APPEAL NO. 92218

A contested case hearing was held on April 27, 1992, in (city), Texas, (hearing officer) presiding as hearing officer. She determined that the appellant had not timely controverted the compensability of the respondent's claim and thus awarded benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act). In the single issue for which review is sought, the appellant asks that we reverse the hearing officer's conclusion of law finding the appellant failed to timely controvert the respondent's claim without good cause and render a new decision finding that good cause was shown. In the alternative, appellant requests a remand for a second benefit contested case hearing.

DECISION

Unable to find an abuse of discretion or to otherwise find the decision so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm.

Succinctly, the respondent was seriously injured on (date of injury), by electricity when a crane he was operating for his employer came into contact with a high voltage power line. The appellant is the employer's workers' compensation insurance carrier. Although evidence was presented through the testimony of the respondent, together with statements from his supervisor and the respondent's wife, that the respondent had not consumed any alcohol for several days before the incident and that he acted normally and did not smell of alcohol at the accident site or at the hospital shortly thereafter, a laboratory report of a blood specimen taken within several hours of the incident showed a blood/alcohol concentration of .205. Additionally, notations in the medical records reference the smell of alcohol on the respondent's breath and body detected by a nurse and a doctor.

The respondent was immediately taken to (NMC hospital) and was transferred later the same day to (H hospital). A laboratory report of a blood/alcohol test performed shortly after the respondent was taken to the emergency room at NMC hospital showed that the respondent had a blood/alcohol concentration of .205. This same information is contained in a medical report dated "(date)" from H hospital. The notations from the nurse and doctor concerning the odor of alcohol on the respondent's breath and body were contained in Nurses Progress Notes and the Emergency Department Assessment Record from NMC hospital. The appellant claims they did not get these records until after 60 days following notice of the respondent's injury although requests had been made for the records.

The hearing officer determined that the appellant had presented sufficient evidence to raise a defense of intoxication (Article 8308-3.02(1), 1989 Act) and that the respondent failed to show by a preponderance of the evidence that his intoxication resulted from inhalation or absorption of alcohol incidental to his work. However, the hearing officer awarded benefits to the respondent because the appellant failed, without good cause, to timely controvert the claim. It is this determination with which the appellant takes exception.

Article 8308-5.21(a), 1989 Act, provides in pertinent part that:

> 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.
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> 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.

(WB) testified that she is a licensed insurance adjustor and was handling this case for the appellant. She testified that she started getting the benefits "flowing" in this case. She stated she wrote a request to NMC hospital and H hospital on (date), for the medical records and that she made several follow up requests to NMC hospital later. Documents admitted into evidence indicate that a form letter signed by WB was sent to NMC hospital dated (date) on Newsom Insurance Adjustors letterhead (with a logo of the National Association Independent Insurance Adjusters) and requested as follows: "Please send us a complete copy of hospital records. We represent the workers' compensation insurance carrier." Subsequent requests dated "9-10-91" and "10-22-91" on the same letterhead requested, respectively: "Please send a compelte (sic) copy of the emergency room records. We represent the workers' compensation carrier." and "Please send us copies of lab tests, most importantly any drug test or alcohol test. We represent the workers' compensation insurance carrier." According to WB, she did not get any medical records until October 29, 1991, and did not know about the respondent's alcohol level prior to that. Subsequently, she talked to someone at the Texas Workers' Compensation Commission about the situation and was advised to request an expedited benefit review conference. She ultimately filed a TWCC Form 21 (Notice of Refused or Disputed Claim) on March 13, 1992, although she believed she had controverted the claim on November 5, 1991, when she filed a form requesting an expedited benefit review conference.

The respondent introduced a form, which he claimed he had difficulty obtaining, that is entitled "AUDIT REQUEST FORM." The form lists, *inter alia*, "North American" (NA) as the auditing company, shows an "AUDIT REQ DATE" of "9/20/91" and "RESULTS REC'D" date of "10/09/91." On cross examination, WB stated that form does not show she got records on October 9th, and that NA would have to be asked about the audit although the audit firm (NA) determines what bills get paid. She acknowledged that she had used NA auditing before and had seen that type of form before. She again stated that she did not get any records before 60 days. There was no evidence concerning the carrier (as opposed to an independent adjustor representing the carrier) ever receiving any medical records regarding the respondent or just what relationship NA had in this case or how they interfaced with the carrier and/or the adjuster, WB. WB did not indicate what other actions she took in investigating this case or whether any other attempts were made to get information.

In her findings of fact, the hearing officer found, *inter alia*, that:

14.There is no evidence that the Carrier ever contacted the Claimant for a medical records release, or otherwise employed any other available method to obtain the Claimant's medical records from (NMC hospital) or (H hospital) within 60 days after August 13, 1991, other than the routine written requests by (WB) to each hospital's medical records department.

15.There is no evidence that the information concerning the Claimant's intoxication contained in his (NMC hospital) and (H hospital) records could not have been reasonably discovered within 60 days after August 13, 1991, by the Carrier.

An issue involving whether evidence could have been reasonably discovered earlier is generally a matter addressed to the sound discretion of the fact finder, as the hearing officer is under Article 8308-6.34(g) of the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92124 (Docket No. redacted) decided May 11, 1992. *See also* Texas Workers' Compensation Commission Appeal No. 92038 (Docket No. redacted) decided March 20, 1992. Unless an abuse of discretion is shown, the determination will not be disturbed on appeal. *See* Wilkins v. Royal Indemnity Co., 592 S.W.2d 64 (Tex. Civ. App.-Tyler 1979, no writ). Questions of "reasonableness" and "ordinary prudence" are generally matters of fact and are determined in light of all the circumstances including the experience and the understanding of the persons whose conduct is involved. State Farm County Mutual Insurance Co. of Texas v. Plunk, 491 S.W.2d 728 (Tex. Civ. App.-Dallas 1973, no writ).

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 the evidence. Article 8308-6.34(e). After hearing the evidence proffered on the issue, the hearing officer was not satisfied that the evidence in question could not have been reasonably discovered earlier. Under the circumstances, we cannot conclude her determination on the matter was an abuse of discretion. As stated earlier, it appears that form requests were sent to the hospitals involved by the independent adjuster, but that the medical records were not received by the adjuster until after 60 days. There is no evidence concerning what other actions, if any, were taken by the adjuster in investigating the case or in attempting to gather information. There is evidence in the record that audit activity of the hospital bills was undertaken by some agent, apparently on behalf of the carrier, well within the 60 days period from written notification to the carrier. For that matter, there was no evidence that the medical reports were not sent to the carrier or to an audit company acting in the carrier's behalf. Too, the record indicated that the adjuster involved was experienced in investigating matters of this nature and might reasonably pursue other avenues in obtaining information other than relying solely on a form request. Appellant's argument that the health care provider violated the law by not filing or submitting an initial medical report to the carrier within 10 days of

initial contact with the injured person as required by Rule 133.100 (Tex. W.C. Comm'n, 28 TEX ADMIN CODE §133.100) is not germane or dispositive of this issue. Aside from the fact that the evidence of record only establishes that the adjuster did not receive the medical records until October 29, 1991, it does not establish that the records were not received by the carrier or some other agent of the carrier, or could not have been reasonably obtained. Even if the medical provider did fail to comply with a reporting requirement, such would merely be a factor to consider in evaluating all the circumstances surrounding the issue of whether the evidence could have been reasonably discovered.

Finding the evidence sufficient to support the hearing officer's findings, conclusions and decision on this matter, and not finding any abuse of discretion under the circumstances presented, we affirm.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge