

APPEAL NO. 93967
FILED DECEMBER 9, 1993

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On September 27, 1993, a contested case hearing was held. The issues determined at the contested case hearing were whether claimant, who is the appellant, had sustained an occupational injury to his right hand and thumb, with a date of injury of _____, and whether the carrier had timely contested the compensability of claimant's injury.

The hearing officer determined that claimant had not sustained a work-related injury, and further that the "employer" had timely disputed the claim within 60 days from the date on which it had facts sufficient to allow it to assess compensability. The carrier in this case is the (self-insured); the employer/institution is (employer). The applicable statute authorizing self-insurance by the employer/institution is found at TEX. LAB. CODE § 503.001 *et seq.* Section 503.071 appoints the Attorney General as the employer/institution's legal representative for purposes of workers' compensation claims hearings.

The claimant has appealed, with timely service being made on the Attorney General, arguing that the preponderance of the evidence sustained claimant's contention that he had a compensable injury to his thumb. The claimant further argues that the hearing officer erred in finding that there was a timely dispute over compensability because the carrier contested compensability beyond the statutorily required limit of 60 days and therefore waived a dispute to compensability of the claim. There was no timely filed response from the carrier, although it filed a motion to extend time for response another 15 days.

DECISION

We reverse the determination of the hearing officer, and render a decision that the carrier is liable for compensation because it failed to timely contest compensability within 60 days after it received written notice of injury, as that term is defined in applicable rules of the Texas Workers' Compensation Commission (Commission), and was unable to show that its denial was based upon newly discovered evidence which it would not reasonably have been able to obtain within the statutory period. The carrier thereby waived its right to contest compensability of the claim, effectively confessing compensability.

We note first that we deny carrier's request for extension of a deadline to reply. The statutorily-designated representative of the carrier was properly served and received the appeal on October 29th.

The date of injury was agreed upon as _____, when claimant stated he

sprained his thumb and it made him realize his ongoing thumb condition might be related to his employment. The claimant, a teacher at the employer/institution, asserted that his right thumb sustained a repetitive trauma injury which causes involuntary extension of his thumb while playing the piano. The carrier did not dispute claimant's contention that piano playing was part of his employment. Claimant stated that his treating physician for this condition was (Dr. W), a (state) doctor who had treated many musicians and written articles about their occupational ailments. The claimant testified that his injury had been described as focal dystonia or occupational cramping of the hand. In any case, the condition affected his ability to play the piano because his thumb would not be in the proper position.

Claimant stated he had not lost wages paid by the employer/institution as a result of his injury. Any wage loss was related to unavailability for a higher-paying promotion as well as loss of concert revenue that was paid from other sources.¹

The facts pertinent to our decision are those involving the second appealed issue: whether the carrier timely disputed the compensability of claimant's injury.

The findings of fact and conclusions of law made by the hearing officer concerning the carrier's dispute of compensability are as follows:

FINDINGS OF FACT

8. Claimant notified employer on or about March 12, 1992, that he had injured his thumb but provided no further information to employer about the injury until March 25, 1992, when he provided a non-specific receipt for payment of a "doctor visit" and evidence of an airline trip to (state) on March 16, 1992, and a return trip to (state) on March 22, 1992.
10. Claimant did not provide sufficient facts or information to employer as of March 25, 1992, to fairly inform the employer of facts that would show the claim was compensable.
11. Employer received on May 18, 1992, a report from Dr. W dated May 5, 1992, which was the first information it had received that set out facts it could assess to determine if claimant's claim should be disputed or not.
12. Employer disputed claimant's claim on June 18, 1992, the 31st day after May 18, 1992, the date on which it was presented with facts

¹As the hearing officer correctly pointed out, these losses are not compensable under the 1989 Act.

sufficient to allow it to assess compensability.

13. Employer's notice of disputed claim was sufficiently worded to constitute a dispute based upon the absence of an injury as defined by the Act.

CONCLUSIONS OF LAW

4. Employer disputed the compensability of claimant's claim before the 60th day after the date on which it received notice which fairly informed it of sufficient facts to allow it to assess compensability.
5. Employer's dispute of compensability was timely, and included sufficient language to dispute whether or not claimant's condition was an injury under the Act.

Significantly omitted from the statement of the evidence and the findings of fact are matters which indicate that these findings and conclusions are an erroneous application of applicable law and rules, as well as against the great weight and preponderance of the evidence.

The claimant testified that when he filled out a form on March 12th to report the injury to his employer, he supplied the name and address of his (state) doctor, as well as bills and airline tickets. He stated that although he called regularly to follow up on the status of his claim, and supplied requested information, he was surprised to learn after much time had passed that the carrier had not contacted his doctor. He said he was never asked "until late" to request a report from his doctor, which he himself did not have. (Ms. R), who identified herself as the person for the employer/institution in charge of handling workers' compensation claims, stated that claimant came to her on March 11, 1992, claimed an injury, and filled out requested paperwork.² She stated that he did not at this time submit any medical bills. Based upon the information he supplied, Ms. R filed an Employer's First Report of Injury or Illness (TWCC-1) on March 12, 1992, with the division of the (self-insured) in (city) responsible for adjusting claims. The adjuster for the claim was (Mr. G). Ms. R wrote a letter that same day to claimant which stated:

²Somewhat inexplicably, claimant's attorney objected to carrier's tender of this document on the basis of failure to exchange, and it was not admitted into the record.

The Personnel Office has received your accident investigation report on the work related injury you reported. The report has been submitted to the (self-insured) and the Safety Co-ordinator. The Personnel Office must be contacted immediately if there is any time lost or if there are medical expenses as a result of this accident.

Ms. R indicated that on March 25th, the claimant brought in some airline tickets for payment, and she "faxed" these to Mr. G in (city). She stated that she and Mr. G then had a telephone conversation about claimant's claim. Ms. R stated that after this date, responsibility for handling the claim was Mr. G's responsibility.

Mr. G testified that he received the TWCC-1 on March 12th by electronic facsimile transmission. On its face, this report identifies the claimant, the purported injury and injured body part, and gives the name of the claimant's doctor. Mr. G testified that his review of this document indicated that the claim was compensable and there was nothing out of the ordinary, and he proceeded to handle it like any other "no lost time" claim. Mr. G stated that he also shortly thereafter received copies of airline tickets (the record indicated that these were received in the carrier's office on April 2, 1992) and a request for reimbursement, which he stated triggered a question in his mind as to why the carrier should pay. He also stated that on May 4, 1992, he received a copy of a credit card receipt indicating payment by claimant of \$205.00 to Dr. W. He indicated that he had problems with this because it did not state what services had been rendered or the connection to the injury.

Under cross-examination, Mr. G eventually conceded that he understood that an injury was "claimed" as of March 12th, because of the TWCC-1, although he stated that this did not mean that he knew an injury had actually occurred. Mr. G also acknowledged that the statutory 60 days for disputing a claim was customarily counted by the carrier from the date a TWCC-1 from covered employers was received in his office. He confirmed that he spoke with claimant several times after March 12th, but before May 18th, about the claim. At least by April 29, 1992, he was in telephone contact with claimant with respect to his medical treatment in (state), and he then asked claimant to have the doctor send him a report. The record is devoid of any indication that the carrier sought medical information directly from Dr. W and was refused in its request.

Mr. G said he received the report on May 18, 1992. The report consisted of a May 5, 1992 cover letter from Dr. W and an attached neurological evaluation on claimant that was dated March 16, 1992. Mr. G stated that he considered the medical report he received to be "new" information because he had got it for the first time on May 18th, and that it was his understanding he had 60 days from this date to dispute the claim.

The actual notice of dispute (TWCC-21) was not filed until 98 days after receipt of written notice of injury by the carrier, on June 18, 1992. On its face, the TWCC-21 states that notice of injury was first received March 12, 1992.

Mr. G stated that he filed this based "solely" on Dr. W's May 5, 1992, report and neurological evaluation. (We would note that it is only the cover letter to the neurological evaluation that is dated May 5th.) The evaluation's preamble recited claimant's past medical history, which included an observation that claimant had been previously told his condition was "most likely genetic." However, the neurological evaluation plainly and unambiguously concludes that claimant had "occupational cramp of the right hand associated with piano playing."

Notwithstanding this, the TWCC-21 cites as the grounds for denying the claim:

Claim is being denied. Medical documentation received May 18, 1992 indicate: "problems began, according to his recollection, in late 1988. . .doing some work with AS, a prominent teacher at [college]" and "that the disorder was most likely genetic."

2 (sic). Aggravation, acceleration, or excitement of a non-occupational disease is not a compensable injury. To be an occupational disease, the disease must be indigenous to work or present in an increased degree in that line of work (Home Ins. Co. v. Davis, 642 S.W.2d 268).

Mr. G testified as to the carrier's methods of handling cases vis-a-vis the 60 day deadline:

Well, if a claim comes in--and nothing comes of it and all of a sudden a year later. . .some information may come in and nothing was done with it because nothing was provided from the employee or doctor or whatever we then will react from it.

Mr. G testified that claims were handled case-by-case, and when asked by claimant's attorney if the rules allowed adjustment of the 60 day deadline case-by-case, Mr. G replied: "The rules? What rules?" Mr. G then stated that he understood that there were certain time obligations incumbent upon the carrier primarily in the case of "lost time" claims.

Leaving aside for the moment whether reaction to filed documents equates to claims investigation, the carrier's notice of dispute in this case was plainly untimely under the applicable statute and rules.

A "compensable injury" means an injury that arises out of the course and scope of employment for which "compensation" is payable. Section 401.001. "Compensation" means payment of a "benefit," which is defined to include "a medical benefit." Sections 401.011(5) and (11). Although the adjuster for the carrier (and, for that matter, the benefit review officer) indicated that there is another standard for disputing a "no lost time" claim, we do not believe that is an accurate statement of the law where the basis for dispute is that there was no compensable injury.

The statute authorizing self-insurance by the university in this case is Article 8309d, recodified as Sections 503.001-503.071. That statute makes clear that the "employer" for purposes of responsibilities imposed on employers under the 1989 Act is the "institution." Section 503.002. The employer/institution in this case was the (employer). The self-insured's carrier functions were assumed by the (self-insured) office in (city). To this end, the employer/institution supplied to the system office that acted as carrier the TWCC-1 Report of Injury which is, by definition, "written notice of injury" in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(1) (Rule 124.1).³

Rule 124.6(d) makes clear that even for a case that involves medical benefits only, a dispute that such benefits are not due because the injury is not compensable must be filed "no later than the 60th day after receipt of written notice of injury." This rule interprets the underlying statute, Section 409.021 (previously Article 8308-5.21), which states, in pertinent part:

- (c) 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.

That statute further prescribes the limited circumstances under which compensability may be reopened:

³We are mindful of the prohibition in Section 409.005(c) against using this report as an admission against the employer or carrier where the facts therein are contradicted. We do not believe, however, that this precludes the trier of fact from noting the date when the report is filed when that date is not in issue, or the fact that it includes certain information (whether or not such information is substantively true). We would also note that the TWCC-1 in this record was put into evidence as a carrier exhibit.

(d) 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.

By counting the 60 days from the date that the hearing officer subjectively determined that carrier had "sufficient" evidence from which to assess compensability, he erred in his interpretation of the law.⁴ The testimony of Ms. R and her March 12th letter to claimant leave no doubt that the employer/institution had been notified of what it characterized as a work-related injury. Ms. R in turn notified Mr. G. Her TWCC-1 was, under Rule 124.1, a "written notice of injury" which required response from the carrier. The carrier's TWCC-21 notice of dispute on its face states that first notice of injury was received March 12, 1992, more than 60 days before the carrier's notice, prima facie evidence of an untimely filing. See Texas Workers' Compensation Commission Appeal No. 92022, decided March 11, 1992. The statute and rules mandate that the 60 days for contesting a claim run from notification of "injury," not from the date at which a subjective determination is made that there are "sufficient" facts from which a carrier may form an intent to dispute a claim.

The carrier made the point at the hearing that claimant did not accompany his report of injury with doctor's bills and reports. It has been observed in another context that workers' compensation insurance carriers have a "duty" to investigate claims. See Aranda v. Insurance Co. of North America, 748 S.W.2d 210, 213 (Tex. 1988); Nationwide Mutual Insurance Co. v. Crowe, 857 S.W.2d 644, 648, 649 (Tex. App.-Houston [14th Dist.] 1993, n.w.h.). We believe that Section 409.021(c) provides motivation to a carrier not to simply serve as a passive repository of filed documents and provided information, but to investigate within 60 days in order to bring claims to prompt resolution. Reference to Rule 124.6(c) also makes clear that the reasons for denial of benefits should result from "actual investigation of the claim." Senator Montford, in A Guide to Texas Workers' Comp Reform, notes the objective of promptness:

Commentary, Section 5.21 . . . As compared to the prior comp law, Section 5.21 significantly accelerates processing time for carriers either to initiate benefit payments . . . or to contest compensability. Promptness of the initial comp payment was considered an important reform objective since delays in initiating benefits under the prior law at times resulted in hardship upon the employee and/or a need (viewed from the employee's perspective) for early attorney involvement.

⁴Our observation is further supported by the record which indicated that during the claimant's cross-examination of the adjuster, the hearing officer stated that the adjuster "had sixty days from when he thinks the time starts to run."

The 60 day deadline begins when a notice of injury is conveyed to the carrier. It is up to the carrier to investigate the facts relating to an alleged injury.

In summary, the hearing officer erred both in his factual conclusions (which are against the great weight and preponderance of the evidence) as well as his application of the law to them. We see no purpose to be served by remand to determine if carrier could reopen the compensability issue, as the facts plainly indicate that the evidence upon which the adjuster relied does not meet the requirements of Section 409.021(d).

The adjuster identified the May 5, 1992, report of Dr. W as his sole basis for controversion. He considered it to be new evidence only because he did not physically receive it until May 18, 1992. However, Dr. W's identity was plainly disclosed on the TWCC-1, and Mr. G testified that he discussed Dr. W's treatment of the claimant with him several times, and discussed the claim with Ms. R as well. The neurological report that was the actual basis for the TWCC-21 existed since March 16, 1992. Claimant's testimony along with Mr. G's testimony indicate that a doctor's report was not even requested from the claimant until shortly before the 60 day deadline. Mr. G did not directly communicate with Dr. W. The record also indicates that the adjuster may have proceeded at a casual pace due to lack of familiarity with applicable rules as well as a mistaken notion that different standards applied to contesting compensability in a "no lost time" claim.

All in all, a reasonable interpretation of this record points to the fact that the carrier clearly could have acted well within the 60 days to obtain the information contained in Dr. W's report. Medical evidence belatedly obtained through want of due diligence and failure to follow up on obtaining information from a doctor whose identity is disclosed from the outset is not newly discovered evidence under Section 409.021(d). Texas Workers' Compensation Commission Appeal No. 92038, decided March 23, 1992.

The waiver of the right to contest compensability has the effect, in our opinion, of a confession of compensability; consequently, review of the hearing officer's findings on the injury issue are therefore moot, and we need not exhaustively consider whether those findings were against the great weight and preponderance of the evidence. We note that the medical evidence was conflicting and the claimant's contention has some support in the record. Likewise, whether the carrier's TWCC-21 was adequate to dispute the existence of an injury is also moot.

The determination of the hearing officer is reversed, and a new decision rendered that because the carrier did not file a timely dispute of compensability in this case, and did not prove that it had a basis under the statute to reopen compensability, the carrier waived its dispute, and the carrier is therefore liable for applicable medical and income benefits to which claimant is entitled under the 1989 Act for claimant's right hand and thumb condition.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge