APPEAL NO. 94292

On February 4, 1994, a contested case hearing was held in (city), Texas with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the hearing were: (1) whether the appellant (claimant) was injured in the course and scope of employment on (date of injury); (2) whether the claimant had disability from June 21, 1993, to July 2, 1993, and from August 30, 1993, to the date of the hearing; and (3) whether the respondent (carrier) contested the claimed injury within 60 days of receiving notice of the injury. The hearing officer determined that the claimant was not injured in the course and scope of employment; that the claimant did not have disability; and that the carrier timely contested the claimant's claimed injury. The hearing officer decided that the claimant is not entitled to workers' compensation benefits under the 1989 Act. The claimant disagrees with the hearing officer's decision and requests that we reverse it and render a decision in his favor. The carrier requests that we affirm the hearing officer's decision.

DECISION

Affirmed.

The claimant began working for the employer, (employer), a restaurant business, under a work-study program in August 1992. The claimant testified that on (date), he slipped and fell at work and reported the accident to one of his supervisors, (Mr. R), the same day. Mr. R denied ever receiving any report of accident or injury from the claimant. The claimant said that he did not have any problems with his back and did not miss work as a result of the (date) accident.

The claimant further testified that on (date of injury), he injured his back at work when he lifted a stack of dishes, turned, and felt his back "pop." The claimant said he felt back pain the evening of (date) and that on (date) reported to another supervisor, (TD), that he hurt his back at work the previous day. The claimant said he also asked TD if the employer had a report of his accident of (date). TD testifed that on June 21st the claimant told him he was injured on (date) when he slipped and fell at work and that the claimant did not mention any accident or injury occurring on (date). TD completed an employer report of injury for an injury of (date). TD further testifed that in mid-July 1993, the claimant told him that the carrier had refused further medical treatment for the (date) injury and that the claimant asked him to file a report for a (date) injury.

(CN), who was also a supervisor, testified that in February or March 1993, the claimant informed the employer that he had been involved in a car accident and that about three weeks later the claimant said his back was hurting but didn't say what caused the back pain. The claimant denied having been involved in a car accident.

The claimant's teacher, (IM), said in a recorded statement that on some unspecified date the claimant had told her he was off work because he had fallen and hurt his back, but that later on she heard the claimant tell a student that he hurt his back lifting trays.

Beginning on June 21, 1993, the claimant was treated by (Dr. M), a chiropractor. Two initial medical reports from Dr. M dated June 22, 1993, were in evidence. One report gave a date of injury of (date of injury), and described the plate lifting incident and also gave a past history of the slip and fall accident on (date). The other gave a date of injury of (date), and described only the slip and fall accident on that date. In both reports Dr. M diagnosed lumbar plexus disorder, lumbosacral strain and sprain, sciatic radicular neuralgia, and sciatic neuritis. Dr. M also noted in both reports that the claimant was to be off work. Dr. M also filed subsequent reports dated August 3, 1993, for each date of injury, and in those reports noted that the claimant could return to light duty work on June 30, 1993. The claimant testified that he worked light duty work for the employer from July 2, 1993, to August 29, 1993, when he could no longer work due to back pain. A report from Dr. M indicates that he took the claimant off work as of October 4, 1993.

The hearing officer found that the claimant was not injured in the course and scope of his employment on (date of injury), and that the claimant "suffered no disability as the result of a compensable injury on (date of injury)." The claimant has the burden to prove that he was injured in the course and scope of employment and that he has disability. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). There was much conflicting and contradictory evidence in this case. The hearing officer is responsible for determining what facts have been established from the conflicting evidence. Having reviewed the record, we conclude that the hearing officer's finding of no compensable injury on (date of injury), is supported by sufficient evidence and is not against the great weight and preponderance of the evidence. Since the claimant failed to prove that he sustained a compensable injury on (date of injury), he could not have disability, as defined by Section 401.011(16), as a result of the claimed injury of that date.

We next address the issue of whether the carrier contested the claimant's claimed injury of (date of injury), within 60 days. Section 409.021(c) provides that, 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. Under Tex. W.C. Comm'n, 28 TEX. ADMIN CODE § 124.6(c) (Rule 124.6(c)), the carrier shall file a notice of refused or disputed claim on or before the 60th day after the carrier received written notice of the injury. Commission form TWCC-21 is the notice of refused or disputed claim. Rule 124.6(c) also states that the notice shall contain all the information listed in 124.6(a), and that all facts set forth as grounds for contesting compensability shall be based on actual investigation of the claim, and shall describe in sufficient detail the facts resulting from the investigation that support the carrier's position.

The hearing officer found that the carrier received written notice of the injury no earlier than September 22, 1993. In its response, the carrier contests that finding and asserts that

it did not receive written notice until November 15, 1993. However, since the carrier's response was not filed within the 15-day time period for filing an appeal, its challenge to the finding of the date written notice was received will not be considered on appeal, and for purposes of this decision we will consider September 22, 1993, as the date the carrier first received written notice of the claimed injury of (date of injury). The claimant does not challenge that finding in its appeal and we note that the claimant's position at the hearing was that the carrier had received notice of injury on September 22, 1993.

A benefit review conference (BRC) was held on November 16, 1993, in regard to the claimed date of injury of (date of injury). The record does not reflect who requested the BRC and no request for a BRC is in the record. There were two issues at the BRC: (1) whether the claimant sustained a compensable injury on (date of injury); and (2) whether the claimant had disability from June 21, 1993 to July 2, 1993, and from August 30, 1993, "through the present resulting from the injury sustained on (date)." The issue as to whether the carrier contested the claimed injury of (date of injury), within 60 days of receiving notice of the injury was added at the hearing at the request of the claimant. In regard to the issue of whether the claimant sustained a compensable injury on (date of injury), the benefit review officer (BRO) wrote on the disputed issue form for that dispute (the disputed issue form is dated November 18, 1993) that the claimant's position was that he had sustained a compensable injury on (date of injury), and that the carrier's position was that the claimant had not sustained a compensable injury on that date. The full text of the carrier's position was set forth in the BRC report as follows:

> The carrier contends that the Employee did not sustain a compensable injury on (date) and is not entitled or due any benefits under the Employer's workers' compensation coverage.
>
> The Carrier states, on the basis of reports from the Employer, that the Employee reported a (date) accident to the Employer on (date). There was no report of a (date) injury. The Employee contacted the Employer on the afternoon of (date) to report that he would be seeing a chiropractor. The first report of injury, regarding the (date) date of accident was on (date). This occurred after the Carrier had determined to refuse the claim for the (date) date of injury due to the Employee's failure to timely report such to the Employer and a report that the Employee may have been involved in a Motor Vehicle Accident in March of 1993. The Carrier questions the validity of the Employee's statement.
>
> The Carrier contends that the Employee fails to present a preponderance of the evidence to substantiate his claim.

The BRO recommended that the claimant had not sustained a compensable injury on (date of injury).

In a TWCC-21 dated December 22, 1993, which is date stamped as being received by the Texas Workers' Compensation Commission (Commission) on December 23, 1993, the carrier stated that it was refusing or disputing payment for the claimant's claimed injury of (date of injury), for the following reasons "[c]arrier refusing/disputing claim as injury did not occur within the course and scope of employment. Carrier refusing/disputing disability." A copy of the TWCC-21 is shown as having been mailed to the claimant on December 22, 1993.

The claimant disagrees with the following findings of fact and conclusion of law in regard to the timely contest of compensability issue:

FINDINGS OF FACT

9.Carrier directly disputed the compensability of Claimant's (date of injury) injury at the [BRC] held on November 16, 1993, which was within 60 days of the September 22 [sic] notice.

10.Carrier issued a Notice of Disputed Claim (TWCC-21) on December 22, 1993, which was no more than a confirmation of the dispute it asserted at the BRC on the (date of injury) injury.

CONCLUSION OF LAW

5.Carrier disputed Claimant's claim of (date of injury) within 60 days of receiving written notice by disputing directly through its representative at the BRC.

The claimant asserts that the hearing officer erred in determining that the carrier disputed the compensability of his injury within 60 days of receiving written notice of the injury because the carrier did not dispute compensability in writing on a form TWCC-21 within 60 days of receiving written notice of his injury.

It is clear that the carrier did contest the compensability of the claimant's claimed injury of (date of injury), at the BRC held on November 16, 1993, which was within 60 days of September 22, 1993, the date the carrier first received written notice of the injury. It is equally clear that both the Commission and the claimant were informed by the carrier of its contest of compensability at the BRC on November 16, 1993, and that the BRO reduced the carrier's contest of compensability to written form on the disputed issue form no later than November 18, 1993, which was also within the 60-day period. The BRO recommended against the claimant, and based on the carrier's contest of compensability, the parties proceeded to a contested case hearing. The question before us is whether, under these particular circumstances, the carrier's failure to file a TWCC-21 as required by Rule 124.6, until December 23, 1993, which was after the 60-day period expired, resulted in a wavier of the carrier's right to contest compensability. We agree with the hearing officer's decision that it did not.

In other cases, we have attempted to keep from elevating form over substance. For instance, in Texas Workers' Compensation Commission Appeal No. 92384, decided September 14, 1993, we held that a doctor had certified in a letter that the claimant had reached MMI notwithstanding that the certification was not on the Commission prescribed TWCC-69 form. However, we remanded the case to the hearing officer because the doctor had not effectively assigned an impairment rating. In doing so we stated:

> We emphasize with this ruling that we are not attempting to elevate form over substance so as to thwart, rather than implement, the dispute resolution process. The fact that a certification of MMI or a finding of impairment is not on the Commission's form does not, in and of itself, go to its substance as an expert opinion.

In addition, in Texas Workers' Compensation Commission Appeal No. 931112, decided January 21, 1994, we stressed the importance under the 1989 Act of compliance by a carrier with the 60-day rule for disputing compensability in order to bring claims to a prompt resolution thereby avoiding the hardship that could befall a claimant as much from indecision as from an adverse decision.

In the instant case, we feel that we would be elevating form over substance were we to hold that the carrier failed to timely contest compensability when it had in fact notified both the claimant and the Commission at a BRC held within 60 days of its receipt of written notice of the injury that it was contesting compensability of the injury, had given reasons for contesting compensability at the BRC, both the contest of compensability and the reasons therefor were reduced to writing by the BRO within the 60-day period, and the parties proceeded to a contested case hearing based on the carrier's contest of compensability. We note that under Rule 141.5(c) the BRO is required to identify and describe the disputed issues and elicit each party's statement of position, and under Rule 141.7(c) the BRO is required to make a written report of the BRC. We note further that the carrier did file a TWCC-21 between the BRC and the contested case hearing. We believe that a holding that the carrier did timely contest compensability under the circumstances presented in this case fosters, rather than inhibits, a prompt resolution of claims. The dispute resolution process was well under way before the carrier's 60-day period for contesting compensability expired, and to now go back and say that there never was a timely contest of compensability would thwart the dispute resolution process as it applied to this case. We believe that this case represents an unusual situation and our holding should not be construed to go beyond the specific facts of this case.

The hearing officer's decision and order are affirmed.

Robert W. Potts

Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

With the deepest respect to my esteemed colleagues on this panel, I feel compelled to strongly dissent from the decision in this case. I believe that the hearing officer erred in giving the carrier retroactive absolution for its utter failure to follow the clear requirements of both the 1989 Act and the Rules of the Texas Workers' Compensation Commission obligating it to timely file a Notice of Refused or Disputed claim (TWCC-21). In my view, insisting that the carrier comply with the requirements of the Act and the Rules in this case would not put "form over substance," but in fact would preserve important principles, such as requiring a carrier act promptly on claims, which go to the heart of the 1989 Act. It would also foster fundamental fairness in the treatment of claimants in regard to the whole issue of controversion of claims.

First, let me say that for the reasons outlined in detail by the majority opinion I accept September 22, 1993, as the date the carrier received the notice of the claim in the present case. Section 409.021 provides as follows:

(a)An insurance carrier shall initiate compensation under this subtitle promptly. Not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, **the insurance carrier shall:**

(1)begin the payment of benefits as required by this subtitle; or

(2)notify the commission and the employee **in writing** of its refusal to pay and advise the employee of;

(A)the right to request a benefit review conference; and

(B)the means to obtain additional information from the commission.

(b)An insurance carrier shall notify the commission **in writing** of the initiation of income or death benefit payments in the manner prescribed by commission rules.

(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.

(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.

(e)An insurance carrier commits a violation if the insurance carrier does not initiate payments or file a notice or refusal as required by this section. A violation under this subsection is a Class B administrative violation. Each day of noncompliance constitutes a separate violation. [Emphasis added.]

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6) states in relevant part:

(a)A carrier that refuses to begin paying temporary income, lifetime income, or death benefits shall notify the commission and the claimant or representative, **on a form TWCC-21** and in the manner prescribed by the commission. The notice shall contain the following information:

(1)the workers' compensation number assigned to the claim by the commission, if known when the report is made;

(2)the employee's name, address, and social security number;

(3)the claimant's name and address, if different;

(4)the employer's name and address;

(5)the carrier's name and commission-assigned identification number;

(6)the date and nature of the injury;

(7)the date the carrier received written notice of the injury and the name of the person making the notice;

(8)the name and professional license number of the person making the report for the carrier; and

(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.

(b)The carrier must file the notice described in subsection (a), for payment of temporary income or lifetime income benefits, no later than the 7th day following receipt of written notice of injury.

* * * * *

(c)If a carrier disputes compensability after payment of benefits has begun, the carrier shall file a notice of refused or disputed claim, on or before the 60th day after the carrier received written notice of the injury or death. This notice shall contain all the information listed in subsection (a) of this section, provided that all facts set forth as grounds for contesting compensability shall be based on actual investigation of the claim, and shall describe in sufficient detail the facts resulting from the investigation that support the carrier's position. [Emphasis added.]

It would appear to me that both the legislature and the Commission in formulating the above quoted statutory and rule language contemplated that the carrier itself provide timely, written and detailed notice of its reasoning in denying a claim. For this Panel to now find that the oral denials by the carrier, even if summarized in writing by the BRO, are sufficient, may, in my view, do violence to both the language and intent of the rule and statute.

It also to me tends to undermine one of the basic purposes of the 1989 Act. The 1989 Act was designed to cut costs to prevent the Texas Workers' Compensation system from collapse. Inherent in the process of cost cutting was the need for sacrifice. This sacrifice was mitigated by additional benefits provided to the participants in the system by reforming it. One of the additional benefits which the 1989 Act provided the claimant was a promptness of payment and processing of claims which had been sorely lacking under pre-1989 Act law. Section 409.021 and Rule 124.6 were clearly enacted to further this promptness. Failing to strictly apply these dictates from the legislature and Commissioners will, in my mind, not further promptness, but could encourage delay, not only in the payment of claims, but in their investigation, by reducing the pressure on the carriers to act promptly. Further, it is unfair to the carriers that have made a determined and successful effort to comply with the requirements of the law to have to compete with a slacker who is not

penalized for noncompliance. Also, by muddying what constitutes compliance with Section 409.021 and Rule 124.6, this decision could undermine the Commission's own compliance and enforcement efforts.

Another reason I am particularly concerned in regard to this issue, is that the Appeals Panel has earlier ruled that a claimant's right to complain of a carrier's failure to comply with the Section 409.021 and Rule 124.6 may be waived. Thus the carrier's failure to comply with the statute and rule may in many cases remain undetected. Recently, in Texas Workers' Compensation Commission Appeal No. 94228, decided April 11, 1994, we observed that ombudsmen and BROs should attempt to prevent this. In the present case, the ombudsman commendably did this by making sure that the issue was raised. In my view, we should be encouraging this type of action and stricter enforcement of Section 409.021 and Rule 124.6 to insure that the rights of a claimant to prompt investigation and processing of his or her claim is not undermined.

I understand that the narrow question before this panel today is one of first impression. I understand that reasonable and sincere minds may differ in how the question before us should be resolved. I claim no special wisdom that my esteemed colleagues lack. However, as the majority heads into uncharted waters, and in my view with the course set in the wrong direction, I decline to get on board. I would reverse the hearing officer and render a decision that the claimant is entitled to benefits under the 1989 Act due to the carrier's failure to timely dispute the claim.

Gary L. Kilgore
Appeals Judge