APPEAL NO. 91057

On September 11, 1991, a contested case hearing was held. The hearing officer determined that the appellant did not injure his back in the course of scope of his employment and was not entitled to benefits under the Texas Workers' Compensation Act. (TEX. REV. CIV. STAT. ANN., art. 8308-1.01 et seq) (Vernon Supp. 1991) (1989 Act). The appellant complains that the decision goes against the weight of the evidence and contends that an issue of scope and course of employment was not contested by the respondent and was not before the hearing officer.

DECISION

Finding the evidence sufficient to uphold the decision of the hearing officer and determining an issue of course and scope of employment was properly before the hearing officer, we affirm.

The appellant worked for Employer on _____ and the respondent was the workers' compensation carrier.

The appellant testified that on that day, he injured his back while culling bent pipes from good ones. He was working as a floor hand on an oil rig. He stated that when he pulled a pipe to get it moving, he felt a hot sensation in his back. The next morning he states he could not get out of bed because of the pain. He was scheduled to be off three days and did not mention his injury to his employer until he was due back at work on (4 days after date of injury). On that same day, Mr. W, the employer's safety director, sent him to Dr. S who advised the appellant that he had strained his back but that he could return to light duty. When the appellant talked to his employer, he was offered light duty on the rig, but declined because he didn't feel there was any light duty on a rig.

The appellant saw Dr. S several more times and being dissatisfied, went to see Dr. K, a neurologist. He was diagnosed as having an "acute herniated disc probably L4-5 as well as L-5 S-1; L5 radiculopathy and lesser extent S1 radiculopathy; and cervical and lumbar sprain." He saw Dr. K on March 13 and April 8, 1991 and he, the appellant, reported no improvement, received treatment, and on the latter occasion, Dr. K said he could return to limited type duty. On April 24, 1991, Dr. K administered an EMG and found the results "compatible with lumbar radiculopathy in the distribution of L-4 S-1 nerve root." Dr. K referred the appellant to a Dr. C who on August 16 recommended consideration for spinal surgery.

Evidence at the contested case hearing established that prior to his first visit with Dr. K on March 5, the appellant responded to an ad on a "wild hog hunt." He participated in the hunt, climbing into and out of a 12 to 15 foot high blind and sat there for some hours. The appellant made arrangements to go on a second "wild hog hunt" on April 1, 1991.

Unbeknownst to the appellant, certain agreements had been made between the organizer of the hunt and the appellant's employer to invite the appellant to the hunt and to take a video tape of the activities. In this video tape, which was admitted as an exhibit, the appellant shows agility of movement and motion that, according to a statement of a Dr. H, also admitted into evidence, would have been impossible for a person having a herniated lumbar disc or a significant back strain. (R. Ex. G and H.) Our viewing of this video causes us to find Dr. H's observations rather credible. The appellant's activities included lifting hunting dogs, carrying a rather large hog, jumping in and out of a truck bed and running around after a hog.

Mr. W testified that the first he heard anything of the appellant being injured on the job on _____ was on (4 days after date of injury) when the appellant was due to come back to work. The appellant told him he had seen Dr. S, the company doctor, who had advised the appellant to perform light duty as a result of a muscle sprain. Mr. W offered him light duty at his current wages, under the company's program, but the appellant refused. Although three other employees were working with the appellant at the time he states he hurt his back, Mr. W was unable to find anyone who was aware of any injury. Mr. W was contacted about February 25, 1991 by KG who told him about appellant going on a wild hog hunt and that the appellant had stated that he wasn't hurt but that Employer had plenty of money. Mr. G agreed to set up another hunt, invite the appellant and video tape the proceedings -for a price of $1,200.00. Before the video was finally (Mr. W indicated some difficulty in obtaining the video) turned over to Mr. W the price went up to $1,700.00.

In a TWCC-21 form "Payment of Compensation or Notice of Refused/Disputed Claim" (R. Ex. J.) dated 04/05/91, it is stated inter alia ... " Carrier preserves defenses of nature and extent, C & S., and on the job injury being claimed." This form also indicates in Block 14 that the carrier's first written notice of injury was received on 02/08/91. Another form admitted into evidence shows payment of compensation benefits stopped on 04/04/91.

Addressing the sufficiency of evidence issue first, we are convinced there was a sufficient evidentiary basis to support the hearing officer's determination. As "the sole judge of the relevancy and materiality of the evidence offered and of the weight and credibility to be given to the evidence" (Article 8308-6.34(e)), he resolves the conflicts in the evidence and inconsistencies in the testimony. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Burlesmith v Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). Finding his decision not to be so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, reversal of his decision is simply not appropriate. Atlantic Mutual Insurance Co. v. Middleman 661 S.W.2d 182 (Tex. Civ. App.-San Antonio 1983, writ ref'd n.r.e.). The actions of the appellant following his purported injury of _____, the initial (4 days after date of injury) medical reports of a back strain with release to light duty, together with evidence of his subsequent physical activities involving hog hunting, support the conclusion that the claimant's back injury, if any, did not arise out of his employment and thus, is not compensable.

Turning to other issues asserted by the appellant, we initially note that the record of the contested case hearing contains a discussion of the issues by the hearing officer and the parties. The hearing officer stated on the record that the issues under dispute coming out of the benefit review conference as he discerned them were: (1) was the claimant injured in the course and scope of his employment on _____, and (2) if so, is he still disabled from returning to work. Both the appellant and respondent clearly agreed, on the record, that these were the issues in dispute although the benefit review conference report stated it as "extent and duration of disability. Disputes video as a `set up'." Now, on this appeal, the appellant asserts there was no scope of employment issue, and further, that compensation was not contested by the respondent within the 60 days provided by the statute.

There is absolutely nothing in the record of the contested case hearing concerning an issue involving failure to contest compensability, by the respondent, within 60 days. Exhibit J has entries to indicate the carrier first received written notice of injury on _____ and contested course and scope in the same form dated 04/05/91. While Article 8308-5.21(a) provides that a carrier waives its right to contest compensability if it does not do so within 60 days (with a provision to reopen a compensability issue for newly discovered evidence), if the issue is not raised at the benefit review conference, then the issue may not be considered at the contested case hearing except by consent of the parties or upon a determination of good cause. (Article 8308-6.31(a)). Since the issue was never brought before the contested case hearing, there is no decision of the hearing officer on which to base a proper predicate for review of this matter by the appeals panel. (Articles 8308-6.41(b), 8308-6.42(c)). Although there is no record (other than an abbreviated report) of a benefit review conference, Texas Workers' Compensation Commission Rule 142.7 (Tex. W. C. Comm'n., 28 TEX. ADMIN. CODE § 142.7 (Rules) provides a procedure for responding to a benefit review conference report. There is no indication either party filed any such response on the issues in this case.

The appellant also urges on this appeal that there was no course and scope of employment issue at the benefit review conference and that it should not have been addressed at the contested case hearing. As indicated, the report of the benefit review conference was not a model of clarity; however, the issues before the contested case hearing were discussed at some length by the hearing officer and the parties. The issues, as perceived by the hearing officer, were clearly set forth on the record and unequivocally agreed to by the parties. Again, the parties did not avail themselves of the provision of Rule 142.7 concerning disputed issues before a contested case hearing. It is a little late in the day, under these circumstances, to urge different disputed issues on appeal. As we indicated in Texas Workers' Compensation Commission Appeal No. 91016 decided September 6, 1991, without an objection or exception being lodged at any stage concerning issues of this nature, the orderly resolution of disputes suggests that waiver is appropriately applied. (See generally the cases cited in Appeal No. 91016).

We note that in his response, the respondent objects to the appellant's request for review as not being timely filed. The appellant had 15 days from the date of his receipt of

the hearing officer's decision within which to file his request for review (Rule 143.3). With allowances for mail time, his request for review had to be postmarked no later than October 15, 1991. Although when respondent called the appeals panel clerk on October 17, 1991, and was advised she was not aware of a request having been filed at the time, the mail room time stamp for October 17, 1991 is clearly stamped on the request for appeal. The envelope bears a clear postmark of October 15, 1991, hence the request was timely filed and appropriately considered.

Having determined the evidence sufficiently supports the hearing officer's decision and not finding merit to the other matter asserted, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge