APPEAL NO. 93186

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas on January 29, 1993, before (hearing officer), hearing officer. Two issues were considered: whether the claimant was injured in the course and scope of his employment on or about (date of injury), and whether he timely reported such injury to his employer. The hearing officer determined that the claimant timely reported an injury, but that he was not injured in the course and scope of his employment. The claimant, who is the appellant in this action, objected to inclusion of the first issue because it was not an issue from the benefit review conference report, and because it was not raised in the carrier's notice of refused or disputed claim. The claimant also raises this issue on appeal, and it also contends that the hearing officer's determination that the claimant was not injured in the course and scope of his employment is against the great weight and preponderance of the evidence.

DECISION

Because we are unable to discern the basis for the hearing officer's ruling that injury in course and scope was properly an issue at the contested case hearing, we reverse and remand for further clarification.

The claimant testified that he was employed by (employer) as an unloader, a job which required him to move boxes of various weights from trailers onto rollers which led to conveyor belts. He said that he began to experience back pain over a period of time and not from one specific incident. He identified (date) as the day he noticed that his job performance begin to suffer from his back pain, although he stated that he had had back pain for a few weeks prior to that date, and had been taking aspirin for the pain.

On June 22, he was told by (Mr. D), who was acting as claimant's supervisor while his usual supervisor was on vacation, that his work pace was slipping and that he needed to improve by the next day or he would be written up. Mr. D testified, and claimant agreed, that he did not at that time tell Mr. D anything about back problems. The following day, claimant did not report to work because he said his back was hurting him. He said he tried to call in, but said he was unable to contact anyone. The following day, June 24th, claimant spoke with Mr. D, who asked him why he had not come in the previous day. Mr. D testified that claimant told him it was because he had hurt his back at work. Mr. D advised him he needed to come in and talk with (Mr. M), who was operation supervisor over Mr. D.

Mr. M testified that he spoke with the claimant on June 24th. When he asked claimant why he had not come to work or called in on June 23rd, he said claimant responded, "I was already hurt anyway." He said claimant told him he had been hurt for over a month and that he was not really sure how it happened. Claimant also told him he had reported it to some people, and he named (Mr. E) who was claimant's usual supervisor. Mr. M said he spoke to both Mr. D and to Mr. E when the latter returned from vacation the

following week, and that Mr. E had not received any report of an injury. He said he determined claimant's injury was not a workers' compensation claim, apparently in part because it had not been timely reported and in part because claimant had not shown up for work on June 23rd.

(Mr. A), the plant supervisor, said he met with claimant sometime after claimant had talked with Mr. M. He said the claimant said he had had an injury in May or a month ago, or over a month ago. He also told Mr. A he had not spoken to anyone until he talked to Mr. D and Mr. M. Mr. A understood from their conversation that claimant's doctor told him his back problems could have happened at work.

(Ms. W), who was employer's medical supervisor at the time period at issue, said she spoke to claimant in late June or early July of 1992, and that he told her his back had been hurting about a month. She said she concluded claimant did not have a workers' compensation claim because he said he was not sure how his back had been hurt.

The claimant testified that after Mr. M told him to see a doctor before he could return to work, he went to his family physician,(Dr. R). Dr. R's initial medical report from June 29th gives a history as follows: "Loading-unloading heavy material, experienced severe pain over the lower back; pain worsened as time went on, became unable to load-unload heavy weights." Dr. R diagnosed lumbar spine strain, prescribed medication and therapy (moist heat, massage, and ultrasound waves), and released claimant to light duty work. While the initial medical report states the claimant was referred to other doctors for EMGs and imaging, the claimant stated that Dr. R was the only doctor he had seen, and that he was still under his care at the time of the hearing.

As the claimant notes in his appeal, the issue of injury in course and scope of employment was heard by the hearing officer over claimant's objection. Such objection, preserved as error on appeal, was based on the argument that the only issue from the benefit review conference was timely notice. It is also based upon the claimant's contention that the carrier disputed claimant's claim solely on the issue of notice.

The benefit review conference report, dated November 10, 1992, states the disputed issue as, "[w]as the claimant injured in the course and scope of employment?" The claimant's position was that he had been having back problems for several weeks and thought his back was just tired; that on or about June 24th he began to feel his back problems were due to unloading, and that he told his supervisor on that date. The carrier's position was stated as follows: "The claimant's date of accident was not (date), it was (date). The employer was not informed of an injury until June 27, 1992. Therefore, 30 day notice was not provided to the employer. There is no medical to support an injury." The benefit review officer's recommendation was "a finding that the claimant injured his back in the course and scope of his employment with [employer]."

The record shows that on January 13, 1993, the claimant responded to the benefit review officer's report, stating that the sole issue at the benefit review conference was one of timely notice of injury, as evidenced by the carrier's Notice of Refused/Disputed Claim

(Form TWCC-21), and that course and scope had never been an issue.

The record further reflects that the carrier filed two Forms TWCC-21. The first, dated July 10, 1992, gives the date the carrier first received written notice of injury as July 10th, and states the reason for dispute, in pertinent part, as "[o]ur investigaiton (sic) show (sic) that claimant did not report claim to employer within 30 days, claimant violated Rule 122.1 of the Texas Workers Comp Act. Medical benefits are also being disputed."

The second Form TWCC-21, dated July 29, 1992, stated in pertinent part, "[o]ur records indicate an alleged date of injury of 5/18/92, not 6/30/92 as indicated by the claimants (sic) TWCC 41. The employer reports that they were not informed of an injury until 6/27/92. The claimant was a no show for work 6/23/92. The employer has not received any medical that would support an injury either 5/18/92, 6/23/92, or 6/30/92. The carrier contends that [claimant] did not report his injury within 30 days to the employer and that there (sic) no medical to support l(illegible) time and wages. At this time indemnity and medical benefits are denied."

The 1989 Act requires an insurance carrier to initiate benefits promptly; no later than the seventh day after the date on which the carrier receives written notice of injury, the carrier shall either begin payment of benefits or notify the Commission and the employee in writing of its refusal to pay. Article 8308-5.21(a) and (b). The carrier's notice must specify the grounds for refusal, and the grounds 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. Article 8308-5.21(c). If a carrier does not contest the compensability of an injury on or before the 60th day on which it is notified of the injury, the carrier waives its right to contest compensability. Article 8308-5.21(a).

The rule implementing these provisions indicates that some specificity is required in the carrier's notice. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(a)(9) (Rule 124.6(a)(9)). That rule provides that the carrier's notice shall contain, among other things, the following information:

> 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.

This panel has examined the contents of such notices when faced with the question of scope of the dispute. In Texas Workers' Compensation Commission Appeal No. 92145, decided May 27, 1992, this panel read the carrier's reasons for disputing the claim, which included no medical to verify injury or disability, claimant told supervisor she was suffering from arthritis and denied injury, and arthritic condition is an ordinary disease of life. We stated that those grounds, when read together, encompassed a controversion or dispute on

the basic issue that an injury was not suffered within the course and scope of employment (although, as we noted, the issue of course and scope was reported without comment from the benefit review conference and was tried by both parties at the hearing, such that any challenge was effectively waived).

On the other hand, in Texas Workers' Compensation Commission Appeal No. 92468, decided October 12, 1992, this panel found insufficient to raise a defense the following reasons for refusal given by a carrier: "Our investigation reveals no medical to support on the job injury; No E-1 from insd. Compensability will be determined following further investigation." In that case, the panel also declined to consider reasons given on an amended TWCC-21, since it was dated more than 60 days from the time the carrier received notice of a claim.

Likewise, in construing the content of a TWCC-21, we have held that the grounds for refusal stated in a notice filed within seven days of the carrier's written notice of injury constitute the only basis for the carrier's defense, unless there is newly discovered evidence that could not reasonably have been discovered at an earlier date. Texas Workers' Compensation Commission Appeal No. 92038, decided March 20, 1992. A TWCC-21 can be amended, however, based on newly discovered evidence, so long as it is filed within the original 60-day period. Appeal No. 92468, *supra*. In this case, the hearing officer apparently considered both Forms TWCC-21 before making his ruling; it is not clear whether his determination was based in part on the language contained in both forms, as he did not appear to consider whether the filing of the second form was based on newly discovered evidence.

The hearing officer also considered the language of the benefit review conference report and the claimant's response thereto. The 1989 Act provides that if a dispute is not entirely resolved at a benefit review conference, the benefit review officer shall prepare a written report that details each issue that is not settled; the report must include, among other things, a statement of each issue raised but not resolved, a statement of the parties' position regarding each unresolved issue, and the benefit review officer's recommendation regarding each unresolved issue. Article 8308-6.15(d). By rule, Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(c) (Rule 142.7(c)), a party may submit a response to the disputes identified in the benefit review officer's report. The carrier contended at the hearing and in its response on appeal that the claimant's response to the benefit review conference report was not timely pursuant to Rule 142.7(c), which states that such response must be filed no later than twenty days after the report is received, and that therefore the claimant had waived any right to raise the issue at the hearing. Claimant contends in his appeal that a party's response to the benefit review conference report is not mandatory. It is also not clear whether the hearing officer considered this argument in making his ruling.

It is likewise unclear as to whether the hearing officer's ruling was based upon any failure of the claimant to raise the issue of carrier's waiver of the issue of injury in course and scope at the benefit review conference. This panel has previously held that the issue can be waived, albeit under fact situations different from the instant case. *See* Texas Workers'

Compensation Commission Appeal No. 91016, decided September 6, 1991 (where there was no objection to inclusion of an issue of notice at any stage of the dispute resolution process prior to appeal, it was held that the issue was tried by consent of the parties). One matter that would be pertinent for the hearing officer to consider is whether a claimant was given sufficient notice of the issues and claimed defense to be able to raise an argument under 8308-5.21(c) at the benefit review conference.

Given the facts of this case, as well as the appropriate statute, rules, and opinions of this panel, we are hesitant to either affirm or reverse the hearing officer's ruling that injury in the course and scope of the claimant's employment was properly an issue at the contested case hearing, without a more thorough understanding of the basis for that ruling. We accordingly reverse the decision of the hearing officer and remand for further clarification and for the development of such additional evidence on this point as is deemed necessary. To the extent that it would add further evidence as to how the issue was framed, we recommend inclusion of the request for the benefit review conference, as well as any other evidence which would serve to flesh out the various considerations raised herein.

The decision and order of the hearing officer is reversed and remanded. A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Worker's Compensation Commission's division of hearings, pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge