APPEAL NO. 92278

A contested case hearing was held on May 19, 1992 at (city), Texas, (hearing officer) presiding as hearing officer. He determined that the respondent (wife of deceased employee) failed to prove by a preponderance of the medical evidence that the deceased's work was a substantial contributing factor of his heart attack but that the appellant had failed to timely contest compensability and had waived the right to contest compensability. Accordingly, the hearing officer ordered the payment of death benefits pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant urges error in ordering payment of benefits in view of the finding of fact that the deceased did not sustain a compensable heart attack and finds fault with several of the hearing officer's findings of fact and conclusions of law. Respondent agrees with the decision and order of the hearing officer, but urges us to reverse the hearing officer's determination that the deceased did not sustain an injury in the course of his employment on (date of injury).

DECISION

Determining the findings, conclusion and decision of the hearing officer were not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, and are supported by sufficient evidence, we affirm.

The deceased expired of a heart attack (death certificate shows myocardial infarction) on (date of injury) at his place of employment where he was performing duties consisting of "pushing wrenches" in "reassembling a pump" and "physically reattaching the pump housing to a shaft." This was done outside and the temperature was "in the 90s." The deceased experienced dizziness and chest pains while working, went to sit in the shade and drink some water, and was subsequently taken to a hospital emergency room in the local area. He expired at the hospital. The medical evidence in this case was sparse; however, the deceased's wife testified that the deceased smoked about a pack and a half of cigarettes a day and had been having some indigestion problems on and off for several years that had gotten somewhat worse. She indicated he had not seen a doctor for a number of years except for once or twice for cortisone shots for his shoulder and leg.

The only medical evidence from a physician in the record consisted of the statements from (Dr. RC) a cardiology and internal medicine specialist who reviewed the deceased's limited medical records and who opined in summary that: "from the meager medical records available it is impossible to state that this patient's heart attack was precipitated by his labor on [date of injury]" (statement dated October 11, 1991), and in commenting on the wife's statements about the deceased's indigestion:

> [f]requently heart pain or angina can mimic indigestion and a patient is thinking he is having indigestion and does not seek a doctor's advice even though the discomfort possible was due to poor circulation and cholesterol build up in the arteries. It is conceivable that this indigestion-type discomfort that the patient

had in the past was indeed due to his heart and not due to gas, acid, or indigestion." (Statement dated March 17, 1992).

and;

[i]t is my opinion that (deceased's) heart attack was the result of a progression of a pre-existing condition. However, it is possible that heavy work in the summer heat could have aggravated this pre-existing cardiac condition, precipitating his heart attack on the date that it occurred." (Statement dated May 12, 1992).

From the state of the evidence, the hearing officer determined that the respondent failed to prove by a preponderance of the medical evidence, that the deceased employee's work was a substantial contributing factor of his heart attack. Article 8308-4.15(2) provides in establishing a heart attack as a compensable injury under the act that "the preponderance of the medical evidence regarding the attack indicated that the employee's work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack . . .." We believe the state of the evidence of record supports and is sufficient to sustain the hearing officer's determination on this issue. A claimant has the burden of proving that the injury was incurred in the course and scope of the employment. Reed v. Casualty & Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref's n.r.e.). In the case of a heart attack, the requirements of Article 8308-4.15(2) must be met. The hearing officer concluded the medical evidence did not satisfy the statutory requirement. We agree. Texas Workers' Compensation Commission Appeal No. 91009 (Docket No. redacted) decided September 4, 1991; Texas Workers' Compensation Commission Appeal No. 91031 (Docket No. redacted) decided October 24, 1991); Texas Workers' Compensation Commission Appeal No. 91044 (Docket No. redacted) decided November 14, 1991.

Regarding the issue of notice of contesting the compensability of injury, Article 8308-5.21(a) provides in pertinent part:

(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.

* * * * *

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.

The Texas Workers' Compensation Commission Rules (Tex. W. C. Comm'n. TEX. ADMIN. CODE §124.6 [TWCC Rule 124.6]) implementing this article provides in pertinent part that:

(b) . . . However, compensability of a death shall be contested no later than sixty days after the carrier has received written notice of a death as set forth in §124.1 of this title (relating to Written Notice of Injury Defined) . . .

* * * * *

(c) If a carrier disputes compensability after payment of benefits has begun, the carrier shall file a notice of refused or disputed claim, on or before the 60th day after the carrier received written notice of the injury or death. This notice shall contain all the information listed in subsection (a) of this section, provided that all facts set forth as grounds for contesting compensability shall be based on actual investigation of the claim, and shall describe in sufficient detail the facts resulting from the investigation that supports the carrier's position.

Subsection (a) of Rule 124.6 provides (where a carrier refuses to begin benefits) that notification shall be accomplished on a form TWCC-21 and sets forth nine items of required information, the ninth item providing:

(9) a full and complete statement of the grounds for the carrier's refusal to begin payment. A statement that simply states a conclusion such as "liability is in question," compensability in dispute," no medical evidence received to support disability." or "under investigation" is insufficient grounds for the information required by this rule."

The evidence at the hearing established that the self insured employer had actual notice of the death on (date of injury) and that its claims servicing agency for processing workers' compensation claims (S W S) had notice not later than July 22, 1991. A copy of a Notice of Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) was entered into evidence and shows that payment of benefits began on "07/24/91" with a notation "survivor benefits being paid to (respondent) spouse in Good Faith pending BRC." Nothing appears at the bottom of the form entitled "Notice of Refused or Disputed Claim."

Another form TWCC-21 dated "02/06/92" and stamped with the Texas Workers' Compensation Commission, (city) stamp showing a received date of "Feb. 10, 1992" was in evidence. In the notice at the bottom of this form entitled Notice of Refused or Disputed Claim is the following notation:

43. as per the benefit review conference request on or about 09/10/91, we are

> denying this heart attack was in the course and scope of claimants employment. However, benefits were initiated 07/24/91 and we are still awaiting benefit review conference as requested to further discuss dispute.

Also admitted into evidence was a form TWCC-45 (1/91) entitled Request for Setting a Benefit Review Conference dated "9-10-91" setting forth under "Disputed issues requiring a Benefit Review Conferences" the following: "Benefits are being paid. However, upon receipt of medical, compensability is in question. Compensability of heart attack is in question."

There is no date/receipt stamp to indicate that this form was ever received by the Texas Workers' Compensation Commission nor is there any indication that the form became a part of the Commission claims file in this case. *Compare*, Texas Workers' Compensation Commission Appeal No. 92028 (Docket No. redacted) decided March 11, 1992. (A copy of this form does have a date/receipt stamp showing receipt in the Commission's (city) field office on Feb. 10, 1992.) A second copy of the form with a notation at the bottom setting out "(Second Request 12/16/91)" was also in evidence and shows a Commission receipt stamp from the (city) central office dated December 16, 1991. A handwritten version of this form, dated "9-4-91," which apparently served as the basis for the subsequently typed form dated "9-10-91" shows a date receipt stamp from the Commission's (city) field office of "Feb. 10, 1992."

The appellant presented two affidavits to show the usual and customary business practice to establish that the TWCC form dated "9-10-91" was filed with the Commission's central office in (city). The hearing officer determined they were not sufficient to establish the form TWCC-45 was received by the Commission.

There was evidence offered to show that the respondent's claims servicing agency received Dr. RC's October 11, 1991 statement on November 4, 1991.

In his discussion of the evidence, the hearing officer set forth that the affidavits were not sufficient to establish receipt of the TWCC-45 dated "9-10-91" on September 11th or 12th by the Commission, and that neither the "9-10-91" form nor the copy received by the Commission's (city) central office on December 16, 1991 constituted "a contest of compensability" but that it only indicates "a future intention to contest compensability if and when the necessary medical is received." He further indicated that even if the December 16, 1991 amounted to a contest of compensability, it was not timely following the November 4th receipt of Dr. RC's report.

The findings and conclusions with which the appellant takes exception are that: (1) there was no record of a request for benefit review conference filed prior to December 16, 1991; (2) the request for benefit review conference did not constitute a contest of the compensability under Rule 124.6; and (3) the self-insured failed to timely contest compensability and thereby waived its right to contest compensability pursuant to Article

8308-5.21(a).

Initially, appellant argues that the finding by the hearing officer that the heart attack was not established to be a compensable injury under the circumstances in this case, rendered moot the second issue of timeliness of contesting or disputing the claim. This argument does not have merit. While it is true that to be compensable, an injury must "arise out of and in the course and scope of employment for which compensation is payable" (Article 8308-1.02(10)), where an injury occurs and the insurer "does not contest the compensability of the injury (emphasis ours) on or before the 60th day" after notification of the injury, the insurer "waives its right to contest compensability." Article 8308-5.21(a). Article 8308-1.03(27) defines injury to mean "damage or harm to the physical structure of the body . . .." Clearly, the deceased suffered an injury in this case. If the compensability of the injury was not timely contested, the right to contest compensability is waived by the clear language of Article 8308-5.21(a). If the position urged by the appellant were accepted, then the statutory provision providing that the right to contest compensability is waived if not timely filed would have little or no application: there would be nothing to waive if the injury were subsequently determined not to be a "compensable injury." Too, while there are distinct proof requirements regarding heart attack cases (Article 8308-4.15) this does not mean compensability of a heart attack can not be waived as set out in Article 8308-5.21(a).

The hearing officer found as fact that neither the form TWCC-45 dated "9-10-91" nor the copy of that form with the notation of "second request" and which was received by the Commission of December 16, 1991, constituted a contest of compensability. We can not say that this finding,and accompanying conclusion, in this regard is unsupported by sufficient evidence or, conversely, that it is against the great weight and preponderance of the evidence so as to be clearly wrong or manifestly unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). In this regard, and aside from the matter that the form TWCC-21 is the form contemplated by TWCC Rule 124.6(c) to dispute compensability after payment of benefits has begun, we conclude that the language set forth in the TWCC-45's and urged by the appellant to be appropriate notice of a contest of compensability, is little more , if any at all, than the type of language given as specific examples of insufficient grounds for the information required by rule to contest compensability. It is the burden of the carrier to articulate its grounds for contest, not upon employees of the Commission, or claimant, to figure out the reason underlying the carrier's position.

The hearing officer also found that the appellant received "newly discovered evidence" on November 4, 1991. This was the October 11, 1991 statement of Dr. RC. Nonetheless, nothing additional was filed, other than a second copy of the "9-10-91" TWCC-45, until the TWCC-21 form was filed on February 10, 1992. Therefore, even presupposing , which we do not so hold, that a carrier would have a full 60 days to contest from the receipt of newly discovered evidence, this latter notice was not filed within 60 days of receipt of Dr. RC's statement and would not operate to preclude the invocation of waiver under Article

8308-5.21(a).

The hearing officer noted in his discussion of the evidence that "[a]pparently the carrier was not aware that they had received (Dr. RC's) medical records on November 4, 1991, when they filed their Second Request for a Benefit Review Conference on December 16, 1991." It is unfortunate that some confusion may have resulted in a contest of compensability not being timely filed. However, we do not find this to be a sufficient or justifiable reason to ignore the dictates of the statute. It is apparent to us that the 1989 Act and implementing rule established firm time factors in several areas (Texas Workers' Compensation Commission Appeal No. 91016 [Docket No. redacted] decided September 6, 1991) including the contest of compensability. They can not be lightly disregarded. *See generally* Texas Workers' Compensation Commission Appeal No. 92122 (Docket No. redacted) decided May 4, 1992.

The decision of the hearing officer is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge