APPEAL NO. 91073

On October 9, 1991, a contested case hearing was held in (city), Texas with Jimmy Puett presiding. This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN., arts. 8308-1.01 through 8308-11.01 (Vernon Supp. 1991). The hearing officer decided that the Commission has authority to order a medical examination for a claimant over 75 miles from his residence. Appellant argues that such decision arbitrarily conflicts with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.6(h) (Rule 126.6(h).

DECISION

Finding merit in appellant's position, the decision is reversed and rendered.

Appellant and respondent stipulated to the following facts:

1.Appellant's injury for which this claim was filed occurred in the course and scope of his employment with Employer.

2.Employer received timely notice of the injury.

3.Appellant was a resident of (city), Texas, on February 15, 1991.

4.Respondent properly requested a Medical Examination Order on July 2, 1991 (calling for an examination in (city), Texas).

5.(city), Texas is located at a distance of more than 75 miles from (city), Texas.

Appellant and respondent agreed that there were no factual issues about which they disagree. The point of contention, they assert, is a question of law concerning whether the Texas Workers' Compensation Commission is precluded by the language of its Rule 126.6(h) from ordering a medical examination requiring travel by Claimant of more than 75 miles from Claimant's residence. Rule 126.6(h) reads:

The Commission shall order examinations requiring travel of up to 75 miles from the Claimant's residence unless the treating doctor certifies that such travel may be harmful to Claimant's recovery.

The 1989 Act at Article 8308-2.09 gives broad rule making power to the Commission. "The Commission shall adopt rules as necessary for the implementation and enforcement of this Act." A rule's provisions should be in harmony with the general objectives of the Act. Gerst v. Oak Cliff Savings & Loan Asso., 432 S.W.2d 702 (Tex. 1968). In Texas State Board of Examiners in Optometry v. Carp, 412 S.W.2d 307 (Tex. 1967), the licensing board made rules that prohibited the use of a trade name by an optometrist when statutory limitations did not address trade names. In fact, evidence established that prior to passage, the legislature deleted sections of the proposed legislation which prohibited trade name practice. The court said it was error to find such rule added new or inconsistent provisions to the statute. It said that such rule was in harmony with the general provisions of that Act and was consistent with one or more specific proscriptions.

In our opinion if Rule 126.6(h) is interpreted to limit the ordering of medical exams to within 75 miles, it would be consistent with both the Act overall and specific provisions of it.

Article 8308-4.16, which Rule 126.6(h) implements, uses "may" in saying "The Commission may require the employee . . .;". Venue for all benefit review conferences and hearings is set at 75 miles absent good cause. Article 8308-6.03. In our opinion the Commission would be consistent with the 1989 Act in adopting a rule that limited required medical examinations to no greater than 75 miles with the proviso that such an order for examination is subject to a determination of potential harm to the claimant.

Having considered that a rule may be written to define the limits of its statutory source, we look to see if this rule, Rule 126.6(h), does set a limit on the Commission as to maximum distance within which it will order medical examinations. If the rule is valid, it ordinarily is construed like a statute and has the force and effect of legislation. City of Lubbock v. Public Utility Comm, 705 S.W.2d 329 (Tex. App.-Austin 1986, writ ref'd n.r.e.). If we say that Rule 126.6(h) sets no limit to travel, then it appears that the proviso as to harm would only apply to travel under 75 miles.

Texas courts have used a rule of statutory construction that may be helpful. County School Trustees v. Harral County C. I. School Dist., 95 S.W.2d 204 (Tex. Civ. App.-Amarillo 1936, no writ) was a suit by one school district to stop another from annexing it. The court looked to the statute which gave authority in this area. It said in part, " . . . two or more adjoining counties shall have the authority, upon written order of a majority of the members of each county . . . to establish . . ." That court said "It is an accepted rule of statutory construction that where the performance of a certain thing in a particular manner or by a particular person is directed, there is an implied command that it be not done otherwise . . ." In Peterson v. Calvert, 473 S.W.2d 314 (Tex. Civ. App.-Austin 1971, writ ref'd), a question of inheritance tax (to be strictly construed against the state) dealt with classifications based on relationships. At issue was whether a classification could include a brother of the wife of decedent. The court said, "By specifying . . . only brothers and sisters of decedent and the direct lineal decedents of such brothers and sisters, the legislature must have intended to exclude all other persons not so related to the decedent." A somewhat different view was taken in Blankenship v. Highlands Ins. Co., 594 S.W.2d 147 (Tex. App.-Dallas 1980, writ ref'd n.r.e.). In a question under prior law, the issue was whether decedent's minor children had a reversionary interest in death benefits paid a widow. The carrier had argued that because the law provided a reversion to the widow if the child became ineligible and did not so provide for the children in the opposite case, then there is no reversionary interest in the children. This court said the rule of construction that states the expression of one thing is the exclusion of others is a common sense rule and requires great caution in use. In addition this court did not accept the interpretation of the old Industrial Accident Board as to this question and held for the orphans. The dissent called for the legislature to amend the law to allow reversion of the widow's benefits. In the area of power of an appellate court to act within certain time limits, Humble Exploration Company v. Browning, 690 S.W.2d 321 (Tex. App.-Dallas 1985, writ ref'd n.r.e.) (U.S. cert. denied, 106 SC 1376), said "The Constitution, rules and laws, are both inclusive of the power and authority of the court to act and exclusive of any authority to act in a manner inconsistent with the statute or rules. Thus where a rule authorizes a court to act in a specific manner it shall not be done otherwise." This court cited the Harral County case, supra, among others. We believe acceptance of the exclusionary rule makes common sense in the instant case. Rule 126.6(h) only allows a medical examination within 75 miles to be ordered.

While we do not say that a Commission rule could not address orders for medical examination over 75 miles in distance, we view Rule 126.6(h) in its present form as limiting such orders to 75 miles or less from the claimant's residence. A rule written to allow an ordered medical examination over 75 miles from the claimant's residence not only is in the carrier's interest but could inure to the benefit of the claimant in some circumstances. We hold the present rule does not add new and inconsistent provisions to the 1989 Act.

Reversed and rendered.

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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