we have not denied the case. We have not contested compensability that's true. When the claim first arose, there was certainly some doubt as to its compensability. Because there was doubt, we accepted the claim and we began benefits. Through the discovery process and the information that's been collected, we certainly feel that this is not a compensable claim at this point. But we're here on the employee's (sic) contest of compensability strictly.

Also, and clearly stated on the record, the employer was present and represented by the same Mr G who subsequently filed this appeal. Also stated on the record was the single issue before the hearing officer--whether or not the claimant was injured in the course and scope of her employment. Although the hearing officer erroneously listed in the style of his Decision And Order that the carrier was the other party (claimant being the first party) to the hearing, it is apparent from the record that the carrier was not a party. The hearing officer announced on the record that employer was the "substitute party" for the carrier and the employer was contesting the compensability of the claimant's injury. It is also apparent from the record that the attorney was representing only the carrier and was not representing the employer. Nothing was indicated in the record that the attorney was representing the

employer; to the contrary, it was stated he represented the carrier, and, we note that the position of the carrier, which did not contest compensability, and that of the employer, who did contest compensability, were in conflict respecting the claim. We also note that the record file indicated that the attorney applied for and was authorized fees only from the carrier. In any event, the contested case hearing proceeded as if the carrier was the opposing party and the carrier's attorney was allowed to conduct the full case opposed to the claim. Indeed, he purported to enter into stipulations on behalf of the employer, engaged in the full presentation of the case including offering all the evidence opposed to the claim, conducted all the cross-examination, called the employer's representative as a witness, presented objections during the course of the hearing, and presented the only closing argument other than that presented by the ombudsman on behalf of the claimant. In essence, the hearing proceeded as if the carrier had been contesting compensability all along. Although not entirely clear from the record, it is apparent that the carrier had not contested compensability and was precluded from doing so by operation of the waiver provisions of Article 8308-5.21. And, the carrier did not attempt to invoke the provisions of Article 8308-5.21(a) which provide the "[a]n insurance carrier shall be allowed to reopen the issue of compensability if there is a finding of evidence that could not have been reasonably discovered earlier."

Under the provisions of Article 8308-5.10, the employer has a right to contest compensability of an injury if the carrier accepts liability for the payment of benefits. When that happens, as in this case, the employer becomes a party to the proceedings in place of the carrier. *See* Texas Workers' Compensation Commission Appeal No. 92110, decided May 11, 1992. Article 8308-5.10 provides for certain unique rights for an employer including the right to be present at all administrative proceedings and the right to present relevant evidence. There are no corresponding "rights" under the 1989 Act accorded to carrier and we do not graft these employer-specific rights to a carrier, particularly in a situation where compensability has not been contested and a carrier subsequently attempts to come in under the umbrella of the employer's right to raise anew the matter of compensability. The concurring opinion in Texas Workers' Compensation Commission Appeal No. 92410, decided September 25, 1992, noted that there is nothing in Article 8308-5.10 to indicate that it can be used by a carrier to circumvent procedural restrictions imposed on the carrier in the presentation of its case.

An interpreter was required in this case as the claimant was not fluent in the English language. Succinctly, there was evidence that the injury involved in the case was a severe rash and skin reaction which suddenly developed when the claimant was working in an area outside her usual working area and which area was hotter than her usual working conditions. According to her testimony, she was handling coats covered in a dusty, dirty, greasy plastic covering. Shortly after she started working, she and other employees noticed a rash spreading on different parts of her body. Supervisory personnel were aware of the condition and she was given first aid which did not resolve the problem. She was

subsequently diagnosed by a board certified dermatologist as having job-related dermatitis of a primary irritant nature. The specific agent causing the condition was not or could not be established.

