APPEAL NO. 94192

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On January 11, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that respondent (claimant) compensably injured his back and neck on (date of injury). Appellant (carrier) asserts seven points of error, two of which relate to whether the carrier timely contested compensability, two relate to whether benefits should have been stopped, one relates to the finding of good cause for failure to timely file a claim, one states that certain injuries did not stem from the (date of injury), accident, and one attacks the determination that the claimant did not make an election of remedies. The file contains no reply by the claimant.

DECISION

We affirm in part and reverse and remand in part.

Claimant was a truck driver for (employer). On (date of injury), while working, he fell from a ramp leading to a loading dock of a retail store. He reported this accident. He was able to continue to work. On (date of injury), he testified that he hurt his back while attempting to lift a couch. He had surgery to the lower back in 1992, and a question of surgery in the cervical area has surfaced.

Claimant filed a personal injury lawsuit against the store where he was injured on (date of injury), while making a delivery. A settlement was made in that case. Prior to that settlement, claimant was deposed on June 15, 1993; that deposition contains statements indicating that he fell between a truck and the loading dock, that when he fell, he twisted to the right, and that he tried to work the week after (date of injury). He stated therein, "[a]nd October the 12th I tried to pick up a sofa and could not do so." Later in the deposition, he said he first saw a doctor, (Dr. G), on October 14th; he said he told Dr. G of both the fall at the loading dock and his attempt to pick up the sofa on (date of injury). Another question in the deposition asked what he was "contending," he replied the fall of (date of injury). Three questions later, claimant said that he had told (MC) on (date of injury) that he tried to lift the sofa "and that I felt that I was really hurt and needed to see a doctor." Claimant later answered "no" to a question of whether he picked up anything on (date of injury) "that you contend hurt your back."

The issues before the hearing were: (1) did the carrier contest compensability on or before the 60th day after notification of the injury, and if not, did it contest on the basis of newly discovered evidence; (2) has carrier waived the right to contest compensability in regard to the 60 day notice provision; (3) did the claimant timely file a claim, and if not, was there good cause; (4) are claimant's cervical spine and elbow connected to the (date of injury) injury; and is claimant barred in this claim by an election of remedies in regard to health insurance.

The hearing officer noted that the employer filed a TWCC-1, Employer's First Report of Injury, on October 15, 1991, offered into evidence by the carrier, which referred to a report

of a back strain and stacking a sofa on (date of injury). Carrier contends on appeal that this piece of evidence cannot be used as an admission, citing Section 409.005, so that there is no evidence of notice of this injury. In addition to that exhibit, Carrier's Exhibit No. 2 is a TWCC-21, Payment of Compensation or Notice of Refused or Disputed Claim, admits that carrier received written notice of injury on October 17, 1991; this form also shows the date of injury to be (date of injury). Also available is Claimant's Exhibit No. 1, a letter from (Dr. D) to carrier's adjuster dated February 10, 1992, which states that claimant was injured on the job on (date of injury), when he lifted a sofa and felt pain in his low back. *See* Texas Workers' Compensation Commission Appeal No 93120, decided April 2, 1993. These documents sufficiently support the hearing officer's conclusions that the carrier did not contest compensability on or before 60 days of receipt of notice and that its contest of compensability (Carrier's Exhibit No. 2 is dated June 22, 1993) was not based on newly discovered evidence that could not reasonably have been discovered earlier. The hearing officer did not err in making no finding that the carrier could in these circumstances reopen the issue of compensability. *See* Texas Workers' Compensation Commission Appeal No 92538, decided November 25, 1992. Since the carrier did not comply with Section 409.021, the carrier has waived its right to contest compensability. The hearing officer was sufficiently supported in determining that the carrier waived its right to contest compensability.

The carrier also states that the hearing officer should have authorized the carrier to stop payment of benefits on the basis of judicial admission, citing the deposition referred to in a preceding paragraph. While a judicial admission is used in regard to statements made in the same case, *see* Aetna Life Ins. Co. v. Wells, 557 S.W.2d 144 (Tex. Civ. App.-San Antonio 1977, writ ref'd n.r.e.), judicial estoppel is not confined to the same forum or even the same parties. This theory does not require reversal, however, because while it says a sworn admission, including one in a deposition, estops the party subsequently from making a contrary statement, inadvertence or mistake may be shown to negate the rule. *See* Highway Contractors, Inc. v. West Texas Equipment Co., Inc., 617 S.W.2d 791 (Tex. Civ. App.-Amarillo 1981, no writ). Since there was no issue before the hearing officer as to judicial admission or judicial estoppel, no specific finding or conclusion should have been made on this point. The hearing officer found only that the claimant attributed his injury at the deposition to the (date of injury), injury. Her other conclusions of law and the decision itself make it clear that she did not find judicial estoppel had occurred. *Also see* Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848 (Tex. 1980), which considered an issue of election of remedies, and stated:

> Uncertainty in many complex areas of medicine and law is more the rule than the exception. It would be a harsh rule that charges a layman with knowledge of medical causes when, as in this case, physicians and lawyers do not know them.

Claimant also testified that after the deposition his doctor, Dr. G, told him that the (date of injury) incident was the cause of his back trouble. (Claimant's Exhibit No. 2 is a letter from Dr. G dated July 28, 1993, to carrier's adjuster saying that the (date of injury) injury is related

to the neck and lower back injuries.) The hearing officer was sufficiently supported by the evidence and the law in making no finding of judicial estoppel.

Carrier makes an argument that it was denied equal protection and due process in being found to have waived compensability so that benefits were not suspended. Again, the carrier's own admission on the TWCC-21, dated June 22, 1993, shows that it received notice of the injury of (date of injury), on October 17, 1991; thereafter in February 1992, Dr. D wrote to carrier's adjuster identifying claimant as injuring his low back on (date of injury), while working on the job. Waiver provisions as discussed earlier are set forth in the statute at Section 409.021. While the Appeals Panel believes constitutional attacks should be decided by a court, it observes no violation of equal protection of the law.

Carrier states that the hearing officer erred in finding that the claimant's cervical spine and elbow problems are related to the (date of injury) injury. The hearing officer is sufficiently supported on this point by the medical opinion of Dr. G.

The carrier asserts error in the hearing officer finding no election of remedies through the claimant's testimony that he used no health insurance for his injuries. Carrier asserts that its request for deposition of the claimant, received by the Texas Workers' Compensation Commission (Commission) on December 6, 1993, was erroneously denied. We note that carrier contended in its request that claimant had not responded to interrogatories, but that on December 6, 1993, answers to those interrogatories were mailed to carrier. The hearing officer's denial of the deposition was dated December 9, 1993. We also observe that carrier requested a continuance of the hearing at the same time as its request for deposition. The hearing at that time was set for December 16th and the request for deposition stated a time for deposition of December 16th. In these circumstances, and with carrier acknowledging that it was notified on October 17, 1991, of the injury on (date of injury), we do not find reversible error in the denial of the request to take claimant's deposition in December 1993.

Finally, carrier states that the claimant did not timely file a claim within one year of the injury. It objects to the hearing officer's determination that the claimant had good cause for not filing timely. The hearing officer found as good cause for not timely filing the carrier's failure to contest compensability. The conclusion of law that says claimant's good cause for failing to timely file a claim is based on the carrier's failure to contest compensability within 60 days, cannot legally stand in this case. Section 409.021(c) provides that a carrier's failure to contest compensability in 60 days, with provisos, results in waiver of its "right to contest compensability." Other aspects of the claim are not waived by the 60-day rule--only compensability. Sections 409.003 and 409.004 then provide a time limit to file a claim and state that failure of a claimant to file results in carrier's relief from liability--a broader concept than compensability. Also, the conclusion in question could be interpreted as giving the carrier no chance to attack a failure to file a claim (which a claimant may choose to do in the 12th month after injury) because this basis would not have matured within the 60 days given the carrier to dispute compensability. The hearing officer may wish to make findings of fact/conclusions of law as to whether carrier's failure to contest compensability within 60 days, coupled with a claimant's subsequent failure to timely file a claim (if no

exceptions are applicable), results in relieving the carrier only of liability beyond the area of compensability or results in relieving the carrier of all liability even though compensability was not challenged in 60 days. In addition, Section 409.004 is somewhat different from the prior law in addressing the results of failure to timely file a claim. While stating that claimant's failure to file a claim relieves the carrier of liability, it divides the exceptions to that failure into two parts rather than one question of good cause. Good cause remains as an exception to relief from liability, but also specified as an exception is "the carrier does not contest the claim." Since the exception concerning not contesting the claim is not set forth as a basis for good cause, but as a separate exception to the relief from liability rule, the issues of good cause and contesting the claim must be addressed separately. The record should be reconsidered and the hearing officer should make findings of fact as to whether there was good cause for late filing. Claimant testified several times that his employer had told him, "he would take care of it and file all the necessary reports." He also said he never filed a claim for workers' compensation before and testified that benefit checks started arriving three to four weeks after the injury. In regard to any question of good cause for late filing of a claim, findings of fact should be made as to when the claim was filed and whether claimant acted with the diligence that a reasonable prudence person would have shown until the time of filing. The record does not show a copy of a claim for the October 12, 1993, injury although a claim for the (date of injury), 1993, injury is mentioned. The Commission file may be examined by the hearing officer to determine whether any claim form or correspondence from the claimant or his representative constitutes a claim. In addition, the hearing officer may wish to make findings of fact as to whether the carrier did "not contest the claim" (*see* Section 409.004). The record shows the carrier's TWCC-21, dated June 22, 1993, which attempts to contest compensability approximately one year and eight months after injury, stated as the reason for refusing payment that:

> Carrier controverts surgery and treatment related to cervical spine or elbow as not related to his (date of injury) workers' compensation claim but to a (date of injury) accident.

The reason set forth for denial may indicate that only certain aspects of the claim were being disputed or contested, and its wording may indicate an acknowledgement that there is a claim. If findings are made as to this exception, added findings, if applicable, may address whether claimant had a duty to act with reasonable prudence in filing a claim after the time of carrier's contesting the claim. If such a duty exists in applying this exception, then findings of fact as to claimant's prudence in regard to when the claim was filed should also be made.

The decision and order are affirmed in part and reversed and the case remanded in part for reconsideration of findings of fact addressing whether filing a claim was necessary in this case, and as appropriate, date an applicable claim was filed, and whether good cause existed for late filing of the claim, with such other ancillary findings as to carrier's contest of the claim and related matters as the hearing officer chooses. In reconsidering the evidence and in developing evidence as to filing a claim, additional or different findings of fact and conclusions of law may be appropriate in reaching a decision. Since reversal and remand

necessitates issuing a new decision, a party who wishes to appeal the new decision must file a request for review not later than 15 days after the date of receipt of the new decision, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge