APPEAL NO. 91016
FILED SEPTEMBER 6, 1991

On June 20, 1991, a contested case hearing was held. The hearing officer determined the respondent sustained a compensable injury in the course and scope of her employment with (Employer) and ordered the appellant to pay benefits provided under the Texas Workers' Compensation Act of 1989 (1989 Act). Tex. Rev. Stat. Ann., art. 8308-1.01, et seq., (Vernon Supp. 1991). The appellant urges us to reverse the decision of the hearing officer and render a decision that the respondent did not sustain an injury within the course and scope of her employment. He also urges us to reverse and render a decision that the respondent failed to give timely notice to her employer of the work related injury. The respondent did not file any response to the request for review.

DECISION

Finding the evidence insufficient to uphold the decision of the hearing officer that the respondent gave timely notice of a work related injury, we reverse.

The respondent had been an employee of Employer since November 1989. Initially, she worked as a cashier, but in January 1991, she was working in the store room where her duties included checking in merchandise, lifting of boxes, hanging merchandise and picking up and stacking catalogs. She testified that when she got up on the (date), she experienced great pain in her back and when she got to work, she could hardly stand, walk, or lift anything. She talked with two of her supervisors and was sent home. This was the last she went to work at Employer. She testified she had been lifting catalogs on _____.

During her testimony, the respondent stated she had suffered a hip and back injury on (date of a previous injury) while employed with a different employer. The nature and length of treatment for this injury is not clear from the record; however, a February 1, 1991 medical report from Dr. C indicates she had two previous surgeries on her right hip. She testified that she didn't realize until mid-February 1991 when she saw Dr. C that her work at Employer had been aggravating her back condition. On cross-examination, she testified that she had fallen at home in January 1990 and had missed one month of work as a result. In explaining why she didn't say anything about this before, she stated she did not think the month off counted when she described her other reasons for missing work which included caring for a sick child and other non-injury reasons. The nature and length of treatment for this injury is not included in the record but may be alluded to in some of the medical reports that refer to a previous injury.

The respondent testified that on January 11, 1991, she went to Dr. C for back problems and mentioned her suspicion that her work at Employer related to her back pain. Dr. C told her he didn't know if her work was aggravating her prior injury. Later, on February 11 she discussed this again with Dr. C and he agreed the work was causing her

problem and in a "to whom it may concern" statement dated February 11, Dr. C states, "[T]his is to confirm that CG current job is aggravating her current injury."

The respondent did not report her injury to her employer until March 22, 1991. The report, admitted as Requestor Exhibit 1, indicates she injured herself on _____, pulled muscles in her back, and that the cause was attributed to "stacking catalogs all day and apparently aggravating an old injury."

The respondent's first level supervisor, in a January 31, 1991 statement, indicates that the respondent reported to work on the 31st but was suffering from back pain and was ultimately sent home. The supervisor stated that the respondent had been having back problems for about a month in the stock room but stated on the 31st and on a previous occasion that it was from a previous back injury at a nursing home.

With the exception of the February 11, 1991 statement of Dr. C referred to above, the medical records refer to the back pain as originating in a previous injury at the nursing home in October, 1989. The reports indicated that the respondent did not complain of any recent injury and stated in one report that she tries not to lift anything heavy at her job.

A disputed issue of notice of injury by the employee was before the benefit review conference, was an unresolved disputed issue reported to the contested case hearing by the benefit review officer, and was set out at the beginning of the hearing as one of the three issues to be heard. There were no objections by respondent's counsel and no issue was raised that the benefit review officer's report was incorrect in listing timely notice as an issue in dispute. The appellant contested the timely filing of notice of work related injury at the benefit review conference, at the hearing and raises it again in this request for review.

Under the provisions of Article 8308-5.01, an employee must "notify the employer" of an injury not later than the 30th day after the date on which the injury occurs. The effect of failure to notify is relief of the employer or its carrier from liability unless, (1) the employer or his representative has actual knowledge of the injury, (2) good cause exists for the failure to notify, or (3) the employer or its carrier does not contest the claim. Article 8308-5.02.

In the instant case, the respondent's back problem was known by the employer and, indeed, the respondent was sent home on (date) because of extreme back pain which made it very difficult for her to stand, walk, or lift. However, although the employer knew of the respondent's back problem, the evidence does not establish notice to the employer within 30 days of the date the respondent knew that the condition was work related (at the latest, February 11, 1991, the day she was so advised by Dr. C). Under the circumstances, the employer did not receive notice within 30 days of the manifestation of injury (notice of injury first reported on March 22, 1991). In Texas Employers' Insurance Association v. Mathers, 771 S.W.2d 225 (Tex. Civ. App.- 8 Dist., writ dismissed), the employer had ample notice of the employee's back condition and treatment; however, there was no notice within the required 30 days that the condition was work related. To fulfill the purposes of the statutory notice requirements, the employer needs only to know the general nature of the

injury and the fact that it is job related. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980).

The hearing officer determined in his conclusions of law that the respondent's notice to her employer was timely. The evidence does not support this conclusion; to the contrary, the evidence convincingly establishes that the respondent failed to give timely notice. (She testified that she suspected the relationship of her work and its aggravating effect on her back problems as early as January 15, 1991, when she saw a Dr. A who stated he thought her job and lifting were causing her back problems.) However, that does not end the inquiry. The hearing officer also concluded the appellant was limited to those grounds of contesting compensability that were contained in its notice of refused/disputed claim dated April 4, 1991 (Respondent Exhibit J). In that form, the appellant denied liability on the grounds that "any disability or medical treatment needed is a result of a prior injury and not as a result of injury working for Employer" In a Notice of Refused/Disputed Claim dated May 22, 1991, (one day after the date of the benefit review officer's report), the appellant set forth the following: "IN ADDITION TO ISSUES RAISED ON NOTICE OF APRIL 4, 1991, CARRIER RAISES THE ISSUE OF 30 DAYS NOTICE. NO REPORT OF INJURY GIVEN TO EMPLOYER OR CARRIER WITHIN 30 DAYS OF ALLEGED INJURY." (Respondent Exhibit H). It is not apparent anywhere in the record why this form was executed by the carrier, whether there was any objection to it or whether it was considered or a subject of any prehearing conference. The issue of notice was already a part of the case having been an issue at the benefit review conference, reported out as an unresolved issue and announced as an issue at the contested case hearing. In any event, the appellant was apparently attempting to make certain that the issue of notice was specifically being contested. Since the appellant did not initiate compensation payments, it was required to, and did so, notify the respondent and the commission of its refusal to pay and advised the employee of the right to request a benefit review conference. Article 8308-5.21(b). However, there is the additional requirement that the notice specify the grounds for refusal and such grounds constitute the only basis for the carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based upon newly discovered evidence that could not have reasonably been discovered at an earlier date. Article 8308-5.21(c).

From Respondent Exhibit H and the hearing officer's Conclusion of Law No. 5 (the record is otherwise silent on the matter), the appellant apparently sought to raise or preserve a defense of timeliness of notice of injury as specified by Article 8308-5.01. As indicated, it is not clear why this was done as the issue of timely notice was already before the hearing officer. However, presupposing that lack of timely notice is a "defense on the issue of compensability" and hence, it must be raised in the seven day notice, he would be required to prove this defense was based on newly discovered evidence that could not reasonably have been discovered at an earlier date (Article 8308-5.11(c)). If so proven, the appellant would not be bound by only those reasons stated in the notice of refused/disputed claim dated April 4, 1991. In essence, the contested case hearing officer determined in his Conclusion of Law No. 5 that the appellant failed to prove the grounds necessary to raise a new defense. From the record before us, that ruling was correct insofar as it holds there

was no showing of newly discovered evidence. He did not abuse his discretion in what, in essence, had the effect of a show cause ruling. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986), Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985). However, this determination would only be controlling if the issue of notice had not already been in dispute, contained in the statement of disputes and stated as an issue in dispute before the contested case hearing. Since it was already in dispute before the hearing officer, this conclusion of law was gratuitious.

Under the circumstances present in this case, we are convinced that an issue concerning notice that the injury related to or arose out of the employment with Employer. was considered and agreed by all parties to be in dispute. In this regard, we note there was no objection or other action against the consideration of this disputed issue throughout the processing of this case: (1) it was clearly an issue before the benefit review conference; (2) it was reported out as unresolved by the benefit review officer report; (3) there was no response or other disagreement expressed concerning the issues listed in the benefit review officer's report (Tex. W. C. Comm'n, 28 Tex. Admin. Code ' 142.7(c); (4) it was listed and announced as an issue at the contested case hearing, without any objection or comment; (5) it was an issue argued by the appellant at the contested case hearing, and; (6) it was an issue determined by the contested case hearing officer as reflected in his Conclusion of Law No. 4 that the respondent's notice to her employer was timely.

Clearly, the actions of the parties throughout this case indicate to us that they either found the language in the carrier's April 4, 1991 notice to encompass the issue of timely notice or they consented to this issue being mediated or adjudicated at all steps in the process. Finally, without an objection being lodged at any stage of the proceedings in this case against the issue of timely notice being considered, the orderly resolution of disputes suggests that waiver is appropriately applied. In a similar vein, a party by failing to make an objection or exception to any pleading of opposing party waives any defect with regard to such pleading. Burgamy v. Lawrence, 480 S.W.2d 38 (Tex. Civ. App.-San Antonio 1972, no writ), Brown Service, Inc. v. Fairbrother, 776 S.W.2d 772 (Tex. Civ. App.-Corpus Christi 1989, no writ) and every defect, omission, generality or other insufficiency of allegations in pleadings are waived unless excepted to, Patterson v. Hatfield-Holcomb, Inc., 582 S.W.2d 899 (Tex. Civ. App.-Waco 1979, no writ). With no objection or any other action by the respondent, represented by counsel, the Article 8308-5.21(c) limitation on the basis of defense the appellant was allowed to raise was effectively waived by the respondent. This is analogous to limitations on actions which must be affirmatively asserted or they are waived. See generally Vernon's Ann. Texas Rules Civ. Proc., Rule 94, Moore v. Rotello, 719 S.W.2d 372 (Tex. Civ. App.-Houston [14th Dist.] 1986, ref'd n.r.e.), Adams v. Marsh, 563 S.W.2d 653 (Tex. Civ. App.-Eastland 1978, no writ), Franco v. Allstate Insurance Co., 505 S.W.2d 789 (Tex. 1974).

We do not find the evidence sufficient to support the hearing officer's determination that the respondent gave timely notice to her employer as required by the 1989 Act. To the contrary, the evidence leads to the inescapable conclusion that the only information available or known to the employer or the carrier prior to the respondent's March 22, 1991

notice of injury was that the injury related to a previous fall and back injury. The respondent was advised by her doctor on February 11, 1991 that her "current job" with Employer was aggravating "her current injury". She also testified that she saw a Dr. A on January 15, 1991, who stated her back problem was caused by her job and she also saw an attorney during the first or second week of February and was advised she might be entitled to some benefits. She made no notification to her employer until March 22, 1991.

We hold that the respondent failed to give timely notice of a work related injury while in her employment with Employer and find that the appellant is entitled to the relief mandated under Article 8308-5.02.

Although a decision on the remaining issues is not necessary because of our disposition of this case, we do not find the other evidence to be so lacking as to conclude it is insufficient to support the remaining findings and conclusions of the hearing officer. The case is reversed and the appellant is held not to be liable for the payment of any benefits.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Joe Sebesta
Appeals Judge