APPEAL NO. 93533

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et. seq.* (Vernon Supp. 1993) (1989 Act). The issues presented at the contested case hearing were:

1. Whether the Claimant sustained a compensable injury on (date of injury);

2. Whether the Claimant's inability to work is due to a motor vehicle accident that occurred on (date of injury), within the course and scope of the Claimant's employment with employer; and,

3. Whether the Carrier waived its right to dispute the claim in this case under the provisions of Section 5.21(c) of the 1989 Act.

The hearing officer determined that claimant was not injured in the course and scope of his employment on (date of injury); that claimant's inability to work was not caused by a vehicular accident on (date of injury), and that the Notice of Refused/Disputed Claim (TWCC-21) satisfied Article 8308-5.21(c) and Texas W.C. Comm'n 28 TEX. ADMIN. CODE ? 124.6(a)(9) (Rule 124.6(a)(9)).

Appellant, claimant herein, contends that the hearing officer based his decision on an erroneous standard, that the hearing officer erred in finding the TWCC-21 was sufficient, that the hearing officer's decision was against the great weight and preponderance of the evidence and requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, responds the appeal was not timely filed or in the alternative that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Carrier contends that claimant's appeal was not timely filed and should not be considered. A review of the Texas Workers' Compensation Commission (Commission's) files indicates that the Decision and Order mailed to the claimant had been returned by the post office because of a wrong address. Another copy of the Decision and Order was mailed to the claimant by the Commission's division of hearings on June 16, 1993. Consequently claimant's appeal was timely filed on June 25, 1993, as being within 15 days after the date on which the decision was received.

Claimant testified through an interpreter, that on (date of injury), while employed by

employer as a member of a roofing crew he was riding in the passenger side rear seat of an extended cab pickup. Claimant testified that the vehicle in which he was riding was stopped at a red light beside a large "18-wheeler" truck. The 18-wheeler was on the right side of the pickup claimant was in. Claimant stated that when the light turned green, the 18-wheeler "veered" into the pickup as the 18-wheeler was attempting a left turn. Claimant stated that men in the pickup yelled, the driver honked the horn and the 18-wheeler stopped. Claimant testified that when the 18-wheeler hit the pickup "everything came tumbling on me." Claimant's version is supported by another passenger who was sitting in the back seat behind the driver and who stated ". . . our truck was shaken so much by the impact that [claimant] was thrown over from the right side where he was sitting and landed on top of me." Claimant states he had no pain the day of the accident, but the next day his back began to hurt and he reported to Mr. F that his back was hurting. Claimant testified the driver gave all the information about the accident to Mr. F. Claimant testified that Mr. F "was the supervisor." Claimant conceded he continued working for a period of time. The medical records indicate claimant was seen on the initial visit by Dr. P, on 1-7-93.

Carrier's version of the accident contradicts claimant's testimony. The driver of the pickup describes the accident as the 18-wheeler "grazed over the top of the hood." In a sworn written statement he states: "There was no sudden jars (sic), there was no impact, I mean I wouldn't have even known we'd been hit if I hadn't seen it." Another passenger in the pickup, in a sworn written statement said the 18-wheeler "just . . . put some paint on the front fender." Carrier offered into evidence two photographs of the pickup in question which the hearing officer describes as showing only ". . . minimal marks and indentations."

Dr. P in a report dated January 7, 1992, gave an impression of "Injury to the cervical and thoracic area with bilateral radiculopathy (right greater than left). Injury to the lumbar area with bilateral radiculopathy." That same report gives a history which includes "[claimant] has a history of bilateral numbness and tingling in legs." A radiology report dated 3-24-93, regarding a lumbar CT scan states: "Findings compatible with a central disc herniation at L5-S1 encroaching on the lateral recesses."

Carrier on 1/20/93 filed a TWCC-21 giving notice of refused or disputed claim which stated:

> 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 hearing officer determined, in pertinent part, that claimant was not injured in the vehicle accident on December 12th, that claimant's inability to work was not caused by the

vehicular accident on December 12th, and that the wording of carrier's TWCC-21, dated January 20, 1993, satisfied the criteria of Section 5.21(c) of the 1989 Act and Rule 124.6(a)(9).

Claimant contests the hearing officer determinations regarding the accident on a sufficiency of the evidence basis and, at least at the CCH, concentrated on the point that carrier's statement on the TWCC-21, Notice of Refused or Disputed Claim, was inadequate and did not meet the statutory requirements of the 1989 Act and Commission Rules. Article 8308-5.21(c) provides:

> (c) The insurance carrier's notice must specify the grounds for the refusal. 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.

Rule 124.6(a)(9) provides that the notice (TWCC-21) shall contain:

> (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.

These provisions require the carrier's notice to specify the grounds for the refusal to pay and the grounds so specified constitute the only basis for carrier's defense unless the defense is based on newly discovered evidence that could not reasonably have been discovered earlier.

In Texas Workers' Compensation Commission Appeal No. 92468, decided October 9, 1992, we held comments such as "[o]ur investigation reveals no medical to support on the job injury; No E-1 from insd. Compensability will be determined following further investigation" as not being adequate to contest compensability. In that case we held that ". . . none of [carrier's] reasons for refusal provides a defense." In Texas Workers' Compensation Commission Appeal No. 93186, decided April 23, 1993, we cited Texas Workers' Compensation Commission Appeal No. 92145, decided May 27, 1992, where

> . . . 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.

In Texas Workers' Compensation Commission Appeal No. 93202, decided April 28, 1993, we held language to the effect that claimant was fired for failing a drug test, claimant now alleges on the job injury, and claimant falsified his employment application ". . . fell short of the specificity required by Article 8308-5.21 (b) and (c) and Commission Rule 124.6(a)(g) (sic) . . . ." In Texas Workers' Compensation Commission Appeal No. 93302, decided June 2, 1993, we held that language to the effect that "clmts medical condition is not work related . . . (and) clmts condition is not work related" sufficiently disputes that the alleged injury occurred within the course and scope of employment. The carrier clearly was stating that the basis for refusal to compensate was because the claimant's medical condition "is not work related."

In perhaps the most analogous case, Texas Workers' Compensation Commission Appeal No. 93326, decided June 10, 1993, the reason for refusal of payment was:

> [Claimant] reported his injury on 11-5-92 afer (sic) his termination on 10-30-92. Our investigation reveals the statements of three co-workers states [claimant] continued to work normally and never reported an injury up until his termination. We continue our investigation. [Claimant] first sought medical care 11-11-92.

We held that language sufficient to provide notice that the claim was disputed or refused. In that case we stated that "magic words are not necessary to contest the compensability of an injury under the Article 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." The key point to be determined is whether, read as a whole, any of the reasons listed by carrier would be a defense to compensability that could prevail in a subsequent proceeding. We held in Appeal No. 93326, *supra*, quoting from Texas Workers' Compensation Commission Appeal No. 92145, decided May 27, 1992, "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 hearing officer, in carefully considering the language used in the instant case, believed that although "portions of the controversion statement do contain conclusions . . . . When the statement is read as a whole, however, it is clear that carrier is controverting the claim . . . that Claimant did not sustain an injury on (date of injury)." We cannot, as a matter of law, find that the hearing officer's decision was incorrect. Based on similar language in Appeal No. 93326, we find that the language used in the instant case meets the criteria of the 1989 Act and Rule 124.6(a)(9).

Regarding claimant's contention of error in the hearing officer's findings that claimant was not injured in the vehicular accident, the case hinges largely on claimant's credibility. Claimant argues, and cites authority, that "a solid hit from a large truck medically can cause injury, including aggravation or exacerbation of a pre-existing condition, both of which are compensable. " We agree with the proposition of law that an aggravation or exacerbation

of a pre-existing condition can, in certain circumstances, be compensable as a new injury. It is the question of fact, whether the vehicle claimant was riding in sustained "a solid hit," where the hearing officer made his determination that claimant was not injured. There is ample evidence from the pickup driver, another passenger and the photographs of the pickup, by which the hearing officer could and apparently did, find that the pickup did not sustain "a solid hit." We agree with claimant's proposition "that five people (in this case only four) can be in a vehicle and only one is susceptible to injury." However, that is a question of fact for the hearing officer to decide. The hearing officer is the trier of fact and conflicts and inconsistencies in the testimony before him are to be resolved by him. *See* Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1970, no writ). The hearing officer simply did not accept the claimant's testimony regarding the claimed injury. As the sole judge of the relevance and materiality of the evidence and the weight and credibility to be given to the evidence, he was within his authority to give it little or no weight in balancing it against the other evidence. Article 8308-6.34(e), 1989 Act; Taylor v. Lewis, 552 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); *see* Texas Workers' Compensation Commission Appeal No. 91102, decided January 22, 1992. In reviewing the evidence he considered, as set out in his DECISION AND ORDER, we cannot hold that his decision was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Finding a sufficient factual basis upon which to affirm and finding no reversible error we affirm the decision of the hearing officer.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge