APPEAL NO. 931112

This appeal is brought pursuant to 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*.). A contested case hearing was held on November 8, 1993, in (city) Texas. The hearing officer,(hearing officer), determined that the appellant (claimant) was not injured in the course and scope of her employment, but that she suffered from arthritis, a non-compensable ordinary disease of life. The hearing officer further determined that the carrier "properly" disputed compensability of the claim more than 60 days after receiving notice of the injury based on evidence that could not have been reasonable discovered earlier and that the claimant does not have disability. The claimant appeals, expressing disagreement with the decision and order of the hearing officer.

DECISION

The decision of the hearing officer is affirmed on the issue of disability and reversed on the issues of whether the carrier properly disputed compensability and whether the claimant had a compensable injury. A new decision is rendered that the carrier did not properly contest compensability.

The claimant worked for approximately 12 years as an occupational health nurse for (employer) and is suffering from arthritis in both knees. She described her job as non-sedentary (standing or walking 75% to 80% of the time) with primary responsibility for running the employer's dispensary, including keeping it clean and stocked, updating publications, scheduling appointments and attending patients. She asserted that she had to be "up and down all the time" on a concrete floor. She did not contend that her employment caused her arthritis, but only that her employment caused an aggravation of this "existing condition." The claimant testified that in (month year), upon returning to work after a three month absence, she experienced severe pain in her thighs. Previously she had noticed pain in her knees which was relieved only when she was able to get off her feet. Because her pain got worse, she sought treatment from (Dr. A) on December 15, 1992, who took knee x-rays and diagnosed "decrease of joint space in the lateral compartments of the right especially worse than the left." Dr. A also indicated on an employer's "Medical Department Out-Of-Plant Referral" form dated December 15, 1992, that the claimant was unable to work "more than" eight hours per day or 40 hours per week, and he further indicated on the same form that the claimant "may not be able to perform all duties." The claimant further testified that as a result of lengthy discussions with Dr. A during the week following her initial visit, she "found out" her increased pain was work related. On December 22, 1993, this diagnosis and history were recorded on an employer's medical record. According to the claimant, on this date she also filed a claim for benefits with the Texas Workers' Compensation Commission (Commission). No documentary evidence of this claim was introduced at the hearing.

It is undisputed that the carrier first learned on (date), that the claimant was alleging a compensable injury in the form of aggravation of her pre-existing arthritic condition. How this came about is not clear in the record, but the claimant testified that on January 12, 1993,

she agreed to a carrier's request for an "independent medical examination." In a January 26, 1993, response to a letter of January 15, 1993, from (VB),[1] the adjuster, Dr. A restated his diagnosis and commented that December 15th was "the first (claimant) had known she had knee problems for sure. . . ." He added:

> When we first discovered this problem in December 1992, [claimant] specifically asked if this could be related to the fact that she has to do a great deal of walking on a concrete floor at [employer].
>
> There is no question but what such activity would aggravate this condition, although I expect its exact causation is probably more one of degenerative joint disease but since work activities certainly in her environment could aggravate this condition, of course the answer to your question has to be yes.
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> . . . [claimant] relates that when she was off work for a time back in September, her thigh pain disappeared and when she went back to work, it recurred. This would certainly suggest that work activities are aggravating it substantially.

The claimant stated she was also off work from January 18 to 29, 1993, because of severe pain.

In a letter of February 4, 1993, VB notified the claimant that the carrier had received Dr. A's letter of January 26th and requested that the claimant be seen by (Dr. B) for an independent medical evaluation. The claimant apparently met with the carrier's nurse on February 17, 1993, to discuss her case; an appointment with Dr. B was set for April 7, 1993. In her testimony, VB attributed the delay in getting a earlier appointment to the need to assemble the claimant's existing medical records and to have a formal job analysis prepared. In VB's opinion, a job analysis was necessary because Dr. A's conclusions about how much standing was involved in the claimant's job "seemed excessive." There is no evidence showing when the job analysis was completed (it is marked as being received by the carrier on May 14, 1993), but VB was certain, and this is confirmed by Dr. B, that Dr. B had it when he examined the claimant on April 7, 1993.

By letter of April 7, 1993, received by the carrier on April 12, 1993, Dr. B diagnosed degenerative arthritis of the right knee with valgus deformity and mild degenerative arthritis of the left knee. After a review of claimant's job analysis prepared at the request of the carrier, Dr. B concluded that the claimant's "degenerative joint disease in her knees was not created or aggravated by her employment" and that she "would have pain in her knees regardless of what surface she was walking (sic)." According to VB, as a result of this report, the carrier submitted a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on April 15, 1993, in which carrier controverted the claim as based on a noncompensable ordinary disease of life.

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[1]The January 15, 1993, letter was not in evidence, but was referred to as the cause for Dr. A's response of January 26, 1993.

WHETHER CARRIER TIMELY CONTROVERTED COMPENSABILITY OF CLAIMANT'S INJURY

Sections 409.021(c) and (d) provide that a carrier which does not contest compensability of an injury by the 60th day after being notified of the injury waives its right to contest compensability absent a finding of new evidence that "could not reasonably have been discovered earlier." The parties agreed in this case, and the evidence supports the conclusion, that the carrier was first informed of the claimed injury on (date). The carrier also concedes that it did not controvert compensability within the 60-day period, but instead relies on the exception provided for newly discovered evidence set out in Section 409.021(d).

Resolution of the question of whether evidence could have been reasonably discovered earlier is committed to the sound discretion of the hearing officer. Texas Workers' Compensation Commission Appeal No. 92218, decided July 15, 1992, and Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993. We will overturn a hearing officer's conclusion on this issue only if we deem it an abuse of discretion, that is if made without reference to any guiding standards or rules. *See* Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986) and Texas Workers' Compensation Commission Appeal No. 93774, decided October 15, 1993. Whether evidence could have been reasonably discovered earlier is a question of due diligence, that is, whether there was a lack of due diligence on the part of the carrier in not obtaining the evidence earlier. Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992.

In the case under appeal, the claimant argues that the carrier was unreasonably dilatory in pursuing information on which it could base a dispute of compensability. The claimant contends that she agreed in January to be examined by another doctor and that, if Dr. B was not available for an earlier appointment, there were other doctors who could have performed the examination. She states that she even requested to see another doctor, but was told she had to see Dr. B. In her opinion, she cooperated in every way in this process and was always available for an earlier appointment. If in fact Dr. B had to wait for the job analysis before he could examine her, she does not understand why her copy says it was received on May 14, 1993, after her appointment with Dr. B. Implicit in this last argument is claimant's belief that, contrary to the carrier-requested job analysis, her job required a substantial amount of standing and walking on concrete floors and that this should have been already known to the carrier and employer. She believes the carrier's untimely dispute of the compensability of her injury prejudiced her because, had she know her claim would have been controverted, she would have sought a disability retirement instead of a normal retirement based on years of work, an option now no longer available to her.

The hearing officer in his Statement of Evidence states that in the latter half of January 1993 the carrier delayed an independent medical examination pending a job analysis and "[a]t this point . . . the carrier had no basis for disputing compensability of the claim." He further states in Finding of Fact 8 that "[t]he Carrier's dispute of compensability was based on evidence that could not have been reasonably discovered earlier." The

"evidence" referred to is not specifically identified, but we assume it is Dr. B's report of April 7, 1993, which relies substantially on the carrier-initiated job analysis for its conclusion that the claimant's arthritis was "not created or aggravated by her employment." No evidence was offered by the carrier as to when this job analysis was requested or completed. The analysis itself is a straightforward description of routine duties expected of an occupational health nurse and bears no indications that special observation techniques or measurements were required or had to be made over extended periods of time.

The Appeals Panel has recently stressed the importance under the 1989 Act of compliance by a carrier with the 60-day rule for disputing compensability in order to "bring claims to a prompt resolution" thereby avoiding the hardship that could befall a claimant as much from indecision as from an adverse decision. Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993. We have in the past refused to excuse noncompliance with this time limit where ample evidence existed at the time of notice of an injury or shortly thereafter, but the carrier for whatever reason did little or nothing to procure the evidence. Appeal No. 93774, *supra*. Similarly, we have found lack of due diligence when a carrier did virtually nothing over a period of several months to undertake an active investigation of a claim. Appeal No. 92218, *supra*. There was no evidence in this case from which to conclude that the job analysis sought by the carrier was scientifically complex or obscure or required time consuming testing or observation to develop. We believe the carrier knew or should have known as early as January 29, 1993, when it received Dr. A's report, that he based his conclusion on his perception of the demands of the claimant's job. Given the nature of the claim (an ordinary disease of life as affected by the claimant's employment), it is difficult to conclude--and the carrier offers no help in this regard other than to say it was waiting for the job analysis to be completed --that the carrier could not have gotten from the employer within 60 days of January 29, 1993, a job analysis reflecting the amount of standing and walking required of the claimant in a job she had held for 12 years and which would be sufficient to enable the carrier to meet its obligations under Section 409.021(a) to pay benefits or contest compensability. The claimant's supervisor, (RB), conceded as much when he from his own knowledge in his testimony confirmed the findings of the formal job analysis that the claimant's job was essentially a sedentary, paperwork kind of job with most of the work confined to the first aid room.

We thus conclude on the basis of the record presented for review that there is no evidence on which the hearing officer could have found that the carrier's dispute of compensability was based on evidence "that could not have been discovered earlier." For this reason, we reverse the decision of the hearing officer on this issue and render a new decision that the carrier did not timely dispute compensability.

Because our decision on this issue amounts to a "confession of compensability" by the carrier, Texas Workers' Compensation Commission Appeal No. 931036, decided December 23, 1993, the hearing officer's further conclusion that the claimant was not injured in the course and scope of employment is reversed. In so doing, we emphasize that in no way are we retreating from our previously expressed view that injuries from walking or standing may be compensable only if "inherent" in a particular employment as compared

with daily life and employment generally and if supported by "specific medical evidence establishing that the activity, during the course of employment, caused the complained of injury." Texas Workers' Compensation Commission Appeal No. 931067, decided December 31, 1993.

WHETHER CLAIMANT HAS DISABILITY

Section 401.011(16) of the 1989 Act defines disability as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage." The claimant has the burden of establishing disability, Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993, and a finding of disability may be based on the claimant's testimony alone if credited by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993.

The evidence of disability in this case was ambiguous. The claimant continued working in a "modified duty" status (except for approximately 10 days) up to the date she requested retirement. She had first applied for retirement before she was treated by Dr. A in December 1992 for her increased pain. She speculated that the employer would only give her modified duties for a short period of time and with the understanding that she would retire in the near future. She thus believed she was compelled to retire to prevent further damage to her knees. RB testified to the contrary, that other employees have been on this status for lengthy periods of time, including one employee since 1985. Claimant's treating doctor, Dr. A, in his initial report stated only that the claimant could not work more than eight hours per day and 40 hours per week. His latest report states "if she were to return to her usual occupation, there is a reasonable probability that she would be unable to tolerate it." While the evidence she presented to the hearing officer on the issue of disability could reasonably have given rise to different findings and conclusions, this is not a sound basis to disturb those findings or substitute our judgment for that of the fact finder. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex.Civ. App.-Amarillo 1974, no writ). When reviewing a hearing officer's decision on a factual sufficiency basis, we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We believe the determination of the hearing officer that the claimant did not establish disability is supported by sufficient evidence and is not contrary to the great weight and preponderance of the evidence. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1952).

The decision of the hearing officer is reversed on the issues of whether the carrier properly disputed compensability of the alleged injury and whether the claimant suffered a compensable injury. A decision is rendered that the carrier did not properly contest compensability making claimant's injury compensable. That portion of the decision of the hearing officer that the claimant does not have disability as a result of her alleged injury is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge