APPEAL NO. 93628

At a contested case hearing held in (city), Texas, on June 24, 1993, the hearing officer, (hearing officer), concluded that the respondent (claimant) was injured in the course and scope of his employment on (date of injury), that he has had continuous disability based on his injury since that date, and that appellant Texas Property & Casualty Insurance Guaranty Association (Carrier 2) waived its right to contest compensability in this case by failing to timely contest the compensability of claimant's injury. In its request for review, Carrier 2 challenges the sufficiency of the evidence to support the conclusions regarding claimant's having a compensable injury and disability. Rather, asserts Carrier 2, claimant's injury was the result of horseplay and his injuries were not sufficiently serious to result in disability. Further, Carrier 2 contends it was not required to contest the compensability of the injury within 60 days, as provided for by the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 409.021(c) (1989 Act), because it is not an insurance carrier under the 1989 Act but is, rather, a nonprofit, unincorporated legal entity which took over the claim when Texas Citrus And Vegetable Exchange (Carrier 1) became an impaired insurer. No response was filed by the claimant.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

Claimant testified that he was injured on (date of injury), when he was twice knocked off his "long jack," a machine he described as similar to a forklift, and fell approximately one foot to the floor after two collisions between his long jack and another being operated by coworker (Mr. H). He said he continued to work and reported the accident to his supervisor at a work break taken shortly after the collisions. He stated he was shaken up and began to feel pain and develop a headache at the break. Claimant explained that he did not immediately feel these symptoms because the room where the collisions occurred was maintained at 27 degrees and he wore a coat. Claimant said he was angry at Mr. H for twice hitting his long jack, responded by pushing boxes off Mr. H's long jack, and denied sustaining any injury in pushing the boxes off. Carrier 2 introduced handwritten notes of (Mr. M) entitled "Accident Investigation on [claimant]," dated "11-6-92." None of the three witnesses interviewed by Mr. M, including Mr H, mentioned seeing claimant fall off his machine and two of them opined that the collisions were not hard enough to cause injury. In his statement, Mr. H said that he was unable to pass by claimant's long jack in the aisle because his way was blocked by claimant's machine and by pallets. While he acknowledged twice hitting claimant's long jack, he said the contacts were "more pushing than bumping," and that claimant then got off his long jack and knocked several cases of employer's products off Mr. H's machine. Apparently, it was the content of these witness statements that prompted Carrier 2 to assert the horseplay exception to its liability. *See* Section 406.032(2).

Claimant further testified that the next day he sought treatment at a hospital

emergency room (ER) and was thereafter treated by his family doctor, (Dr. M), who took him off work and has yet to release him to regular work. A record from the doctor who saw claimant at the ER on November 6th stated the injury date as November 5th and reported a history of neck, back and left elbow pain "when hit by a long jack." That doctor released claimant to return to work the following day. Claimant testified, however, that he has not worked since the accident because while his treating doctor, Dr. M, released him for light duty sometime in May 1993, the employer had no light duty work available. He also stated he had received workers' compensation benefit payments after the accident until the end of January 1993 when the checks stopped coming and he has not since received further payments. He admitted having been in an altercation away from work in March 1993 but denied he was being treated for injuries arising from that altercation.

According to the Initial Medical Report (TWCC-61) signed by Dr. M, claimant was seen on November 10, 1992, and the diagnosis included cervical strain, dorsal strain, right shoulder strain, and an injury to his left elbow. A Specific and Subsequent Medical Report of a February 4, 1993, visit to Dr. M reflected the diagnosis as cervical strain and left elbow strain, and contained anticipated dates for claimant to return to limited work (March 4th) and to full-time work (April 15th). Also in evidence, however, were slips signed by Dr. M which took claimant off work from (date of injury), through July 15, 1993.

With the evidence in this posture, we are satisfied that the challenged findings respecting the compensability of claimant's injury and his having disability are sufficiently supported by the evidence. Section 410.165(a) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, 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*), issues of injury and disability may be established by the testimony of a claimant alone. *See e.g.*, Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 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 (Tex. Civ. App.-Amarillo, no writ). We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

Respecting the issue of the timeliness of carrier's contest of the injury, (Ms. J) testified that she was a claims examiner for Carrier 2, that Carrier 1 went into receivership on November 18, 1992, that Carrier 2 notified the Texas Workers' Compensation Commission (Commission) on November 23rd that it would be taking over Carrier 1's files, that Carrier 2

received the claims files of Carrier 1, including claimant's file, during the last week of December 1992, that Carrier 2 received a doctor's report on claimant on February 4th and she then prepared a summary, contacted the employer, and discovered evidence of "horseplay," that she and her supervisor decided that claimant's claim was not "covered" because of horseplay and she was directed to hold up claimant's benefits payments, and that she filed a controversion on March 17, 1993.

Ms. J also testified that Carrier 2 decided not to comply with an Interlocutory Order issued by a Commission Benefit Review Officer on May 19, 1993, which ordered "[Carrier 1] In Receivership" to pay temporary income benefits (TIBS) "from 2/1/93 through 5/19/93, at the rate previously paid," on the advice of legal counsel to the effect that Carrier 2 was not bound by such an order nor by the 1989 Act or the Commission's rules.

Claimant introduced two forms entitled Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) which bore the name "S. J" as the insurance carrier representative and which stated that the insurance carrier's first written notice of injury was received on "11-05-92." The date of the first TWCC-21 form was "02-10-93." It reflected that compensation was paid from "11-13-92" to "01-31-93" and was terminated because the November 6, 1992, TWCC-61 from the "treating doctor" indicated claimant had been released to full duty on November 7th. It also reflected that an investigation was being conducted but did not state any ground for refusing or disputing the claim. The second TWCC-21 form was dated March 17, 1993. It reflected it was a correction to the previous filing. It further stated that Carrier 2 was contesting the injury based on the exception in "Article 3, Section 3.02(3)" (now Section 406.032(2)) which provides that an insurance carrier is not liable for compensation if "the employee's horseplay was a producing cause of the injury." Both of these forms were dated well beyond the 60 day period following Carrier's 1's first written notice of the injury stated to be (date of injury).

Section 409.021(c) provides as follows: "If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60 day period." Section 409.021(d) provides that an insurance carrier "may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier." *And see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6).

Carrier 2 insisted it was not an "insurance carrier" and was thus not bound by the 60 day time limit in the 1989 Act. No authority was cited for this proposition. Carrier 2 also appeared to maintain, in the alternative, that its evidence of horseplay was newly discovered and thus effectively extended the time in which it could contest the compensability of the injury. Finding that Carrier 1 received notice of the claim on (date of injury), and became an impaired insurer in late November 1992, that Carrier 2 received the workers'

compensation claims files of Carrier 2 on or before December 31, 1992, that neither Carrier 1 nor Carrier 2 filed a Notice of Refused/Disputed Claim until after March 17, 1993, and that the evidence on which the TWCC-21 form was based was not newly discovered evidence since it consisted of statements dated November 5th and 6th which were in the employer's possession and which could have been reasonably discovered within 60 days of having notice of the claim, the hearing officer concluded that "the Carrier waived its right to contest compensability in this case by failing to controvert in a timely manner."

In his well reasoned discussion, the hearing officer, referring to the Texas Property and Casualty Insurance Guaranty Act (Guaranty Act) (Tex. Ins. Code Ann. art. 21.28-C (Vernon Supp. 1993)), stated that Carrier 2 "is considered the insurer to the extent of its obligation on the covered claims and to that extent has all rights, duties and obligations of the impaired insurer as if the insurer had not become impaired." The hearing officer further remarked: "[Carrier's 2's] contention that the claim in this case is not `covered' because horseplay was involved is not well taken Both the Claimant's testimony and the carrier's statements indicate that the Claimant's vehicle was struck twice before he acted in retaliation."

Section 401.011(27)(a) (1989 Act) defines "insurance carrier" in part as "an insurance company," while Section 401.011(28) defines "insurance company" to mean "a person authorized and admitted by the Texas Department of Insurance to do insurance business in this state under a certificate of authority that includes authorization to write workers' compensation insurance." The Guaranty Act created Carrier 2 and in Article 21.28-C, Section 6, provides that Carrier 2 "is a nonprofit, unincorporated legal entity composed of all member insurers, who must be members of the association as a condition of their authority to transact insurance in this state." Section 8(b) provides that Carrier 2 "is considered the insurer to the extent of its obligation on the covered claims and to that extent has all rights, duties, and obligations of the impaired carrier as if the insurer had not become impaired." Section 8(d) provides, in part, that Carrier 2 "shall investigate claims brought against the [Carrier 2] and shall adjust, compromise, settle, and pay covered claims to the extent of the [Carrier 2's] obligation and deny all other claims." Section 5(8) defines "covered claim."

We agree with the hearing officer that Carrier 2, in effect, stood in the shoes of Carrier 1 with respect to this claim and was obliged to timely dispute the compensability of claimant's injury pursuant to the 1989 Act. Notwithstanding that the hearing officer concluded that Carrier 2 waived its right to contest compensability in this case, the hearing officer nevertheless went on to consider the merits of the horseplay exception raised by Carrier 2 and determined it was not established by the evidence. The challenged findings and conclusion of the hearing officer 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., 751 S.W.2d 629 (Tex. 1986).

Finding no reversible error and the evidence sufficient to support the challenged findings and conclusions, we affirm the hearing officer's decision.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge