APPEAL NO. 93202

At a contested case hearing held in (city), Texas, on February 9, 1993, the hearing officer, (hearing officer), concluded that the respondent (claimant) was not injured in the course and scope of his employment on (date of injury), and that he failed to prove he has disability as a result of such alleged injury. However, the hearing officer further concluded that the grounds stated in the Notice of Refused/Disputed Claim (TWCC-21) filed by appellant (carrier) failed to state a basis to defend against the compensability of the claim and ordered that claimant is entitled to medical benefits for any health care reasonably required by the injury and may become entitled to temporary income benefits (TIBS) should he later establish disability for eight or more days. Carrier challenges the sufficiency of the evidence to support the finding that the grounds stated in its TWCC-21 contain only conclusions and do not specify recognizable bases for contesting the compensability of the claim. Carrier also challenges the conclusions that because it failed to adequately state grounds to defend against the claim and further failed to adduce newly discovered evidence which would entitle it to reopen the compensability issue, it became liable for medical benefits for the alleged injury and for such other benefits as to which claimant may in the future become entitled. Claimant's response agrees with the hearing officer's determination respecting the carrier's failure to dispute his claim and the effect such failure had on his own failure to prove a compensable injury and disability. Claimant, however, also challenges the determinations adverse to him and takes issue with a number of statements, findings, and conclusions in the hearing officer's decision.

DECISION

Finding no error and the evidence sufficient to support the challenged finding and conclusions, the hearing officer's decision is affirmed.

While we can consider claimant's response, we cannot consider the claimant's appeal that is part of his response because it was not filed within 15 days after the hearing decision was received, as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.41(a) (Vernon's Supp. 1993) (1989 Act). According to the rules of the Texas Workers' Compensation Commission (Commission), a request for review is presumed to be made timely if mailed on or before the 15th day after receipt of the hearing officer's decision, and received by the Commission not later than the 20th day after the date of receipt of the decision. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3). Rule 102.5(h) states:

> For purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the Commission shall deem the received date to be five days after the date mailed.

According to the Commission's records, the hearing officer's decision was mailed to

the parties on February 25, 1993. Five days after that date yields a date of receipt of March 2, 1993. Counting fifteen days from the latter date means that an appeal had to be filed by March 17th, and received by March 22nd, to be filed timely. The claimant's response was both filed and received on March 29th.

Claimant testified that a work-related back injury in 1985 resulted in two operations including the insertion of steel bars in his back in 1986. He was unable to work for approximately six years after that injury and as recently as July 1992 was still seeing a doctor and taking prescribed pain medication for his back pain. Claimant said he received workers' compensation checks for some unknown period of time and settled his claim for that injury for $42,000.00, together with medical benefits for five years. On October 14, 1992, claimant applied for work with (employer) as a "rod buster" whose duties involved tying together steel reinforcement rods and carrying them to sites to be inserted into concrete forms. On his application, claimant denied any prior work-related injury and testified he did so because he regarded the question as illegal and felt the employer would discover his "disability" and not hire him. Claimant also submitted a urine sample that day for a drug analysis and did not mention he was taking prescribed medications for high blood pressure and back pain.

Shortly after lunch on (date of injury), claimant was carrying steel rebar with several coworkers and said he stepped into a hole and fell backwards flat onto his back. He said he was holding onto a steel rod to help lift the rebar package and that the rod bumped against his leg as he fell. He lay on the ground a few minutes, got back up, and continued to work without mentioning to anyone his pain from that fall. At about 3:30 p.m. that day, the general superintendent, (Mr. G), approached claimant at the job site and advised him he was terminated because he had failed the drug screen test. Mr. G said the test screened for both legal and illegal drugs and he did not know the nature of the drug or drugs for which claimant tested positive. When he told claimant he was terminated, claimant never mentioned having fallen or having been injured that afternoon. However, the next morning, claimant called Mr. G to report he had fallen the previous day and was injured.

Claimant's immediate supervisor, TM, one of the four or five coworkers helping to carry the steel bundle, saw claimant slip in a rut, fall over on his left side, get right back up, and continue to work without any complaint or indication of injury. They carried other steel bar packages after that incident and before claimant was terminated and claimant had no apparent problem. Claimant submitted statements from several other coworkers who similarly described claimant's slip and fall followed by his immediately getting back up and continuing to work without indication of injury. Claimant said he enjoyed the work and the crew and would have reported to work the next day had he not been terminated. On October 22nd, claimant sought medical treatment, was provided with pain medication, and was diagnosed with lumbosacral strain and a right leg contusion. It was carrier's position

at the hearing that claimant was not actually injured on (date of injury) but decided to report an injury the day after he was terminated, and that whatever pain he had was attributable to his old injury which was not reinjured on (date of injury).

Claimant introduced a TWCC-21, dated October 29, 1992, which stated the date of injury as "(date of injury)" and the date of carrier's first written notice as "10-23-92." In item 43 of the TWCC-21, carrier stated the reasons for disputing the claim as follows:

Claimant was hired with the requirement he pass a drug screen test which he failed. Claimant was fired on (date of injury) for this reason. Claimant now alleges on the job injury on (date of injury). Claimant also falsified his employment application indicating he never had injured himself before when in fact, he has had 2 prior WC injuries and 2 back surgeries.

Articles 8308-5.21(b) and (c) provide, in part, that not later than seven days after the date an insurance carrier receives written notice of the injury, it shall either begin the payment of benefits required under the 1989 Act or notify the Texas Workers' Compensation Commission (Commission) and the employee in writing of its refusal to pay. The insurance company's notice must specify the grounds for the refusal and the grounds so specified constitute the only basis for the carriers' 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 earlier discovered. Commission Rule 124.6(a)(9) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(a)(9)) provides that the insurance carrier's notice shall be on a TWCC-21 form and shall contain "a full and complete statement of the grounds for the carrier's refusal to begin payment of benefits." The Rule goes on to provide as follows: "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."

In Texas Workers' Compensation Commission Appeal No. 92145, decided May 27, 1992, the carrier stated its reasons for disputing the claim thusly:

1) Carrier has no medical to verify injury or disability. 2) Claimant told supervisor suffering from arthitic (sic) condition and when asked if injured, denied injury. 3) an arthitic (sic) condition is an ordinary disease of life. 4) Carrier has requested assistance of bilingual rehab to assist with obtaining claimant's recorded statement & any medical records for review.

We commented that while we agree that Article 8308-5.21(c) and Rule 124.6(a)(9) "require specificity and not generalities in setting forth the grounds upon which the controversion is based, we believe the respondent has sufficiently complied. 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."

In Texas Workers' Compensation Commission Appeal No. 92468, decided October 12, 1992, the carrier's specified reasons for refusal to pay were stated as follows:

> Our investigation reveals no medical to support on the job injury; No E-1 from insd. Compensability will be determined following further investigation. You have the right to request a Benefit Review Conference by contacting the local Texas Workers' Compensation Commission. Additional information can be obtained by calling [number].

In considering the adequacy of these grounds for disputing the claim we stated:

> Unlike the grounds for refusal stated in Appeal No. 92038, *supra* ["employee failed to report on-the-job injury within 30 days . . ."], none of respondent's reasons for refusal provides a defense. There may be administrative or even evidentiary questions raised by the refusal, but no defense to compensability that could prevail for respondent in a subsequent proceeding appears within any reason provided.

We held that this notice of refusal did not state a basis to defend against compensability.

The carrier argued at the hearing and maintains on appeal that its reference to "claimant now alleges an on-the-job injury on (date of injury)," when read in the context of the additional assertions, constitutes a dispute as to the compensability of the claimed injury given the fair reading standard we spoke of in Appeal No. 92145, *supra*. However, the hearing officer found that the grounds stated in carrier's TWCC-21 "contain only conclusions and do not specify recognizable bases for contesting compensability of this claim." We agree. Recitals that claimant was fired for failing to pass a drug test, that he made false statements on his job applications, and that he "now alleges an on-the-job injury" hardly state a defense. An employee could certainly sustain a job-related injury notwithstanding such employee may be shown to have failed a drug test and to have made false statements on the employment application. To say that the claimant "now alleges an on-the-job injury on (date of injury)" is to say no more than that the claimant has reported a work related injury on that date. We view carrier's reasons for disputing the claim in this case to suffer from the same defects as those in Appeal No. 92468, *supra*. In contrast, in Appeal No. 92145 the carrier had stated that claimant had denied an injury and that carrier considered the arthritic condition claimant told his supervisor he was suffering from as an ordinary disease of life.

We are satisfied carrier's stated reasons for disputing this claim fell short of the

specificity required by Articles 8308-5.21(b) and (c) and Commission Rule 124.6(a)(g) and that carrier's assertions of error in its request for review are without merit. Carrier did not take the position that it had any newly discovered evidence entitling it to reopen the issue of compensability. We decline the carrier's suggestion that we adopt as an analogue the provisions of TEX. R. CIV. P. 45(b) relating to the specificity required of pleadings and abandon our case by case review of contested issues relating to compliance with the aforesaid statute and rule. The Appeals Panel is not the rule making authority within the Commission.

Finding no error and the evidence sufficient to support the challenged finding and conclusions, we affirm.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge