APPEAL NO. 92280

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On March 19, 1992, a contested case hearing was begun, with the employer contesting compensability under Article 8308-5.10(4). Hearing officer presided and continued the hearing until April 30, 1992, when it concluded in (City 1). He determined that claimant, appellant herein, was not compensably injured on either (alleged date of injury) or _____. Appellant states that he was not injured on (alleged date of injury); that he was injured on _____; that the 1989 Act "left this out" (reference to Article 8308-5.10 setting no time limit for an employer to contest compensability); and that a statement he offered was erroneously excluded.

DECISION

Finding that the decision is supported by sufficient evidence of record, we affirm.

Appellant drove a beer truck. He fought with his assistant, who helped him deliver the beer, upon their return to the warehouse at the end of the workday on (alleged date of injury). The hearing officer found that appellant was injured on (alleged date of injury) but that the injury was caused by appellant's willful intent to harm his helper, and was excluded under Article 8308-3.02(2) of the 1989 Act. Since appellant does not contest the determination as to willful intent, the factual basis of the fight will not be described.

Two witnesses testified about the effect of the (alleged date of injury) fight upon appellant. WK was the night warehouseman on that day. He helped break up the fight and observed appellant's helper beat appellant's head on the floor and a door about four or five times. After that, WK said appellant had a stiff neck and did not move too well. DL was the sales manager of the beer company. He observed appellant after the fight and before _____ at work with a black eye, stiff, and beat up. He added that appellant's version of the cause of the fight was incorrect insofar as he had reported that his helper had been rude to certain customers. DL checked with those customers and found no credence to that statement. The testimony of these two witnesses was sufficient for the hearing officer to find that appellant injured his neck on (alleged date of injury).

Another conflict in the evidence was shown when BD testified as general manager that appellant's version of the facts of the fight was contradicted both by his opponent in the fight and by WK, who helped break it up. These conflicts in the evidence could hurt the credibility of appellant and cause the hearing officer as trier of fact to doubt his story of injury on _____. (Discussed in the next two paragraphs). *See* Montes v. TEIA, 779 S.W.2d 485 (Tex. App.-El Paso 1989, writ denied). The hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34(e) of the 1989 Act.

Appellant's injury, which he reported as occurring on _____, was not witnessed. While there is no requirement that an injury be witnessed to be compensable,

appellant's credibility was in question because of the conflicts mentioned above. In addition, the description of the injury was inconsistent with other evidence. Appellant said he was on the truck at the next to last delivery site of the day when he grabbed a case of beer to hand down to his helper (this was a different helper from the one on (alleged date of injury); the helper was not there as appellant turned with the beer in hand, so he jumped down off the truck with the beer; this injured his neck. He did call immediately and report that he hurt himself but said that he could complete the last delivery.

The helper's primary duty on the beer truck was to physically handle the beer. The driver assisted the helper in this endeavor. No attempt was made to controvert the assertion made at the hearing that the appellant had the reputation among drivers of this company for providing the least help to his helper in carrying beer. There was no evidence that appellant routinely climbed up on the truck to hand down beer to his helper. In addition, there was strong evidence that toward the end of the day enough beer would have been delivered so that no climbing was necessary. The remaining beer could be reached while standing on the ground at the side of the truck. The evidence surrounding the circumstances of the alleged injury on _____ in conjunction with the evidence of injury to appellant after the fight of (alleged date of injury) was sufficient for the hearing officer to find no injury on _____.

In this case the carrier did not choose to contest compensability--it accepted liability. Employer contested. The carrier had notice of the injury by August 22, 1991. Employer filed its contest of compensability with the commission on November 4, 1991. The employer's filing was over 60 days from August 22nd. Under the provisions of Article 8308-5.21 of the 1989 Act, the carrier would not then have been able to timely file a contest of compensability unless it qualified under a specific exception to the 60 day rule. That provision reads as follows:

> **SECTION 5.21. INITIATION OF COMPENSATION; INSURANCE CARRIER'S REFUSAL.**
>
> (a) An insurance carrier shall initiate compensation under this Act promptly. If the insurance carrier does not contest the compensability of the injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of the injury during the 60-day period. If the insurance carrier does not initiate payment or file a notice of refusal in a timely manner as required in Subsection (b) of this section, the insurance carrier commits a Class B administrative violation. Each day of noncompliance constitutes a separate violation. The insurance carrier shall notify the commission in writing of the initiation of income or death benefit payments in the manner

prescribed by commission rules. An insurance carrier shall be allowed to reopen the issue of compensability if there is a finding of evidence that could not have been reasonably discovered earlier.

(b) Not later than the seventh day after the date on which the insurance carrier receives written notice of the injury, the insurance carrier either 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 and advise the employee of the right to request a benefit review conference and the means to obtain additional information from the commission.

(c) The insurance carrier's notice must specify the grounds for the refusal. 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. If the commission determines that the insurance carrier did not have reasonable grounds for the refusal, the insurance carrier is subject to a Class B administrative violation.

In contrast, the employer is governed by Article 8308-5.10 of the 1989 Act. That provision allows an employer to contest compensability when the carrier does not but, unlike Article 8308-5.21, it imposes no time limit for such action. It reads:

SECTION 5.10. EMPLOYER BILL OF RIGHTS. Immediately on receiving notice of injury or death from any person, the commission shall mail to the employer a description of the services provided by the commission, the commission procedures, and the employer's rights and responsibilities under this Act. The commission is not required to provide this information to an employer more than once in any calendar year. The information provided to the employer under this section shall include a clear statement of the following rights of the employer:

(1) the right to be present at all administrative proceedings relating to an employee's claim;

(2) the right to present relevant evidence relating to an employee claim at any proceeding;

(3) the right to report suspected fraud;

(4) the right to contest the compensability of an injury if the insurance carrier accepts liability for the payment of benefits;

(5) the right to receive notice, after making a written request to the insurance carrier, of any proposal to settle a claim or any administrative or judicial proceeding relating to the resolution of a claim; and

(6) the right to contest the failure of the insurance carrier to provide accident prevention services under Article 7 of this Act.

The record also shows that employer wrote to carrier on September 5, 1991, indicating its concern that the carrier had begun to pay benefits. In attempting to get the carrier to deny the claim, the letter pointed out that the employer had fired appellant for fighting. It said that appellant was injured by that fight but several days later he reported being injured in a wholly different way at a different time. While the employer stated that it was paying medical bills through its medical insurance, it said that it was inconsistent for the carrier to pay workers' compensation--no one "believes he was hurt on the job."

Employer testified that prior to November 4, 1991, it had communicated with the commission by phone about contesting compensability and about obtaining the commission's form to make that assertion after it had been unsuccessful with its carrier. There was no evidence that employer's contesting compensability was an effort on the part of carrier and employer to circumvent the 60 day requirement to contest compensability imposed upon the carrier by Article 8308-5.21 of the 1989 Act--at the hearing the employer commented that the carrier had not even supplied it with copies of documents required to be exchanged. The hearing officer correctly concluded that the 1989 Act did not impose a limitation period on the employer to contest compensability when the carrier does not. *See* Article 8308-5.10 of the 1989 Act. He was also correct in finding that no rule sets such time limits. In determining that the employer had used "more than reasonable diligence" in contesting compensability, the hearing officer used an appropriate standard--reasonable diligence--in the absence of legislative provision. We note that the employer notified the commission in writing less than two weeks after the 60 day period imposed on the carrier had run. Article 8308-5.21(a) and (c) of the 1989 Act also uses a reasonable standard for discovery of new evidence to be used as a basis for either reopening the issue of compensability after the deadline or for expanding the grounds for the carrier's defense. *Compare* this case to Texas Workers' Compensation Commission Appeal No. 92278 decided August 10, 1992. Appellant's assertion that the "legislature . . . left this out," but that "the carrier must pay," is rejected. A term employed in one section of the statute should not be implied where excluded. *See* Smith v. Baldwin, 611 S.W.2d 611 (Tex. 1980). The evidence supports the hearing officer's conclusion that reasonable diligence was used by the employer in contesting the claim.

Finally, the appellant appears to contest the exclusion of the statement of another employee who had been present at the time of the fight of (alleged date of injury). The hearing officer would not admit it because it was not exchanged prior to the hearing and

good cause was not shown for failing to provide it earlier. While the statement was dated only April 29, 1992, it was from a witness that appellant knew had seen parts of the fight and knew this from the time of the fight. The hearing officer was not arbitrary in refusing to find good cause for the delay in providing a copy of the statement to the other party. *See* Texas Workers' Compensation Commission Appeal No. 92077 decided April 13, 1992. Even if the hearing officer should have admitted this document, the document only says that the affiant helped break up the fight and between (alleged date of injury) and _____ the appellant appeared to him "to be doing his work duties as before the altercation." If it were error to exclude it, it was not reversible error. *See* Atlantic Mutual Ins. Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.), which held that unless a ruling on a question of evidence would govern the outcome of the case, reversible error does not occur by an error in exclusion.

The findings of the hearing officer are sufficiently based on evidence of record and address the issues at hearing. The conclusions of law follow the findings of fact and support the decision. The decision is based on sufficient evidence of record and is affirmed.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge