APPEAL NO. 91007
FILED AUGUST 28, 1991

On June 10, 1991, a contested case hearing was held in _____, Texas. (Hearing officer) was the hearing officer. The hearing officer determined that the respondent, claimant herein, was within the scope of employment at the time she fell and injured her back. He concluded that claimant was entitled to benefits under Tex. Rev. Civ. Stat. Ann. arts. 8308-4.21, 4.61 (Vernon Supp. 1991). Carrier asserts that claimant did not sustain a compensable injury, that no notice of injury was given within 30 days to the employer, and that the hearing officer should have decided whether notice was given at the contested case hearing.

DECISION

We find: (1) that the issue of notice was not properly brought to the contested case hearing and therefore required no decision by the hearing officer, and (2) that the decision that a compensable injury occurred was based on sufficient evidence of record. Accordingly, we affirm the decision of the hearing officer.

Since carrier's issue of notice is controlled by the hearing officer's response to that question, his approach to that issue will be examined first.

Carrier, in stating that the issue of timely notice should have been decided at the contested case hearing, points out that the Benefit Review Conference (BRC) did not resolve the notice issue (and did not list it as a dispute). This anomaly is not addressed in statute or rule, but a reading of Article 8308-6.31 of the 1989 Act and Rule 142.7 (Tex. W. C. Comm'n, 28 Tex. Admin. Code § 142.7) provides remedies for any party to raise a dispute not reported by the BRC. To address an incomplete BRC report, the provisions of Rule 142.7(e), adding a dispute by a showing of good cause, would have been appropriate. This remedy could not be raised at the contested case hearing, however, because notice to the hearing officer and the other party was not given 15 days prior thereto. In addition, carrier's "Response to Benefit Review Officer's Dispute Status Report" received by Texas Workers' Compensation Commission on May 28, 1991, did not question the list of disputes to be heard at the hearing. The record shows no consent of the parties to add "notice" as a dispute but does reflect the hearing officer announcing compensability to be the only issue, with no objection.

Testimony developed by carrier that the back injury was not reported promptly went to the question of credibility of the claimant's testimony. It did not call for the hearing officer to rule that a notice issue should be added absent compliance with Rule 142.7. Similarly, questions in carrier's written interrogatories about notice could not compel consideration of the issue without meeting the criteria of that rule.

The hearing officer through Article 8308-6.31 and Rule 142.7 is directed to consider only those issues contained in the statement of disputes. This rule has the force and effect of law. Sears v. Texas State Board of Dental Examiners, 759 S.W.2d 750 (Tex. App.-Austin 1988, no writ) and Southwest Airlines v. Bullock, 784 S.W.2d 568 (Tex. App.-Austin 1990, no writ). The statute and rule make it clear that administrative proceedings under Article 6 of the 1989 Act are issue driven. With no issue of notice before him, the hearing officer was correct in not making findings or conclusions on that matter.

If an issue of notice had met the requirements of Rule 142.7, the hearing officer could have considered evidence relative to:

(1)the employee's notice to the employer within thirty (30) days under Article 8308-5.01 of the 1989 Act;

(2)the employer's or carrier's actual knowledge under Article 8308-5.02. (Also see Universal Underwriters Ins. Co. v. Pierce, 795 S.W.2d 771 (Tex. App.-Houston [1st Dist.] 1990, no writ) and Miller v. Texas Employers Ins. Assn, 488 S.W.2d 489 (Tex. App.-Beaumont 1972, writ ref'd n.r.e.); and

(3)the employee's good cause for failure to timely notify under Article 8308-5.02.

Without development of the issue of notice at the hearing, we cannot know what the hearing officer would have decided on any facet of notice listed above. Carrier's first issue on appeal (notice) cannot, and need not, be answered in view of our decision that the hearing officer was correct in not considering that question.

Carrier's third issue on appeal asserts that claimant did not prove a compensable injury to her back. The facts are uncontroverted that claimant is a security officer at employer - (branch). She worked on Saturday and Sunday, (date) and (date). Her duties included the routine checking of buildings and offices within them. On February 8th in the "Mesa" building, some amount of ether was vented out of a chemistry laboratory into a mechanical room on the first floor of that building. Methods of clearing that substance were completely successful within hours of the release according to carrier's evidence.

Claimant, in some detail, described the abrupt sickness that overtook her as she moved about the Mesa building in the morning of (date). She also said that this same sickness, headaches, dizziness, and vomiting, struck her again on February 10th in the same building. She testified that while hurrying to get to a restroom to vomit, she tripped over a chair and injured her back. There were no witnesses. Claimant and her supervisor disagree as to whether notice was given on February 9th or 10th but both agree that notice of her sickness was given on (date) or (date). The supervisor acknowledged that he answered claimant's questions about filing a workers' compensation claim on (date). Claimant was in good health before (date).

Claimant testified she reported the back injury to the first physician she saw, Dr. P, on (date). (His records verify her report of ether inhalation but do not record any reference to back injury.) She said she did not report the back problem to the hospital emergency room she visited on February 11th and 12th because it did not become painful until between (date) and (date). Claimant also saw Dr. S, a chiropractor, who by letter dated March 6th refers to her low back pain. In "Initial Medical Report" to Texas Workers' Compensation Commission dated (date), Dr. S lists injury date as (date) and refers to low back pain as having developed along with vomiting, headaches, nausea, and neck pain. In addition, Dr. L in April 1991 found "mild spasm of the paracervical and trapezius muscles . . ." and Dr. S in a report dated March 15, 1991, refers to a fall that claimant mentioned but describes it differently from her testimony. Claimant's supervisor says he had no notice of any back problem until March 8th when he got the letter from Dr. S. He adds that Dr. S did not indicate that the back problem was job related.

Cases call upon the trier of fact to carefully weigh the evidence of an interested witness even when uncontradicted. Reed v. Aetna Casualty & Surety Co., 535 S.W.2 377 (Tex. App.-Beaumont 1976, ref'd n.r.e.). Liberty Mutual Fire Ins. Co. v. Ybarra, 751 S.W.2d 615 (Tex. App.-El Paso 1988, no writ) calls upon the trial judge to weigh and consider credibility even when testimony is uncontroverted. An assertion of hernia was made after an unwitnessed stepping down from a truck in Northern Assurance Company of America v. Taylor, 540 S.W.2d 832 (Tex. App.-Texarkana 1976, writ ref'd n.r.e.). The court found no need for medical testimony in "areas of common experience." It also said ". . . if the injury is job related and there is any probative evidence of that fact, then the sufficiency of the evidence is a question for the jury." Similarly, in Page v. TEIA, 544 S.W.2d 452 (Tex. Civ. App.-Dallas 1976), affirmed, 553 S.W.2d 98 (Tex. 1977), a guard was walking across a part of his employer's property when his knee buckled. The court allowed recovery on lay witness testimony as to causation and refused a request to overrule the Taylor case, supra, and two others that dealt with recovery for idiopathic falls. Hartford Accident & Indemnity Co. v. Contreras, 498 S.W.2 419 (Tex. App.-Houston [1st Dist.] 1973, writ ref'd n.r.e.), upheld a jury recovery for claimant based on his testimony and that of a physician. He unloaded bags and felt some pain in his back that evening after work. He thought it was tiredness at first and could not say which lifting caused it. He reported the injury and went to a physician two days later who testified that x-rays were negative, his muscles were strained, and the injury was probably caused by lifting at the job.

Generally lay testimony to prove cause of injury is sufficient when there is a strong, logically traceable connection between the cause and result. Griffin v. TEIA, 450 S.W.2d 59 (Tex. 1969). However, the court in Griffin could not reconcile a failure to promptly tell coworkers or seek medical aid with a determination of compensable injury. Insurance Company of North American v. Kneton, 440 S.W.2d 53 (Tex. 1969), found a prompt onset of pain to be indicative of causation when considering lay testimony. While claimant, in each area mentioned by these two cases, did not act promptly as to her back injury, she did so regarding her sickness. The available facts in this case presented a very close issue, but we find the evidence to be sufficient to support the award. Accordingly, the decision of the hearing officer is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief, Appeals Judge

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Robert W. Potts
Appeals Judge