As indicated above, the thrust of the employer's appeal here is not that the employer was denied any right to present any evidence or that it otherwise was deprived of any right as a party to the proceedings. For that matter, the serious procedural error noted above could be said to have inured to the benefit of the employer in that the case was basically presented by an experienced workers' compensation attorney who was representing the carrier. As it developed at the hearing, the employer and carrier had some interests in common. Consequently, the error did not harm the employer and the employer did not complain at the hearing or on appeal of the procedure followed. To reverse and grant a new hearing, under the circumstances, would tend to benefit the party who did not suffer harm because of the procedural error and would tend to penalize the prevailing party, the claimant in this case.

We do not find merit in the request for review filed by the employer. The employer's main complaint seems to center around a claim of inadequate interpretation or ability of the interpreter and that the interpretation was misleading. There was no objection to the interpreter or the interpretation at the hearing. To the contrary, there appeared to be general agreement by all the participants that in order to facilitate the proceedings, a more informal procedure for the claimant's testimony would be used and the hearing officer commented that if anyone had a problem with what was being interpreted, that he was sure they would speak up. As stated, there were no comments or objections although it appears there were other Spanish speaking persons present at the hearing. The need for the interpreter only involved the claimant's testimony (aside from interpreting the proceedings for the claimant). Under the circumstances, we do not find any error nor do we find any corrective action necessary or appropriate.

We have reviewed the record regarding employer's complaint that the hearing officer made factual errors in his findings of fact. The main emphasis is placed on the hearing officer's finding that the coats that the claimant was working with at the time she began breaking out in a rash were covered with dirty black plastic protective coating. Actually, the claimant testified that the coats were covered with plastic and that it was very dirty--lots of dust and grease, and that her hands would be black from handling them. The hearing officer's reference to "black" plastic, while perhaps not completely accurate, does reflect the import of the claimant's testimony; that is, that she came in contact with dirty, dusty, greasy substances on the plastic covering the coats and shortly thereafter broke out in the rash condition made the basis of the claimed injury. While there may have been some confusion in the claimant's testimony regarding whether and how often she had done this type of work in the past or worked in the particular area, this was a matter for the hearing officer to sort out and resolve in ultimately arriving at his findings of fact in the case. Garza v. Commercial

Insurance Co. of Newark N. J., 508 S.W.2d 314 (Tex Civ. App.-Amarillo 1974, no writ.) Employer also complains that the hearing officer did not give proper consideration to portions of some medical reports introduced into evidence. The hearing officer had all the documentary evidence before him for his consideration and evaluation and, as the fact finder, is the one who determines the relevance and materiality of the evidence and the weight and credibility to be given the evidence. Article 8308-6.34(e). Where there is some conflict or some inconsistency within or between the evidence before him, he resolves such matters. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ); Garza, *supra*.

We have reviewed the complete record in this case and the appeal submitted by the employer and do not find that the determinations of the hearing officer to be so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986). While different inferences might well have been drawn from the evidence adduced at the hearing, this is not a sound basis for us to substitute our judgment for that of the fact finder. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). There is sufficient evidence to support the hearing officer's decision.

We note that at one point in the hearing there was an objection to the hearing officer's questioning of a witness in areas outside the issue under consideration, namely in areas more concerned with disability and average weekly wage. The hearing officer indicated that the Appeals Panel had "unfortunately" imposed a duty on hearing officers to develop the evidence. For clarification, the 1989 Act at Article 8308-6.34, not the Appeals Panel, imposes a responsibility on the part of the hearing officer for a "full development of facts required for the determinations to be made." However, neither the 1989 Act nor the Appeals Panel has placed any requirement on a hearing officer to attempt to develop evidence or facts on matters not in issue, as was the case here.

As we have stated, the proceedings here were procedurally flawed to a significant extent. However, the employer, the only party (other than claimant) having status to appeal, was not only not prejudiced but may well have reaped benefit from the evidence presented by the carrier at the hearing. *See generally* Phillips v. Texas Employers' Insurance Association, 306 S.W.2d 188 (Tex. Civ. App.-Amarillo 1957, no writ). There is no complaint or other indication that the employer was precluded or hampered in presenting any evidence that it desired. Accordingly, the decision of the hearing officer is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge