APPEAL NO. 931148

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*.). At a contested case hearing held in (city), Texas, on October 27, 1993, the hearing officer, (hearing officer), took evidence on the following disputed issues: 1. Was the respondent's (carrier) contest of compensability sufficient to meet the specificity requirements of Section 409.022 (1989 Act) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6); and 2. Did the appellant (claimant) sustain an injury in the course and scope of employment on or about (date of injury). The hearing officer made certain factual findings and concluded that claimant was not injured in the course and scope of his employment on (date of injury). The hearing officer further concluded that the carrier's notice of disputed claim (TWCC-21) not only sufficiently stated grounds for disputing the claim, which was the disputed issue, but was also timely filed, a matter not stated in the disputed issue. Claimant's request for review attacks both legal conclusions. Regarding the conclusion that claimant was not injured in the course and scope of employment on (date of injury), the claimant does not challenge any of the factual findings supporting this conclusion but merely requests review of the insufficiency of the evidence to support the conclusion. As for the conclusion regarding the timeliness and sufficiency of the carrier's dispute of the claim, the claimant challenges not only this conclusion but also one factual finding which stated that the carrier filed a notice of disputed claim on August 4, 1993, stating the reason for disputing the claim as "no evidence of an injury in course and scope." Claimant's position is that the employer filed its written report of the injury on July 28, 1993; that the carrier, on August 2nd, filed a TWCC-21 stating "investigation continuing," which was not a sufficient statement of dispute; that while carrier filed a second TWCC-21 on August 4th stating "no evidence of an injury in the course and scope," carrier did not show that the second TWCC-21 was based on newly discovered evidence which could not reasonably have been earlier discovered; and, therefore, carrier was bound by its first TWCC-21 which did not sufficiently dispute the claim. Claimant also contended that the grounds stated in carrier's second notice of dispute were insufficient under the aforesaid statute and rule. The carrier's response urged the sufficiency of the evidence to support the determination that claimant was not injured on (date of injury), and further contended that carrier's second notice of dispute sufficiently stated a dispute.

DECISION

Finding the evidence sufficient to support the challenged factual finding and legal conclusions, we affirm.

Claimant testified that he commenced employment with (employer) in May 1993, that sometime in June he sustained an injury to his left foot for which he received benefits under the 1989 Act, and that on (date of injury), at about 3:00 p.m., he was injured when a scaffold he was standing on tipped. According to the testimony of employer's owner, (Mr. CT), claimant had returned to light duty work after his foot injury of June 22nd only one day before the date of the scaffold incident. Claimant said he was standing on a scaffold, which he

described as being 20 feet high, cutting bolts off an interior metal wall with an acetylene torch; that a wheel came off the scaffold and it started to fall; that he reached out and grabbed a beam with his left hand; and that coworkers stabilized the scaffold and he then climbed down. At another point claimant testified: "I hung myself with this [right] arm." He testified at first that he fell from the scaffold but later said he did not fall but that when it tipped he "slipped away from the scaffolding," shut the torch off and climbed down. He said he finished working the shift, slept on the drive home to a distant city, and was unaware he was injured until about 10:00 p.m. that evening when he began to experience severe back pain. Claimant testified that the next morning he still felt pain and sought medical care but could not obtain it because of payment problems. He said he saw an attorney in an effort to obtain medical care and sometime thereafter obtained treatment. He agreed he told no person associated with his employer of his injury and did not dispute that employer's first notice of his claimed injury came from the lawyer he consulted for help in obtaining medical care. Claimant said he has not worked since his accident and that his back hurts "from top to bottom."

Coworker (Mr. S) testified that he was in the immediate vicinity of the scaffold, which he described as being approximately seven feet high; that the scaffold was near a wall and corner inside the building being worked on; that claimant was able to move the scaffold as he worked along the wall cutting bolts as the scaffold was on wheels; that at one point a wheel rolled into a depression in the floor and came off; that he saw it happen and that he and (Mr. C) immediately went over, stabilized the scaffold, and put the wheel back in place. Mr. S further testified that the scaffold could not "go anywhere" because of its proximity to the wall and corner. When it tipped, claimant put one foot and one hand against the wall, kept the cutting torch in his other hand, smiled, said,"Oh, that was close," and kept right on working without coming down off the scaffold. Mr. S also stated that about 15 minutes later, he asked claimant to do some welding and that claimant climbed down from the scaffold, climbed a ladder, did the requested welding, and then resumed his work on the scaffold. Mr. S said he witnessed the entire incident and that claimant did not get hurt and nor indicate he was hurt for the rest of the day.

According to Mr. C's statement, he was working at the site on (date of injury)) for the general contractor and was unaware of any employee of employer having fallen or having been injured on (date of injury)). (Mr. O), employer's foreman, and (Mr. RT), employer's crew supervisor, were both at the job site on (date of injury)) and they, too, were unaware of claimant's having fallen or having sustained an injury on that date. According to his statement, (Mr. G), who worked for the general contractor employing employer for the metal building rehabilitation job, was at the job site on the day claimant said he was injured. He said that claimant was cutting bolts that day; that he saw and spoke to claimant throughout the day; that claimant did not fall or say anything about getting hurt, and that when the shift ended claimant slept in the truck on the way back to the city where they resided.

A report from (Dr. C) of claimant's visit of July 26, 1993, stated that claimant complained of right shoulder and low back pain, as well as left foot pain. This record recited the following history: "This patient was working about (date of injury)) when he fell 20 feet

off a scaffold. He was sent to the Center where they x-rayed his foot. As he fell, he grabbed ahold of the steel with his right shoulder. After some help came to stabilize the scaffold, the patient was lowered to the ground." Dr. C diagnosed subacromial bursitis, right shoulder, myofascitis, lumbar sprain, and left foot sprain. Claimant testified that he did not actually fall from the scaffold to the ground.

The hearing officer found that on (date of injury), claimant worked at the job site cutting bolts while standing on a scaffold about eight feet off the ground; that in the afternoon of that date the scaffold lost a wheel and tilted to one side becoming temporarily unstable; that claimant did not fall but continued to perform his duties; that claimant reported the injury to an attorney on July 19th and first sought medical treatment on July 26th; and that employer first became aware that claimant was alleging a work-related injury when it received a call from a doctor's office to verify employment. Claimant has not challenged any of these factual findings but challenges the legal conclusion that he was not injured in the course and scope of his employment on (date of injury).

Section 410.165(a) provides that the hearing officer is the sole judge not only of the materiality and relevance of the evidence offered but also of its weight and credibility. As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer may believe all, part, or none of the testimony of a witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others (Cobb v. Dunlap, 656 S.W. 2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)). Though not obligated to accept the testimony of a claimant, an interested witness, at face value (Garza, *supra*), an issue of injury may be established by the testimony of claimant alone. *See e.g.* Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992. As an interested party, the claimant's testimony only raises an issue of fact for determination by the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758, 760 (Tex. Civ. App.-Amarillo 1973, no writ). The hearing officer could credit the testimony of Mr. S and the statements of others at the job site and conclude that claimant failed to establish that he was injured on (date of injury)) as he contended. We do not substitute our judgment for that of the hearing officer where, as here, the challenged determination is supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W. 2d 865, 868 (Tex. App.-Texarkana 1989, no writ.)

The hearing officer further found that employer filed its first report of injury on July 28, 1993. Claimant does not challenge this finding. The hearing officer also found that carrier filed a TWCC-21 on August 4, 1993, stating the reason for disputing the claim as "no evidence of any injury in course and scope." Claimant does challenge this finding on the apparent grounds that the TWCC-21 was not based on newly discovered evidence and did not sufficiently dispute the claim. Based on these findings, the hearing officer concluded that carrier's TWCC-21 was timely filed and that the grounds of dispute were sufficient to comply with Section 409.022 and Rule 124.6.

Though not the subject of a finding, the evidence showed that the carrier's first TWCC-21 was dated August 2, 1993, and stated that payment was refused or disputed for the following reasons: "Investigation continues." Carrier's second TWCC-21, found by the hearing officer to have been filed on August 4, 1993, the seventh day after July 28th stated the grounds for disputing the claim as follows: "Carrier disputes as no evidence of an injury in the course and scope. Carrier has not been able to locate employee." Claimant's contentions are that carrier did not show that its second TWCC-21 was based on newly discovered evidence and that it did not state a basis for dispute with the specificity required by Section 409.022 and Rule 124.6. Claimant does not contend that the August 4, 1993, filing of carrier's second TWCC-21 was beyond the seventh day following carrier's receipt of notice of the injury on July 28th.

Section 409.021(a) provides, in part, that a carrier, not later than the seventh day after receiving written notice of an injury, shall begin the payment of benefits or notify the Commission and the employee in writing of its refusal to pay. Section 409.021(c) provides that if a carrier does not contest the compensability of an injury on or before the 60th day after the date the carrier is notified of the injury, the carrier waives its right to contest compensability; and, that the initiation of payments by the carrier does not affect its right to continue to investigate or deny the compensability of an injury during the 60 day period. While not the subject of a finding, we note that the Benefit Review Conference (BRC) report shows that no compensation had been paid by carrier to the date of the BRC (October 4, 1993). Section 409.021(d) provides that a carrier may reopen the issue of compensability if there is a finding of evidence that could not have reasonably been earlier discovered. Sections 409.022(a) and (b) provide, in part, that a carrier's notice of refusal to pay benefits must specify the grounds for the refusal and that such grounds constitute the only basis for the carrier's defense on the issue of compensability unless the defense is based on newly discovered evidence that could not reasonably have been earlier discovered.

Rules 124.6(a) and 124.6(a)(9) provide, in part, that a carrier that refuses to begin paying income benefits shall notify the Commission and claimant on a form TWCC-21 and in the manner prescribed by the Commission, and further, that such notice shall contain the following information:

* * * * * *

(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.

Rule 124.6(b) requires the carrier to file the TWCC-21 no later than the seventh day following receipt of written notice of the injury. Rule 124.6(c) provides, in part, that 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 receiving written notice of the injury.

In Texas Workers' Compensation Commission Appeal No. 931131, decided January 26, 1994, we reviewed a scenario where the carrier, not later than the seventh day after receiving written notice of an injury, refused to commence payment of benefits and in its TWCC-21 stated, in effect, that the claim was under investigation. The carrier filed a second TWCC-21 after the seventh day but before the 60th day stating specific grounds for disputing the compensability of the claim. The hearing officer determined that the carrier had timely contested compensability, apparently because its second TWCC-21 was filed within 60 days. The Appeals Panel stated that "[t]he 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, [emphasis supplied]" reversed and rendered a decision that the carrier's dispute was untimely, and provided the following analysis:

> 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.

The Appeals Panel went on to observe in that decision: "[t]he 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."

The case we here consider is factually distinguishable from Texas Workers' Compensation Commission Appeal No. 931131. In both cases the carrier apparently decided not to begin paying benefits by the seventh day following receipt of written notice of the injury, and within that period filed TWCC-21 forms which, in effect, merely stated that the claims were under investigation (and thus failed to sufficiently contest compensability under Rule 124.6). However, in the case we here consider, neither of carrier's TWCC-21 forms were filed after the seventh day whereas in Appeal No. 931131 the second TWCC-21, sufficient under Rule 124.6, was filed after the seventh day. We are not cited to nor are we aware of any restriction on a carrier's filing more than one TWCC-21 within the seven day period, as was apparently done by the carrier in this case. Accordingly, the efficacy of carrier's second TWCC-21 as a contest of the compensability of the claim in this case turns not on the reopening of the issue of the compensability of the injury based on evidence

which could not reasonably have been earlier discovered, but rather on its adequately stating a basis of dispute.

The Appeals Panel has said that Article 8308-5.21(c) (now Section 409.022) and Rule 124.6(a)(9) "require specificity and not generalities" in stating the grounds for disputing a claim. Texas Workers' Compensation Commission Appeal No. 92145, decided May 27, 1992. The decision in Texas Workers' Compensation Commission Appeal No. 93326, decided June 10, 1993, stated the following:

> We have previously indicated that magic words are not necessary to contest the compensability of an injury under the Article [Article 8308-5.21(c)] and Rule and that we look to a fair reading of the reasoning listed to determine if the notice of refusal or denial is sufficient. *See* Texas Workers' Compensation Commission Appeal No. 93302, decided June 2, 1993, where we held "is not work related" as sufficient and Texas Workers' Compensation Commission Appeal No. 92145 [*supra*] where, in affirming the sufficiency of the language used, we stated, "a fair reading of the grounds listed, when considered together, encompass a controversion or dispute on the basic issue that an injury was not suffered within the course and scope of employment. The language used in the present case meets that criteria."

And see Texas Workers' Compensation Commission Appeal No. 93302, decided June 2, 1993, where the hearing officer found sufficient the carrier's statements denying two claims because the claimant's medical condition "is not work related" and the Appeals Panel affirmed stating: "A fair reading of the notices sufficiently appraised the claimant that the carrier was contesting the claimed injuries were not work related or within the course and scope of employment." In Texas Workers' Compensation Commission Appeal No. 93533, decided August 9, 1993, the Appeals Panel determined as a sufficient dispute the following:

> Based on witness' statements vs. non-statement of claimant (attorney represented), and medical is nonconclusive on date of injury and history, this claim is disputed. The claimant continued to work full time through December 24, 1992, with no complaints to anyone. The first doctor's visit was January 7, 1993. Claimant terminated on January 8, 1993, due to never coming back to work.

The Appeals Panel observed in that decision that the "key point to be determined is whether, read as a whole, any of the reasons listed by the carrier would be a defense to compensability that could prevail in a subsequent proceeding."

In the case under consideration, we are satisfied, as we were in Texas Workers' Compensation Commission Appeal Nos. 93326, 93302, and 93533, *supra*, that the language used by carrier in its second TWCC-21 met the criteria of the statute and rule, and that the challenged determinations are not so against the great weight and preponderance

of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge