

APPEAL NO. 93616

Pursuant to The Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq.* (1989 Act), a contested case hearing was held in (city), Texas, on June 17, 1993, (hearing officer), presiding as hearing officer. He determined that the respondent (claimant) was an employee of the appellant's (carrier) insured at the time of his injury, that the carrier's notice of dispute clearly gave the only grounds for disputing the claim that "[c]laimant was terminated from employment with our insured on 2-25-91," that the claimant had disability from (date of injury), which ended on May 28, 1991, and that claimant's average weekly wage (AWW) was \$330.50. Carrier appeals urging that it is not the carrier for claimant's employer, that the hearing officer erred in finding claimant sustained a compensable injury in the course and scope of his employment, and that the hearing officer erred regarding AWW. No response was filed.

DECISION

Determining that there is sufficient evidence and a correct application of the law to support the findings and conclusions of the hearing officer, the decision is affirmed.

The fact that the claimant sustained some injury on (date of injury), was not in issue and certainly was not contested by the carrier in its Notice of Refused or Disputed Claim (interim TWCC-21), dated "4/17/91." In that form, the carrier stated: "Claimants (sic) injury occurred on (date). Claimant was terminated from employment with our insured on 2-25-91." That form indicates that the employer is "BN" who apparently was in a business that included the managing of (RHA). (This was not developed in the record but is mentioned in comments from the attorneys at the hearing). The claimant testified that he had worked as a maintenance man for RHA since 1990, that there had been turmoil in the management which turned over occasionally but apparently did not involve him, and that on (date of injury), he was working to get an apartment prepared when he was injured moving a refrigerator. A Hispanic lady who worked at the complex came to his rescue. He testified that he was not terminated from employment on February 25, 1991 and that he was only told he was terminated after the injury accident on March 6th, by a person who he assumed was taking over the management of the complex. In any event, he was taken to a hospital and later treated by his own doctor who determined maximum medical improvement (MMI) on May 28, 1991. He testified as to his wage and that he was also provided an apartment as a part of his compensation. He denied that he was in the office on the morning of March 6th and prior to his injury or that he was fired by anyone until after the accident. He indicated that he had gotten several paychecks that had Southwest Properties on the check but that he always understood he worked for RHA and had always been the maintenance man. He understood that BN was the "head man of (RHA)" and that all he knew was that "I was working for (RHA)." He testified that he returned to the RHA office on March 8, 1991 to pick up his check and that they asked for his keys at that time and also that an RHA security guard was present who tried to remove him from the property before he could get his check.

The carrier introduced a sworn interview taken on June 7, 1993 of (RG) who was a security guard at RHA in March 1991. He stated that he was present in the RHA office on the morning of (date of injury), before the claimant's accident and that he heard the property supervisor, (LS) terminate the claimant and had him turn in his keys. He stated that the claimant said "he would take care of the situation" and then left the office. Subsequently, a Hispanic lady came in and said in Spanish that the maintenance man was hurt in one of the apartments. RG also stated that he made a notation on his daily activity report, which was attached to his interview statement, about this whole incident.

The hearing officer's decision hinged on the notice of dispute filed by the carrier. He specifically concluded that the carrier waived its right to dispute the claim on any other ground "including the defense, raised for the first time at the Benefit Contested Case Hearing, that the Carrier's insured was not the Property Manager of the Rustic Hill Apartment on (date of injury)." The hearing officer found, and there is credible evidence to support him, that BN's property management service was responsible for RHA during some part of 1991. The claimant testified that he was hired by and worked for RHA and that BN was the head man at RHA. There was no evidence at all that BN terminated the claimant on February 25, 1991 or at any other time prior to the injury. While it is apparent that there must have been some turmoil in the ownership or management of the RHA complex over the period of time that claimant worked there, and it is possible that different management services were in charge at various times, the fact remains that this was not cited or implied as the basis for the Refused or Disputed Claim notice filed by the carrier. And, that the carrier in this case filed the form denying compensation on the grounds that the claimant had been fired some nine to ten days before the injury, tends to support a conclusion that the carrier believed the claimant was covered, but for the alleged termination. In any event, the hearing officer determined, and is supported by the record and the 1989 Act, that the carrier waived any other grounds for disputing the claim. Section 409.022(a) and (b) provides:

- (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.

We have previously determined that grounds not raised or specified by a carrier for disputing a claim are waived absent a showing of newly discovered evidence. See Texas Workers' Compensation Commission Appeal No. 92218, decided July 15, 1992; Texas Workers' Compensation Commission Appeal No. 92278 August 10, 1992. See *generally*,

Texas Workers' Compensation Commission Appeal No. 92330, decided August 31, 1992. Here, the carrier never asserted as a basis for disputing the claim that it was not the carrier for the claimant's employer; rather, that their covered employer terminated the claimant some nine days before the injury. As stated above, there was no evidence of any such termination of the claimant by one BN, the claimant testified that he was employed by RHA whose "head man" was BN and that he was not terminated by anyone prior to the injury in issue. Whether some other property management service or person may have become involved in personnel matters involving the claimant was not a ground timely advanced by the carrier for denying or disputing the claim.

Regarding the matter that the claimant had disability beginning (date of injury) and ending on May 28th, and that his AWW was \$330.50, the claimant testified as to these matters. And, there was medical evidence, including a maximum medical improvement certification by the claimant's treating doctor effective May 28, 1991, to support the period of disability. The claimant testified as to his wage and as to the value of the apartment provided him as a part of his wage. The hearing officer, as the fact finder, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility to be given the evidence. Section 410.165(a). Only if we were to find, which we do not in this case, that his findings were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, would there be a sound basis to disturb his decision. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Accordingly, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge