APPEAL NO. 92038

On October 9 and 16, 1991, and November 6, 1991, a contested case hearing was held. He (hearing officer) determined that the appellant no longer had the right to contest compensability on any ground other than respondent's failure to give 30 days notice and since there was good notice, the appellant may not avoid liability for compensation. The appellant urges error in several findings of fact and conclusions of law, and claims that issues involving the question of whether an injury was suffered in the course and scope of employment and whether there was sufficient medical evidence to support a claim were properly raised and considered at the benefit review conference, were preserved for the hearing officer's consideration, and that a request for enlargement of issues was based upon newly discovered evidence. A response to the request for review was not timely filed and was not considered. TEX. REV. CIV. STAT. ANN. art. 8308-6.41(a) (Vernon Supp. 1992) (1989 Act); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE. § 143.4 (TWCC Rule 143.4).

DECISION

The evidence is sufficient to support the decision of the hearing officer and is accordingly affirmed.

The issue in this case centers around the question of what issues were in dispute. The benefit review conference report states the "issue raised but not resolved after benefit review conference" to be "did Mr. M reported (sic) the injury within 30 days?" No other issues are indicated. The benefit review conference was held on August 27, 1991. Further, there is no evidence that either party responded or otherwise objected to the benefit review officer's report pursuant to TWCC Rule 142.7(c). However, the appellant did file a "Carrier's Request to Enlarge Scope of Contested Case Hearing" by correspondence dated October 18, 1991. Since this request was filed well beyond the 20 day time limit required by TWCC Rule 142.7(c) (the benefit review officer's report was mailed to all parties on September 13, 1991), it could only be considered as a request under TWCC Rule 142.7(e) wherein an "enlargement" of issues is allowed only upon a showing of good cause.

At the beginning of the contested case hearing, the hearing officer stated the issue to be "did Mr. M or a person acting in his behalf give the required notice under section 5.01 of the Act not later than 30 days after _____?" He also stated there was an issue as to whether there was "good cause to allow the amendment to this proceeding to permit the following issues to be introduced: did Mr. M suffer any injury in the course and scope of his employment and is there sufficient medical evidence to support a claim for compensation." The respondent's counsel objected to the expansion of the hearing stating these matters had been taken care of in the benefit review conference. The hearing officer reserved his ruling and stated he would hear the evidence that backs up the issues and then rule on "whether there is good cause in the findings of fact and decision in this matter."

In pertinent part, the hearing officer's Decision and Order, dated January 6, 1992, set forth that the appellant and the employer had actual notice of the respondent's claimed on-the-job injury within the required notification period under Article 8308-5.01 of the Texas Workers' Compensation Act. Further, the hearing officer determined that the appellant had not presented good cause for failing to raise additional issues and that the appellant had limited itself to contesting compensability only on the notice issue under Article 8308-5.21(c) since the appellant had refused to pay benefits within seven days notice of injury and set out the grounds as "employee failed to report on-the-job injury within 30 days . . . ." In essence, the appellant urges, *inter alia*, that the "issues of course and scope and compensability were tried by consent" at the benefit review conference and the contested case hearing and that there was good cause to have these issues disputed at the contested case hearing because of newly discovered medical evidence. The appellant objects to the hearing officer's findings of fact and conclusions of law which form the basis for his determinations as to the limited issue of notice and the appellant's failure to show good cause.

Succinctly, the respondent, testifying through a translator, claimed he injured his back on the job on _____, while working for (employer), who carried workers' compensation coverage with the appellant. The respondent claims he informed his supervisor several times about his work-related injury and that he requested to go to a doctor. The supervisor denies any report of injury by the appellant. The appellant states that he stopped working for the employer (he says he stopped because of the injury and the work was too demanding; the employer says the appellant was terminated for lack of productivity) on June 6, 1991, and first went to the doctor on his own on June 13, 1991. The appellant subsequently retained an attorney who filed a notice of injury with the appellant and the Texas Workers' Compensation Commission. The cover letter indicated (incorrect date of injury), as the date of injury (respondent's counsel indicated this was a typographical error) but the attached TWCC Form 41, "Employee's Notice of Injury or Occupational Disease and Claim for Compensation," lists date of injury as "_____" and the attached "power of attorney" indicates date of injury as on or about the "_____." This cover letter and attachments were received by the appellant on June 28, 1991, and were sent to the employer who received them on Monday, July 1, 1991. The employer filled out an employer's first report of injury or illness form the same day.

The first matter for our resolution is whether the respondent fulfilled the notice requirements. Article 8308-5.01 provides in pertinent part:

> (a) An employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurred.

Although the respondent testified that he reported his injury to his supervisor several times on the day of injury and the next several days, the hearing officer quite apparently did not base his decision on this testimony as there is no finding of fact about the respondent's claimed verbal notice and the hearing officer concluded that the employer had actual notice on July 1, 1991, of the respondent's claimed on-the-job injury of _____. The evidence does not show that any notice of injury was sent by the respondent or his attorney directly to the employer. However, Article 8308-5.02 provides that the effect of failure to notify under 5.01(a) is to relieve the employer and carrier of liability unless:

> (1) the employer or person eligible to receive notification under Section 5.01(c) of this Act or the insurance carrier has actual knowledge of the injury.

The hearing officer found that both the employer and the appellant had actual notice by July 1, 1991, and that the appellant therefore was not excused from liability. We find there is sufficient evidence to support the hearing officer's findings in this regard. Admitted into evidence at the hearing was the respondent's attorney's letter, with attachments, concerning notification of injury to the appellant dated June 24, 1991, and receipted for on June 28, 1991. Also in evidence is the testimony of Mr. C, safety coordinator for employer, and an employer's first report of injury signed by him on "7-1-91." Mr. C indicated that he was notified by the appellant on July 1, 1991, about the claimed injury by the respondent. Although there was some question about the date of injury on the attorney's cover letter and the two attachments, the hearing officer obviously resolved this possible conflict in favor of the claimed injury date of _____. This was clearly within his authority to do as the fact finder. *See* Burlesmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ).

We believe the intent and purpose of the notice requirement has been fulfilled where, as here, the employer is fully aware of a claimed on-the-job injury within 30 days. This gives both the employer and the insurer an opportunity to quickly investigate the facts surrounding the claimed injury. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980). We also agree with the hearing officer's resolution of the matter concerning the 30 day notice requirement when the 30th day falls on a Sunday as is the situation with June 30, 1991. In such an instance, the 30 day notice requirement is met when the notice is received on the very next working day. *See* Article 8308-1.05. In this regard, TWCC Rule 102.3 provides in pertinent part:

> (a) Due dates and time periods for filings and notices required under this Act shall be computed as follows:
>
> > (1) Computing a period of days. In counting a period of time measured by days, the first day is excluded and the last day is included.

. . . .

(3) If the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.

We next turn to the matter of whether the appellant was limited in contesting this claim to the matter of timely notice. On July 3, 1991, the appellant filed a TWCC interim form, Payment of Compensation or Notice of Refused/Disputed Claim, and disputed the claim for the following reasons: "Employee failed to report on-the-job injury within 30 days. Therefore, carrier is controverting all indemnity and medical benefits."

Under the provisions of Article 8308-5.21(b), "Not later than the seventh day after the date on which the insurance carrier receives notice of the injury, the insurance carrier shall begin the payment of benefits as required under this Act or shall notify the Commission and the employee in writing of its refusal to pay . . . ." This Article goes on to provide that the "insurance carrier's notice must specify the grounds for the refusal" and the "grounds specified in the notice constitute the only basis for the insurance carrier's defense on the issue of compensability in a subsequent proceeding unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date."

The hearing officer heard and considered the evidence offered by the appellant and determined that the appellant had waived the right to contest the compensability of the respondent's injury on grounds other than the question of timely notice of injury because (1) as of August 26, 1991, 60 days had passed since the appellant knew of the claim, (2) the appellant did not modify its original contest of compensability prior to August 26, 1991, which was 60 days after the appellant received notice of respondent's claim, and, (3) there is no showing that any evidence the appellant could now offer to contest compensability could not have been reasonably discovered within 60 days after June 28, 1991.

We agree with the determination and result reached by the hearing officer concerning the "newly discovered" evidence matter. This evidence involved medical reports that the appellant states were first provided to them at the benefit review conference on August 26, 1991. (The report and other documents indicate the benefit review conference was on August 27, 1991.). The appellant states they filed an Amended Notice of Controversion within 60 days, in compliance with Article 8308-5.21. The hearing officer found that the evidence (medical reports of treatment of the respondent) could have been discovered with reasonable diligence before August 26, 1991, the 60th day after June 28, 1991, the date of first notification. The notice of injury sent to the appellant by respondent's counsel on June 24, 1991, includes the name of the treating doctor. There is no evidence to indicate that the appellant ever inquired about medical records or made any

attempt to obtain the medical records. The hearing officer was not persuaded that the appellant, who apparently was surprised by some entries in the medical reports, could not have reasonably discovered this evidence earlier. The notice of the treating doctor and the absence of any other evidence that the appellant made any attempt to obtain the medical records sufficiently supports the hearing officer's determination on this issue. Similar to the discretion resting in a trial judge in granting a new trial based upon newly discovered evidence, the hearing officer can determine, within his sound discretion, whether there is a sufficient basis for permitting an enlargement of issues based upon newly discovered evidence. *See* Moffett v. Texas Employers' Insurance Association, 217 S.W.2d 142 (Tex. Civ. App.-El Paso 1948, writ ref'd n.r.e.). It must generally be shown, among other things, that the evidence was unknown and that failure to discover was not due to want of diligence. Liberty Mutual Insurance Co. v. Hancock, 427 S.W.2d 321 (Tex. Civ. App.-Eastland 1968, no writ); McCardell v. Hartford Accident and Indemnity Co., 360 S.W.2d 831 (Tex. Civ. App.-Beaumont 1962, aff'd 369 S.W.2d 331). We do not find the hearing officer's determination on this matter violated a clear legal right or that it was a manifest abuse of his discretion. Texas Employers' Insurance Association v. Waldon, 392 S.W.2d 509 (Tex. Civ. App.-Tyler 1965, writ ref'd n.r.e.).

Article 8308-5.21(b) and (c) clearly provided that when the insurance carrier elects not to begin payments within seven days of notice of injury, it must notify the employer and Commission and the notice must specify the grounds for refusal. The grounds specified constitute the only basis for the insurance carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date. Accordingly, the appellant's only defense, under the circumstances of this case, was on the timely notice issue. That issue having been correctly resolved against the appellant, the relief requested that we reverse the hearing officer and render in favor of the appellant must be denied.

The factual setting in this case is markedly different and distinguishable from that in Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991, where we determined that an issue not specifically set out in the initial Notice of Refused/Disputed Claims was properly in dispute. All parties considered it as an issue before the benefit review conference; the issue was reported out as an unresolved dispute in the benefit review officer's report without comment or disagreement by any party; it was clearly stated as an issue at the contested case hearing, with the apparent agreement of all parties and no objection being voiced, and it was an issue presented and argued at the hearing, without objection, and it was an issue determined by the hearing officer. We stated in that previous decision that the actions of the parties indicated that they either found the language set forth in the initial notice to encompass the issue of timely notice, consented to the issue being adjudicated or that without any objection being lodged, waiver would be appropriately applied.

In this case, respondent objected to enlargement of the issues. We have

considered the remaining issues raised by the appellant and find them to be without merit and to otherwise have no effect on the decision in this case.

The decision of the hearing officer is affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge