APPEAL NO. 91132
FILED FEBRUARY 14, 1992

On November 18, 1991, a contested case hearing was held. He (hearing officer) determined the respondent had given timely notice of his injury and was entitled to temporary income and medical benefits under the Texas Workers' Compensation Act. TEX. REV. CIV. STAT. ANN. art. 8308-1.01 et seq. (Vernon Supp. 1992) (1989 Act). The appellant concedes on this appeal that notice of claim of injury was received by the employer within 30 days as required and "waives that prior assertion." Appellant asserts the second issue should be restated as follows:

> "Whether the Claimant is entitled to income benefits as the result of an injury occurring in the course and scope of his employment."

Appellant also attaches two evidentiary documents to his appeal and asks that we consider and weigh this new documentary evidence. Appellant asks for alternate forms of relief: (1) reverse the decision that respondent had a compensable injury in the course and scope and render a new decision, overturn the order to pay benefits and order the subsequent injury fund to repay benefits already paid; (2) order the respondent to disclose weekly benefits received from the Texas Employment Commission and order the appellant to reduce weekly income checks by $250.00 per week until the amount is offset; (3) reverse the decision of the hearing officer and remand for further consideration and development of evidence.

DECISION

Finding no legal or factual basis upon which to effect the relief requested and determining the evidence sufficient to support the decision of the hearing officer, we affirm.

At the outset, we note the issue(s) at the contested case hearing were far from being clearly set forth. The issue "raised but not resolved" following the benefit review conference was stated as: "Whether or not Mr. R was injured in the course and scope of his employment as it is alleged that he did not report the injury until after he was terminated." There is no indication that either party responded to the benefit review officer's report concerning the statement of unresolved issue(s) as provided under Rule 142.7 (Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE §' 142.7) (Rules). *See* Texas Workers' Compensation Commission Appeal No. 91007 decided August 28, 1991; Texas Workers' Compensation Commission Appeal No. 91057.

At the contested case hearing, the hearing officer stated the issue before him suggested by the benefit review officer's report to be "[w]hether a Mr. R reported his injury to his employer in a timely manner and, if he did not, whether he had good cause for

having failed to do so." When asked if he agreed that this was the sole issue, respondent's counsel answered, "Yes, your honor, the sole issue is was a timeliness of the injury reported and also temporary total disability benefits." The hearing officer responded "Okay" and asked appellant's counsel at the hearing if he understood "those to be the issues." Appellant's counsel responded "That's correct, sir."

It appears from the record that the main focus of both the benefit review conference and the contested case hearing was directed at the notice matter. And, as indicated, appellant, appropriately so in our view, has waived this issue on appeal and no longer contests that appropriate notice was given. However, evidence presented during the contested hearing also addressed the matter of the injury sustained by the respondent including the respondent's testimony and medical records. Appellant's counsel objected to the medical records being admitted because "it's our contention that Mr. R did not sustain an on-the-job injury until after - - or at least he did not report an on-the-job injury until after he'd been terminated and it's our contention that he filed a claim in retaliation because he was terminated and no one knew anything in regard to an injury until after he was terminated." Appellant's counsel also stated "it's our contention the injury - - that if he sustained an injury - - such, it wasn't on the job, it wasn't reported as an on-the-job injury." The hearing officer, while continuing to indicate his understanding that the issue was notice, allowed the medical records into evidence "to keep the record clear."

While the issue or issues at the contested case hearing continued to be unclearly stated and confusingly discussed at the hearing, it is apparent that the question of an injury occurring within the course and scope of employment was litigated and considered by the hearing officer. We note that the appellant sets out in his request for review that:

> "Carrier adopts the Statement of Evidence as presented by the hearing officer. It is apparent from the recap that both sides hotly contested the issue of injury in the course and scope of employment at the benefit contested case hearing, and that the officer chose to believe the evidence presented by the Claimant finding his evidence to be more credible."

In his report of the contested case hearing, the hearing officer set out in his "Statement of Case" that the hearing was set to hear, *inter alia* whether the claimant "is entitled to income benefits as a result of his injury." He goes on to make findings that:

> "4. On _____, the Claimant injured his back while handling freight.
>
> 6. The Claimant's injury to his back resulted in his inability to obtain or retain employment in his

vocation beginning May 3, 1991."[1]

and concluded that:

> "4. The Claimant was disabled as the result of a compensable injury on _____, 1991. Inasmuch as the claimant has not reached maximum medical improvement, the Claimant is entitled to temporary income benefits."

Clearly, all the ingredients for determining an injury in the course and scope of employment are within the findings and conclusions of the hearing officer. A person is entitled to receive temporary income benefits (TIBs) if he has disability and has not reached maximum medical improvement. Article 8308-4.22(a), 1989 Act. One of the requirements for having disability is having a compensable injury (Article 8308-1.03(16), 1989 Act) and to have a compensable injury, the injury must arise out of and in the course and scope of employment. Article 8308-1.03(10), 1989 Act. Under the circumstances present, if the issue of injury in the course and scope of employment was not waived because of the failure to raise the issue (Article 8308-6.31(a); Texas Workers' Compensation Commission Appeal No. 91058 decided December 5, 1991), then it must be concluded that the issue was considered to be under dispute at the contested case hearing, was, in fact, litigated by the parties and was decided by the hearing officer. *See generally* Texas Workers' Compensation Commission Appeal No. 91016 decided September 6, 1991.

We next look to the evidence that the respondent sustained an injury in the course and scope of his employment and determine whether it is sufficient to support the findings, conclusions and decision of the hearing officer.

Succinctly, the respondent testified that on _____, he injured his back when shifting freight in the back of the truck he operated while performing his job for his employer (appellant's workers' compensation client). Since the injury occurred on his last pick up, he notified a supervisor of his injury when he placed his normal call in to the office. The respondent testified he notified both of his supervisors the following morning and, that the employer was also notified by his (respondent's) attorney. He was unable to drive to work the next day and his wife drove him.

Respondent's wife testified that her husband told her he had hurt himself at work and that she drove him to the employer's place of business the following day. She stated he wasn't able to work and that he later saw a doctor because of the injuries. She stated

---

1 We do not ascribe the phrase "in his vocation" as being pertinent to a disability determination under the 1989 Act and view it as mere surplusage in Finding of Fact No. 6.

the respondent had not indicated any problems with his back prior to the injury on _____.

The medical statements from the respondent's doctor reflect that the respondent reported he injured himself at work, that the examination and x-rays of respondent "revealed significant limited lumbar mobility to approximately 40% of normal" and "some narrowing of the L4-5 interspace, with loss of the normal lumbar lordosis on examination." The doctor indicated the respondent was unable to work.

Testimony of one witness and the statement of another, both supervisors of the respondent, indicate that the respondent did not notify them that he injured himself on-the-job and that he did not appear to be limping or to be otherwise injured on _____ and _____.

As the appellant cogently states in his request for appeal, "obviously, the issue is decided by whom you wish to believe." The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence (Article 8308-6.34(e)); Texas Workers' Compensation Commission Appeal No. 91037 decided November 20, 1991. Although there were conflicts in the evidence presented, this is for the hearing officer to resolve. See Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We find that the evidence is sufficient to support the findings, conclusions and decision of the hearing officer and that they are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. *See* Texas Workers' Compensation Commission Appeal No. 91129 decided February 10, 1992.

The appellant asks that we consider new items of evidence attached to his request for review. This we decline to do. As indicated, the hearing officer is the fact finder, not the appeals panel. Article 8308-6.34(g), 1989 Act. The appeals panel is limited in its consideration of evidentiary matters to the record developed at the contested case hearing. Article 8308-6.42(a)(1), 1989 Act; Texas Workers' Compensation Commission Appeal No. 91121 decided February 3, 1992. We further note there is no indication whatsoever that the evidentiary items attached to the request for review were unknown or unavailable at the time of the hearing or that due diligence would not have brought them to light. The items both bear dates a number of months prior to the contested case hearing. Nor are these items such that they would, in any reasonable likelihood, cause a different result. *See generally* Hogin v. Texas Employers Insurance Association, 790 S.W.2d 97 (Tex. App.-Fort Worth 1990, writ denied) for newly discovered evidence requirements for a new trial.

We note in passing that one of the documents appears to be an appeal action for unemployment compensation. The matter of the respondent having applied for unemployment compensation was obviously known at the time of the hearing. Indeed, appellant's counsel specifically asked the question of the respondent, "Have you filed for unemployment compensation?" The respondent answered "Yes, I have." No further

inquiry was made. The appellant asks that we order they be credited for an amount of TIBs apparently based upon this document and the apparent assertion that weekly unemployment benefits have been or are being received by the respondent. We observe that although there are provisions in the Texas unemployment legislation which renders an individual disqualified for benefits for periods when workers' compensation benefits are paid (TEX. REV. CIV. STAT. ANN. art. 5221b-3(e) (Vernon Supp. 1992), there are no provisions under the Texas Workers' Compensation Act of 1989 which affect compensation benefits because of payments from collateral sources. *See generally* 75 Tex. Jur. 3rd Work Injury Compensation § 358 (1991); 76 Tex. Jur. 3rd Work Injury Compensation § 574 (1991); American Employers Ins. Co. v. Climer, 220 S.W.2d 697 (Tex. Civ. App.-Dallas 1949, no writ); Aetna Casualty & Surety Co. v. Moore, 386 S.W.2d 639 (Tex. Civ. App.-Beaumont 1964, writ ref;d n.r.e.).

The decision and order of the hearing officer are affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Joe Sebesta
Appeals Judge