APPEAL NO. 931131

This appeal arises under 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*.). On November 12, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues agreed upon for resolution were:

1.Did the Claimant sustain an injury in the course and scope of his employment on (date of injury)?

2.Did the Claimant report the injury to his Employer within 30 days of (date of injury), or in the alterative, did the Claimant establish "good cause" for not reporting the injury within 30 days?

3.Does the Claimant have "disability" as a result of his injury on (date of injury)?

4.Did the Carrier "contest compensability" in a timely manner?

The hearing officer determined that the appellant, claimant herein, failed to prove that he sustained an injury in the course and scope of his employment on (date of injury), that claimant failed to give notice of injury to his employer within 30 days and failed to establish good cause for failure to do so, that claimant failed to prove he had disability as a result of the alleged injury on (date of injury), and that the carrier had contested compensability in a timely manner.

Claimant contends that the hearing officer erred in that the carrier failed to "properly controvert" the claim and that a second "TWCC-21, while filed within 60 days did not, . . . contain any newly discovered evidence." Claimant also argues that he did give notice to his employer on the date of injury and that the employer had knowledge of his injury in that "more than one day was missed from work." Claimant urges that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

We reverse and render a new decision that claimant is entitled to benefits under the 1989 Act.

Claimant testified that he worked for (employer)., employer herein, as a route salesman making home food sales in a delivery truck. Claimant testified that on (date of injury), while driving his delivery truck, he began to feel faint and dizzy. Claimant stated

that just prior to fainting he was able to apply the emergency brake of his truck. When claimant regained consciousness he was in an ambulance on the way to a local hospital. There was no wreck, collision or physical damage to the truck. Claimant testified he spoke to his sales manager about the incident on (date of injury), the day of the incident. Claimant, at that time and even at the CCH, was unsure what caused him to faint and the sales manager, according to claimant, advised claimant to file under his group health coverage. Claimant subsequently is urging that he sustained cervical and lumbar back injuries, apparently as a result of the truck coming to an abrupt stop on (date of injury). The hearing officer, on several occasions, stated he was unclear on how the "mechanics" of the injury occurred. Claimant's position was that he was active before the accident and subsequently had severe back pain and therefore it could only have been the accident which caused his back injury. Claimant speculates that his truck stopped abruptly when he applied the brakes and that this caused him to strain at his seat belt and caused the injury.

The hospital emergency room (ER) record of (date of injury), shows an admission at 1435 hours, a history of "passing out," complaints of tightness on chest radiating to (L) shoulder, neck & (L) arm being numb & tingling." Special instructions included "(2) moist heat to neck & upper back."

Claimant's treating doctor was (Dr. C) who, in a report dated December 3, 1992, records a history of claimant "passing out" while driving the delivery truck and being taken to the hospital. Dr. C notes claimant ". . . has continued to have episodes of severe dizziness and vertigo riding in an automobile." Claimant is noted to have a past history of "diagnosis of multiple sclerosis and seizures." Dr. C referred claimant to (Dr. W) "for further evaluation and treatment of syncopal episodes and a history of seizure disorder." Dr. W by report dated December 16, 1992, recounts a history of "acute onset of dizziness," going to the ER and a "past medical history . . . that six years ago he had an episode of dizziness and vertigo . . . ." The report notes claimant "states that there is numbness below the hips bilaterally but it is worse on the left than on the right." Claimant is recorded as complaining of "constant headaches" and a "subjective" decrease of sensation in the left arm. Dr. W's plan is to obtain an MRI of the head and C-spine.

Claimant was next seen at (Clinic) in March 1993. Apparently claimant received a fairly extensive workup (which is not in the record) at the Clinic and saw a neurosurgeon, (H). Dr. H in a brief comment dated March 2, 1993, noted "[claimant] may return to work from a neurosurgical standpoint" and "[h]e may resume driving in October 1994 if he remains seizure free." A March 10, 1993, report from Dr. W, the referral doctor stated: "[Claimant's] physical examination and neurologic exam was within normal limits. He then underwent extensive testing including an MRI of his cervical spine as well as an MRI of his head which revealed no significant abnormalities." Dr. W did note some "mild disk bulging on his MRI of his cervical spine" but considered them clinically irrelevant. Dr. W noted

claimant failed to show up for a follow-up appointment and concluded, ". . . I do not feel [claimant] is disabled and should return to employment. He has no medical restrictions at this time." Claimant then saw (Dr. L), a chiropractor, who by report dated June 25, 1993, recited claimant's history, complaints of low back pain, left hip, left leg pain to knee, left abdominal pain, middle back-scapular pain, neck and shoulder pain as well as various other complaints. Dr. L concluded that the complaints "could very well be resultant from [claimant's] history of strenuous repetitive work activities and trauma of the truck's abrupt stop."

It is undisputed that claimant went to the employer's place of business and filed a first report of injury to the acting sales manager on (date). The employer completed an Employer's First Report of Injury or Illness (TWCC-1) on (date), showing the injury was reported on (date). Carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (Texas Workers' Compensation Commission Form-21) (TWCC-21) on May 3, 1993, stating in block 43:

> Our investigation reveals that we do not have any medical information regarding diagnosis or causal relationship. We are also seeking information to clear up confusion as to how injury occurred. Confusion stems from the fact that this claim was handled by the employer's disability and has just been reported as a workers' comp claim.

Subsequently carrier filed another TWCC-21, on June 23, 1993, disputing the claim in block 43 as follows:

> 1)Injury does not fall within the course and scope of employment. . .
>
> 2)Claimant failed to report his claim for an on the job injury within the prescribed time period. . . . Claimant has shown no good cause for late filing.
>
> 3)Election of benefits. . . .

Claimant testified that he has been drawing unemployment compensation since August 1, 1993, and that in accordance with Texas Employment Commission (TEC) requirements he has been actively seeking employment. Claimant testified that he works two or three hours Saturday nights at a country and western club shining boots. Claimant stated he was able to work "on a limited basis." On the issue of notice, claimant at various times took inconsistent positions that he gave notice of a work-related injury to his sales manager on (date of injury), and upon specific questioning by the hearing officer, that he did not realize his condition was work related until after he was seen in the Clinic in March 1993. The hearing officer pointed out that if claimant did not

realize his condition was work related on (date of injury), he could hardly have given notice of a workers' compensation injury to the sales manager that day.

The hearing officer determined claimant experienced a "syncopal episode" at work on (date of injury), but failed to establish a causal connection between his employment, the syncopal episode and his back injury and that claimant failed to establish a "mechanism of injury" to support a finding of injury in the course and scope of employment. The hearing officer further found that claimant had not timely reported his work-related injury to his employer and there "is no reasonable explanation to excuse claimant's delay. . . ." The hearing officer found claimant did not have disability and "[t]he Carrier received written notice of injury on (date). The Carrier contested compensability when they filed their Notice of Refused or Disputed Claim dated May 3, 1993, and June 23, 1993." The hearing officer concluded that the carrier contested compensability in a timely manner.

Claimant's principal allegation of error is that carrier did not timely controvert the claim. Claimant states "the second TWCC-21, while filed within 60 days, did not, absolutely did not, contain any new previously undiscovered evidence" and therefore carrier should be held to their original TWCC-21, which claimant alleges is defective. Claimant refers to Appeals Panel decisions the ombudsman had cited and declared that they were "totally disregarded by the hearing officer" and the "language alone in the initial TWCC-21 did not comply with commission rules." We agree with claimant's assertions that the language in the May 3rd TWCC-21 does not constitute a full and complete statement of the grounds for refusal to pay as required by Rule 124.6(a)(9), and are of the opinion that the cited Appeals Panel decisions discuss the language necessary to constitute compliance with Rule 124.6(a)(9) but are distinguishable from the instant case on the facts in that in the instant case two TWCC-21s were both filed within 60 days of the notice of injury.

Claimant at the CCH, as well as on appeal, cites Texas Workers' Compensation Commission Appeal No. 93202, decided April 28, 1993. In that case the Appeals Panel discussed whether the language used in the TWCC-21 met the requirements of specificity required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(a)(g) (Rule 124.6(a)(9)). In that case the hearing officer found that the carrier had failed to adequately dispute the claim based on lack of specificity in the language and did "not specify recognizable bases for contesting compensability" and the Appeals Panel affirmed.

Also in Texas Workers' Compensation Commission Appeal No. 93326, decided June 10, 1993, the issue was the wording of the TWCC-21 and the Appeals Panel held "that magic words are not necessary to contest the compensability of an injury." In reviewing several cases the Appeals Panel affirmed the hearing officer who found terminology that claimant reported his injury after his termination and never reported an injury until his termination as adequate to contest compensability.

Texas Workers' Compensation Commission Appeal No. 92468, decided October 12, 1992, discussed at some length in carrier's response, where an initial TWCC-21 stated ". . . no medical to support on the job injury. . . . Compensability will be determined following further investigation" was held inadequate as a basis on which to defend against the issue of compensability. The initial TWCC-21 was not filed within seven days of the date the carrier received written notice of the injury and the Appeals Panel said "[i]n addition, no additional Notice of Refused/Disputed Claim was filed within 60 days provided in . . . [the] 1989 Act." Although this might indicate more than one TWCC-21 may be filed within the 60-day period, the circumstances permitting those filings will be subsequently discussed in this opinion.

In Texas Workers' Compensation Commission Appeal No. 92038, decided March 20, 1992, the Appeals Panel affirmed the hearing officer who had determined that the carrier had waived the right to contest the compensability of the claimant's injury on grounds other than timely notice because ". . . (2) the appellant (carrier) did not modify its original contest of compensability prior to August 26, 1991, which was 60 days after (carrier) received notice of (claimant's) claim . . . . " This contemplates, under certain circumstances, that a carrier may be allowed to "modify its original contest of compensability." Neither this case, nor any of the other cases cited by the claimant contains the fact situation we have in the instant case where the carrier refused payment of benefits and timely filed a notice of compensability within seven days of the notice of injury but its TWCC-21 lacked the specificity required by Rule 124.6(a)(9). Carrier then filed an amended or modified TWCC-21, which had the necessary specificity required by Rule 124.6(a)(9) within 60 days (57 days) of the notice of injury. The question raised is, whether the carrier, after a refusal to pay benefits, may amend, modify or otherwise file another TWCC-21 after seven days, but before 60 days, of the notice of injury.

Section 409.021 (1989 Act) provides in pertinent part:

Sec. 409.021.INITIATION OF BENEFITS; INSURANCE CARRIER'S REFUSAL; ADMINISTRATIVE VIOLATION.

(a)An insurance carrier shall initiate compensation under this subtitle promptly. Not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall:

(1)begin the payment of benefits as required by this subtitle; or

(2)notify the commission and the employee in writing of its refusal to pay and advise the employee of

(a)the right to request a benefit review conference; and

(B)the means to obtain additional information from the commission.

(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.

(e)An insurance carrier commits a violation if the insurance carrier does not initiate payments or file a notice of refusal as required by this section. A violation under this subsection is a Class B administrative violation. Each day of noncompliance constitutes a separate violation. (V.A.C.S. Art. 8308-5.21(a)(part), (b)).

Section 409.022 provides:

Sec. 409.022.REFUSAL TO PAY BENEFITS; NOTICE; ADMINISTRATIVE VIOLATION.

(a)An insurance carrier's notice of refusal to pay benefits under Section 409.021 must specify the grounds for the refusal.

(b)The grounds for the refusal 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.

(c)An insurance carrier commits a violation if the insurance carrier does not have reasonable grounds for a refusal to pay benefits, as determined by the commission. A violation under this subsection is a Class B administrative violation. (V.A.C.S. Art. 8308-5.21(c)).

We note that in codifying this provision the paragraphing has been changed slightly from the version approved by the legislature in Article 8308-5.21. Rule 124.6 implements the statute (1989 Act) and provides in pertinent part:

> (a)A carrier that refuses to begin paying temporary income, lifetime income, or death benefits shall notify the commission and the claimant or representative, on a form TWCC-21 and in the manner prescribed by the commission. The notice shall contain the following information: [Emphasis added.]
>
> * * * *
>
> (9)a full and complete statement of the grounds for the carrier's refusal to begin payment of benefits. 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.
>
> (b)The carrier must file the notice described in subsection (a), for payment of temporary income or lifetime income benefits, no later than the 7th day following receipt of written notice of injury. . . .
>
> (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 support the carrier's position. [Emphasis added].
>
> (d)Payment, or denial of payment, of a medical bill shall be made in accordance with the Act, § 4.68, and not under this section. However, a carrier that contends that no medical benefits are due because an injury is not compensable under the Act shall file a notice of refused or disputed claim set forth in this section no later than the 60th day after receipt of written notice of injury.

It appears clear to us and consistent with comments in the rule history, that Rule 124.6 provides for a "pay or dispute" situation. If the carrier elects to refuse to begin paying benefits it must file a form TWCC-21 specifying reasons for refusing to begin payment of

compensation within seven days or risk a Class B administrative penalty (Section 409.022(c) formerly Article 8308-5.21(c)). If the carrier files a TWCC-21 within seven days, as in the instant case, the carrier is bound by the grounds set forth in the TWCC-21 unless the defense is based on newly discovered evidence (Section 409.022(b)). The initiation of payments does not affect the right of the carrier to continue to investigate or deny the compensability of an injury during the 60 day period. Section 409.021(c). The purpose of these provisions is to ensure either prompt commencement of compensation or statement of the specific reasons for failure to do so.

In Texas Workers' Compensation Commission Appeal No. 92532, decided November 13, 1992, carrier filed its initial TWCC-21 fourteen days after it received written notice of claimant's claim. Claimant in that case argued that carrier had waived its right to contest compensability because it had not filed its Notice of Refused/Disputed Claim (TWCC-21) within seven days of receiving written notice. The Appeals Panel held:

> While Article 8308-5.21(a) provides that the insurance carrier commits a Class B administrative violation if it fails to either initiate payment or file a notice of refusal in a timely manner as required by Article 8308-5.21(b), it does not shorten the waiver date from 60 days to seven days. We considered this issue in Texas Workers' Compensation Commission Appeal No. 92122, decided May 4, 1992, and there stated that "[w]e do not read Article 8308-5.21 to provide that a carrier's 60-day period to either contest compensability or suffer a waiver of its right to contest is dependent upon its first initiating payment of benefits. However, Class B administrative penalties, not waiver, are provided for by the statute should a carrier fail to either initiate payment or provide notice of refusal to pay not later than seven days after receiving written notice of injury.

We affirm that position and add that if the carrier seeks to avoid the potential administrative penalty by filing a TWCC-21, it will be bound by the statement of grounds it sets forth as a reason for its refusal to begin payment of benefits unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date. *See* Section 409.022(b). Carrier offered no comment or evidence that the June 23rd TWCC-21 involved newly discovered evidence which could not have been reasonably discovered at an earlier date, choosing instead to stand on the argument that the carrier is allowed to file more than one notice of disputed claim without newly discovered evidence provided it has been filed "within the 60 day limit."

Claimant argues, and rightly so, that the grounds specified in carrier's May 3rd TWCC-21 do not meet the requirements of Rule 124.6(a)(9). As a ground for refusal to

begin payments carrier specifies " . . . that we do not have any medical information regarding diagnosis or causal relationship. We are also seeking information to clear up confusion as to how injury occurred. . . . Our investigation is proceeding . . . . " Rule 124.6(a)(9), in requiring a full and complete statement of the grounds for carrier's refusal to begin payment of benefits, specifically states that conclusions such as "no medical evidence received to support disability" (in this case regarding diagnosis or causal relationship) and "under investigation" are insufficient as grounds for the information required by this rule (Rule 124.6).

The key in the instant case was carrier's refusal to begin paying benefits. Had carrier begun payment of benefits, carrier could have relied on amendments or modifications to its TWCC-21 filed prior to or on the 60th day after receiving written notice of the injury. In the comments to the rule history one commentator " . . . suggested that a procedure be established to provide reimbursement of these benefits to the carrier . . ." if it is later determined that the claim was noncompensable. The Commission disagreed, noting "that there is no statutory authority for repayment unless willful intent [by claimant] can be established . . . or pursuant to an interlocutory order. . . ." 16 Texas Register 312 (January 18, 1991). Obviously the problems of "pay or dispute" within seven days were considered.

The hearing officer also found that claimant's inability to obtain and retain employment after (date of injury), was due to nonwork-related events or conditions and concluded that claimant failed to prove that he has disability as a result of the alleged injury. Claimant does not dispute these determinations, appealing only that he had given timely notice of his injury, or had good cause for failing to do so and that carrier had failed to timely and adequately contest the compensability of his claim. As Section 410.204(a) provides that the Appeals Panel shall issue a decision on each issue on which review was requested, we have declined to review issues which are not appealed. *See generally* Texas Workers' Compensation Commission Appeal No. 93766, decided October 10, 1993, and Texas Workers' Compensation Commission Appeal No. 93386, decided July 2, 1993. In that the issue of disability has not been appealed, the hearing officer's determination on this issue has become final.

In that we are reversing the hearing officer's decision, on a matter of law, finding that carrier had not adequately contested claimant's claim, and since the grounds specified in the May 3, 1993, TWCC-21 constitute the only basis for the carrier's defense absent a showing of newly discovered evidence, the issue of whether and how claimant gave timely notice of injury to his employer within 30 days of the date of injury or whether claimant had good cause for failing to do so, is not at issue here and will not be discussed.

The hearing officer's decision and order on the appealed issues are reversed and a new decision on the appealed issues is rendered that claimant is entitled to workers' compensation benefits under the 1989 Act for his injury of (date of injury), not inconsistent with this opinion.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge