APPEAL NO. 931061

On June 22 and October 21, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). The issues raised but not resolved after the benefit review conference (BRC) were: (1) whether the respondent (claimant) reached maximum medical improvement (MMI) on August 3, 1992, based on Dr. H' report; and (2) whether the claimant had disability after August 3, 1992. The appellant (carrier) requested that the hearing officer add to the issues to be resolved at the hearing the issue of whether the claimant was injured in the course and scope of his employment on (date of injury), and the issue of whether horseplay was a producing cause of the claimant's injury. The hearing officer determined that the claimant did not reach MMI on August 3, 1992, and that the claimant had disability from August 9, 1992, until April 23, 1993. The hearing officer further determined that the carrier failed to show good cause for adding the issue of injury in the course and scope of employment and the issue of horseplay, and thus the carrier's request to add those issues was denied. Although the hearing officer denied the carrier's request to add the requested issues, he nevertheless made findings of fact on those issues. The carrier does not dispute the hearing officer's determinations on the issues of MMI and disability. The carrier disputes certain findings of fact and conclusions of law concerning injury in the course and scope of employment, horseplay, and failure to show good cause to add those issues to the issues to be resolved at the hearing. The carrier requests that we reverse the decision of the hearing officer and render a decision that the claimant was injured as a result of horseplay and that the claimant take nothing by his claim. The claimant responds that the hearing officer's decision is supported by the evidence and requests affirmance of the decision.

DECISION

The decision of the hearing officer is affirmed.

Since the carrier has not appealed the hearing officer's findings, conclusions, and decision regarding MMI and disability, the evidence pertaining to those issues is not discussed except as necessary to an understanding of the matters that have been appealed.

On (date of injury), the claimant was working as a porter for (employer), a car dealership. On that day the employer instructed him to take a customer's car to a shop to have a leather steering wheel cover installed, which he did. While driving the customer's car on the way back to the dealership, the claimant was involved in an accident. The claimant said he had missed the exit for the dealership, went to the next exit and got on the frontage road to go back to the dealership when a car cut him off and he went off the road into a ditch, struck a culvert, and then hit a store sign. According to (JT), the employer's manager, the customer's car was totalled. Another employee, (MS), went to the accident scene and took the claimant back to the dealership. The claimant then went to the hospital. The claimant was off work for several days, and when he returned on (date), JT fired him for speeding in the customer's car, being ticketed, and for "driving out of area." The

claimant agreed that he was speeding at the time of the accident and also agreed that the car windows were down, the sunroof was open, and the car radio was on. A police report indicates that the claimant was going 69 miles per hour in a 55 mile per hour zone and that the claimant was given a speeding ticket.

In an investigative report from (investigative company) to the carrier dated March 16, 1992, the investigative company acknowledged receipt of the assignment of the claimant's claim for investigation. The report states that the claimant was instructed to take a customer's car to downtown (city) to have a leather steering wheel cover installed and that the claimant indicated that he missed his exit and was avoiding contact with another vehicle when he ran off the road. The report states that the claimant was speeding, was "out of the area," the car windows and sunroof were open, and the radio was on at the time of the accident. The report further states "[JT's] opinion of what actually occurred was that he believes the claimant had the radio turned up very high and was joyriding in the customer's car and intentionally missed the exit so that he could ride around (sic) little bit more." The report also states that a statement was taken from MS who said the claimant told him he was going 70 to 75 miles per hour when the accident occurred. The report indicates that the statements of JT and MS were sent to the carrier with the report. According to a date received stamp, the carrier received the report on March 23, 1992. The claimant denied that he purposely missed the exit to the dealership. He said that another car prevented him from getting to that exit so he went on to the next exit.

Hospital reports dated (date of injury), show that the claimant complained of back, neck, and shoulder pain. By March 11, 1992, the claimant reported to health care providers that he also had pain in his right knee and left hand. The claimant was later diagnosed as having an internal derangement of the right knee, lumbar strain, neck and rib cage contusions and strains, and a strain and contusion of the left hand. On August 3, 1992, (Dr. H), who had been treating the claimant, stated that the claimant had "essentially made a full recovery from his injuries as the result of the incident of (date of injury)." Dr. H also said that the claimant should be able to return to full duty. However, in January 1993, Dr. H wrote that on the claimant's last visit to him of August 3, 1992, the claimant had not reached MMI. In November 1992, (Dr. J) took the claimant off work until further notice and on November 23, 1992, Dr. J performed surgery on the claimant's right knee. The claimant testified that Dr. J released him to return to work in April 1993.

The two issues raised but not resolved after the BRC were: (1) whether the claimant reached MMI based on Dr. H's report of August 3, 1992; and (2) whether the claimant had disability after August 3, 1992. The hearing officer found that the claimant had not reached MMI on August 3, 1992, and further found that he had disability from August 9, 1992 to April 23, 1993. These findings have not been appealed and, therefore, are final.

In regard to the matter of the carrier's request to have additional issues resolved at the hearing, some background information is in order. The claimant said that he was paid temporary income benefits (TIBS) from March 11, 1992, to September 15, 1992, and from November 9, 1992, to July 18, 1993. In a Payment of Compensation or Notice of

Refused/Disputed Claim form (TWCC-21), dated September 18, 1992, the carrier stated that written notice of injury was received on March 10, 1992, and that TIBS had been paid from March 11, 1992, to September 15, 1992. The carrier indicated on the form that it was terminating TIBS because MMI had been reached on August 3, 1992. There is no indication on the form that the carrier refused or disputed the claimant's claim that he sustained a compensable injury on (date of injury).

A BRC was held on January 21, 1993, to mediate the issues of whether the claimant reached MMI on August 3, 1992, and whether the claimant had disability after August 3, 1992. The benefit review officer's (BRO's) recommendations in favor of the claimant were sent to the parties on February 4, 1993, and the parties were notified that a hearing was set for March 17, 1993. There is no mention of a request for addition of issues in the BRC report. The claimant filed a response to the BRC report indicating agreement with the BRO's recommendations. The record does not reflect a response to the BRC report from the carrier. The hearing officer granted the claimant's request for a continuance and the hearing was reset to April 27, 1993. The hearing officer then granted the carrier's request for a continuance and the hearing was reset to June 22, 1993. In a written motion dated June 3, 1993, the carrier requested that the hearing officer include an additional issue of "[w]as the claimant injured in the course and scope of his employment on or about (date of injury), while working for [employer]." The carrier stated in its motion that investigation had revealed that the claimant was engaged in horseplay and that good cause existed for requesting the additional issue. The carrier did not state the basis for its assertion of good cause. The claimant filed a written answer to the carrier's motion on June 18, 1993, asserting that the carrier did not state what good cause existed for adding the requested issue and the claimant asked that the carrier's motion be denied.

At the hearing on June 22, 1993, the carrier requested that the hearing officer add the issues of injury in the course and scope of employment and horseplay to the issues to be resolved at the hearing. As grounds for good cause to add the issues, the carrier asserted that its attorney was not hired until March 1993 and, due to his heavy trial schedule, did not have an opportunity to interview JT and other witnesses until May 1993. The carrier further asserted that it was not until after its attorney had interviewed witnesses that it was discovered that horseplay was involved. The claimant opposed the addition of the requested issues and pointed out that since about March 16, 1992 (date of the memo to the carrier from investigative company), the carrier had knowledge of the facts upon which it now relied to try to establish horseplay. Thus, the claimant urged that there was no newly discovered evidence upon which to reopen the issue of compensability. The claimant asserted that the carrier had waived the issue of injury in the course and scope of employment and the issue of horseplay. Without making a finding of good cause to add the requested issues, the hearing officer stated that he would add the requested issues, grant a continuance for the claimant to prepare to address those issues, and would issue a written order adding the requested issues. By order dated June 30, 1993, the hearing officer "conditionally added" the issue of injury in the course and scope of employment and the issue of whether horseplay was a producing cause of the injury. The hearing officer did not make a finding of good cause to add the issues, but stated only that the carrier alleged

that "recent investigation" showed that such matters should be added. The hearing officer further stated in his order that "[t]he issues are conditionally added such that the hearing officer will take evidence or (sic) such issues, including matters about whether the underlying facts are newly discovered evidence."

When the hearing was reconvened on October 21, 1993, the hearing officer stated that the issues to be resolved were the two unresolved issues from the BRC and the two "conditionally" added issues that the carrier had requested per his order of June 30, 1993. The claimant testified in his own behalf and presented documentary evidence. The carrier presented documentary evidence as well as the testimony of JT and MS. The carrier also presented the testimony of an investigator who testified concerning the claimant's employment during part of the summer of 1993. Basically, JT testified that on the day of the accident he knew that the claimant had been speeding and that the claimant had been ticketed. He also knew that the claimant had gone past the dealership exit and that the windows and sunroof were down and that the radio was on when the accident occurred. He said that prior to the accident he had reprimanded the claimant for speeding in the parking lot of the dealership. JT said he believed that the claimant was involved in horseplay at the time of the accident. MS said that immediately after the accident, the claimant told him he had been speeding. The carrier urged that the claimant was not injured in the course and scope of his employment, and, additionally, that the evidence of speeding, windows and sunroof open, radio on, and being ticketed, established horseplay at the time of the accident. The claimant argued that the evidence established that he was injured in the course and scope of his employment and that he was not involved in horseplay at the time of the accident.

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). The carrier is not liable for compensation if the employee's horseplay was a producing cause of the injury. Section 406.032(2). Sections 409.021(c) and (d) provide as follows:

> (c)If an insurance carrier does not contest the compensability of an 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 an injury during the 60-day period.
>
> (d)An insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c) (Rule 124.6(c)) provides that:

(c)If a carrier disputes compensability after payment of benefits has begun, the carrier shall file a notice of refused or disputed claim [TWCC-21], 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 support the carrier's position.

Rule 142.7 addresses the statement of disputes at a contested case hearing. Subsection (e) of that rule provides as follows:

(e)Additional disputes by permission of the hearing officer. A party may request the hearing officer to include in the statement of disputes one or more disputes not identified as unresolved in the benefit review officer's report. The hearing officer will allow the amendment only on a determination of good cause.

On appeal, the carrier disputes the following findings of fact and conclusions of law:

FINDINGS OF FACT

7.The circumstances that [claimant] did not take the most direct exit, that the car windows and sunroof were open, and the fact that he was driving at a higher rate of speed than was appropriate, from which one could infer deviation from course and scope of employment or horseplay, were all known to the employer by (date).

8.On 16 March 1992 the carrier knew of all the circumstances from which one could infer that [claimant] may have deviated from the course and scope of employment or been engaged in horseplay. The carrier first raised such issues on 22 June 1993. There are no previously undiscovered facts that could not have been discovered within 60 days with due diligence after 16 March 1992.

9.There is no good cause to add the issues of injury in course and scope, and horseplay to the contested case hearing.

CONCLUSIONS OF LAW

4.Because: (i) all the facts probative to an issue of whether [claimant] was engaged in horseplay, or whether he deviated form the course and scope of his employment at the time of his (date of injury) accident, were known to the carrier on 16 March 1992; (ii) the carrier did not raise such issues until more than 60 days after 16 March 1992, when the carrier had

notice of his claimed injury; and (iii) the carrier has not shown any newly discovered evidence that would permit it to reopen the issues beyond 60 days after 16 March 1992, the carrier has waived contesting compensability of [claimant's] claim under the Act.

7.Because: (i) there is no good cause to add issues of course and scope and horseplay to the issues at this contested case hearing; (ii) the issues were not identified as unresolved by the [BRO]; and (iii) the issues were not added by agreement of the parties, the Hearing Officer does not add issues of horseplay and course and scope of employment to the issues at this contested case hearing.

The carrier takes "exception" to the foregoing findings of fact and conclusions of law for the following reasons: (1) the evidence shows that the first time the carrier became aware of horseplay was in June 1993 when the carrier's attorney met with JT; (2) Rule 124.6(c) is "vague and unclear and does not address what investigation the carrier has to undergo to determine at that point in time whether an injury has been incurred in the course and scope of employment;" and, (3) the hearing officer abused his discretion in not finding good cause to add the requested issues.

We find no merit in the carrier's contentions on appeal. The evidence the carrier relied on at the hearing to establish no injury in the course and scope of employment and horseplay was known to the carrier shortly after the accident as evidenced by the March 16, 1992, memo to the carrier from the investigative company. We observe, however, that the date the 60-day time period begins for disputing the claim is the date the carrier received written notice of the injury, which in this case was March 10, 1992, as evidenced by the TWCC-21 dated September 18, 1992. Thus, under Section 409.021(c) and Rule 124.6(c) the carrier had 60 days from March 10, 1992, to dispute the claim, unless, under Section 409.021(d), it is allowed to reopen the issue of the compensability of the injury on a finding of evidence that could not reasonably have been discovered earlier. The carrier failed to dispute the claim within the 60-day period and failed to show that it was relying on evidence that could not reasonably have been discovered earlier in attempting to dispute compensability of the injury in June 1993.

We do not think that Rule 124.6(c) is "vague and unclear" in calling for an investigation. The rule plainly provides for an "actual investigation of the claim." In this case, the carrier investigated the claim shortly after it received notice of the claim and, for whatever reason, did not act on the results of the investigation until June 1993. Nothing of a material nature was presented at the hearing which was not already covered in the (month) (year) investigative report. We find no abuse of discretion on the part of the hearing officer in determining that the carrier failed to show good cause for the addition of the carrier's requested issues. By failing to contest compensability within the statutory 60-day period, the carrier waived its right to contest the compensability of the claim. The 60-day period for contesting compensability applies to the horseplay exception to liability. *See* Texas Workers' Compensation Commission Appeal No. 93628, decided September 8, 1993.

Notwithstanding that the hearing officer determined that the carrier had failed to show good cause to add the issues of injury in the course and scope of employment and horseplay, the hearing officer nevertheless went on to consider these issues and found that the claimant was engaged in the furtherance of his employer's affairs when injured, that he was not engaged in horseplay when injured, and that horseplay was not a producing cause of his injury. The carrier asserts that these findings are against the great weight of the evidence. While we do not reach this issue under the circumstances of this case, we do not conclude that the complained of findings are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Appeal No. 93628, *supra*.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge