APPEAL NO. 94326

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 18, 1994. The issues at the CCH were: 1. whether the appellant (claimant herein) sustained a compensable injury on or about (date of injury); 2. whether the claimant's alleged injury was caused by claimant's willful intent to injure himself; 3. whether the carrier has waived its right to contest the compensability of the claimant's alleged injury; and 4. whether the claimant has sustained disability as a result of his compensable injury. The hearing officer essentially ruled that the carrier did waive its right to contest compensability, that the claimant did attempt to injure himself, that the claimant suffered no injury and that the claimant suffered no disability. The hearing officer then ordered the claimant take nothing stating "it is difficult to conceive what income or medical benefits could be due where no injury exists." The claimant requests that we overturn the decision of the hearing officer because he sustained an injury on the job and should be entitled to medical and income benefits. The carrier responds that the claimant did not establish that he suffered a compensable injury and the evidence supported the findings and conclusions of the hearing officer.

DECISION

We reverse the decision of the hearing officer and render a decision that the claimant suffered a compensable injury. We affirm the finding of the hearing officer as to disability.

The claimant testified that he began working for the employer on February 2, 1987. He has alleged three on-the-job injuries resulting from falls at work. The claimant alleges that he fell at work on (date of injury); on (date of injury); and on (date of injury). As a result of the (date of injury), injury the claimant was scheduled to have knee surgery on his right knee on August 16, 1993. The surgeon who scheduled this surgery, Dr. J, released the claimant to return to work on July 28, 1993, on light duty. The claimant testified that he requested the doctor not release him as he was in a full right leg brace to immobilize his right knee and was scheduled for surgery in a matter of days, but that Dr. J insisted upon releasing him. The claimant testified that the employer offered light duty work and that he returned to work.

The claimant testified that on (date of injury), while back at work on light duty and descending a steep staircase, he slipped and fell down the staircase. The claimant attributed his fall primarily to having to negotiate the steep staircase while wearing the full right leg brace. It is undisputed that the employer took the claimant to Dr. J. Dr. J indicated that the claimant reported that he injured his left knee falling down the staircase. Dr. J's medical report (date of injury), stated as follows:

> [Claimant] fell down stairs today. Employer is with him. Lt knee is stable, no popping or clicking, McMurray's (-).

This report stated that the prognosis was "undetermined." In a letter dated February 16, 1993, Dr. J further stated as follows:

> [Claimant] was seen at the Nacogdoches Bone & Joint Clinic on date of injury) due to an injury sustained at work that day. It was reported that he had fallen down the stairs and injured his left knee. Examination shows that the left knee has good stability medially, laterally, anteriorly, posteriorly and rotationally. There is no popping or clicking. McMurray's sign is negative. The knee is stable and fine. There is no injury noted.

The claimant testified that he reported to Dr. J problems from the fall down the staircase other than to his left knee.[1] The claimant attributes other problems to the fall such as back problems, right leg problems and dental problems. In any case, the claimant stated that Dr. J only examined his left knee and released him to return to work. The Claimant testified that he requested the rest of the day off as vacation and in fact took vacation time for the rest of the time from (date of injury), until the time of his right knee surgery on August 16, 1993. The claimant's (date of injury);, fall on the staircase was witnessed by a supervisor and two coemployees who in later statements indicated that the incident appeared "staged." On August 12, 1993, the employer wrote a letter to the carrier detailing the incident and requesting the carrier dispute the claim as the claimant was not injured and had staged the incident.

Dr. J performed surgery on the claimant's right knee on August 16, 1993. The claimant testified that Dr. J returned him to work on October 25, 1993, again over his objections while he was still on crutches. The claimant alleged that on (date of injury), he fell a third time at work due to water standing on the bathroom floor. He has not returned to work since this incident.

Dr. J found that the claimant attained maximum medical improvement (MMI) from his (date of injury), injury on January 10, 1994, and assessed a zero percent whole body impairment due to that injury. In a letter dated February 16, 1994, Dr. J stated that "[a]ny period of disability from the date of surgery [August 16, 1993] to the date of MMI (January 10, 1994) was caused only by the injury on date of injury)." The carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated November 13, 1993, reached the Texas Workers' Compensation Commission (Commission) on December 2, 1993, and stated that "there is not medical to support an on-the-job injury or any disability. Witness statements discredit the claimant's alleged injury in the course and scope of employment."

The hearing officer's Findings of Fact and Conclusions of Law included the following:

FINDINGS OF FACT

[1]This like much of the rest of the claimant's testimony is somewhat confused and difficult to follow.

4. On (date of injury), Claimant did not sustain damage or harm to the physical structure of his body in the course of an incident on the staircase at the premises of his employer.

5. On (date of injury), Claimant willfully intended to injure himself by staging the incident on the staircase at his employer's premises.

6. On August 12, 1993, LD, the safety director for Claimant's employer, sent a letter to the employer's workers' compensation carrier indicating that Claimant alleged to have sustained an injury while at work on or (date of injury).

7. Carrier did not contest the compensability of Claimant's alleged injury until November 15, 1993.

8. More than sixty days elapsed between August 17 and November 15, 1993.

9. Since (date of injury), Claimant's alleged compensable injury of (date of injury); has not prevented Claimant from obtaining and retaining employment at wages equivalent to the wage Claimant earned prior to (date of injury).

CONCLUSIONS OF LAW

3. Claimant sustained no injury within the course and scope of his employment on or about (date of injury).

4. Claimant's alleged compensable injury of (date of injury), was caused by Claimant's willful intent to injure himself.

5. Carrier has waived its right to dispute the compensability of Claimant's alleged injury.

6. Claimant has sustained no disability as a result of his alleged compensable injury.

Section 409.021 provides as follows, in relevant part:

(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.

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", or "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.

The hearing officer found that the carrier failed to meet the requirements of Section 409.021 and Rule 124.6. In other words, the carrier failed to dispute compensability within 60 days of having received notice of the injury. The hearing officer rejected the defense interposed by the carrier, which is that the letter of August 12, 1993, sent to it by the employer was insufficient to put it on notice of a new injury on (date of injury). Our review of this letter shows that it certainly contained sufficient information to give the carrier notice of this injury. The carrier failed to show that it could not have reasonably discovered the evidence it later used to controvert the claim. We therefore approve the hearing officer's finding that the carrier waived its right to dispute the compensability of the claimant's injury.

Nor can we fault the hearing officer for making findings of fact on the issues of injury and the claimant's willful intent to injure himself. These were issues brought up from the Benefit Review Conference and as such the hearing officer should address them. The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. So is the question of whether the claimant's injury was caused by his intent to injure himself. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance

Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The evidence on the question of whether an injury occurred and whether the claimant intended to injure himself was conflicting. Further, the evidence relied upon by the hearing officer in making her decision on these issues was somewhat contradictory. The witness statements of the eyewitnesses, who state that they believe that the claimant staged the date of injury), injury, indicated that the claimant was feigning injury for the (date of injury), fall as well, yet Dr. J who the hearing officer relied upon heavily in determining that the claimant did not suffer an injury on (date of injury) clearly believed that the claimant suffered an injury on (date of injury), serious enough to require surgery. We cannot say, however, applying the standard of review described *supra*, that these factual findings by the hearing officer were against the overwhelming weight of the evidence.

We must part company with the hearing officer regarding her legal conclusions based upon her factual findings. She found as a matter of fact essentially that the carrier failed to timely contest compensability within 60 days of receiving notice that the claimant alleged an injury of (date of injury), that the claimant did not suffer an injury in the (date of injury), fall, and that the claimant willfully intended to injure himself by staging the fall. Applying the law to these findings the hearing officer correctly concluded that the carrier waived its right to dispute compensability of the claimant's (date of injury), injury. She incorrectly concluded, however, as a matter of law that the claimant sustained no injury in the course and scope of employment and that the claimant's injury of (date of injury), was the result of claimant's willful intent to injure himself. By doing so, the hearing officer has allowed the carrier to prevail on the very defenses it waived, and attempted to raise in its untimely contest of the claim. This ignores Section 409.021 and Rule 124.6 and if allowed to stand would effectively render them meaningless.

When the carrier failed to timely dispute the claimant's (date of injury), injury it became a compensable injury as a matter of law. It is not possible to now say that it was not an injury or that it was not compensable because it was an intentional injury by the claimant. It might be argued that this ignores the reality of the situation, under the factual findings of the hearing officer, and could require the payment of benefits in a situation where payment is not appropriate. However, it is clear that the legislature and the Commission in formulating Section 409.021 and Rule 124.6 contemplated that the carrier

provide timely, written and detailed notice of its reasoning in denying a claim. This was done to further one of the major goals of 1989 Act--to bring about 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 could encourage delay, not only in the payment of claims, but in their investigation, by reducing the pressure on the carriers to promptly process claims. 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 carrier who is not penalized for noncompliance.

Further, whenever the outcome of a case is determined based upon a procedural deadline, rather than the merits, the result may seem harsh or unfair. Yet, procedural deadlines are a necessity and cases are determined upon them every day--whether it be meritorious causes of action dismissed by courts for failure to file suit within the time required by applicable statute of limitations or the Appeals Panel refusing to consider a meritorious appeal because it is filed untimely. This happens because some procedural deadlines are essential to make any system of law workable. Also many procedural deadlines promote important public policies, as the one in the present case, which promotes prompt claim handling. In the present case, the hearing officer has bypassed this procedural deadline and reached the merits of the case and we must reverse her decision. We hold as a matter of law that the claimant suffered a compensable injury on (date of injury), for which he is entitled to benefits as provided by the 1989 Act.

This does not mean that of necessity the claimant has suffered disability or requires medical treatment as result of his compensable injury. Having suffered a compensable injury, the claimant is entitled to reasonable and necessary medical treatment for the injury. Determining what is reasonable and necessary is a matter for the medical review process. As to disability, the hearing officer found that the claimant's alleged injury of (date of injury), has not prevented the claimant from obtaining and retaining employment at wages equivalent to the wage claimant earned prior to (date of injury). Such a finding is one of fact which we are bound to uphold unless it is against the great weight and preponderance of the evidence.

The decision and order of the hearing officer are reversed. A new decision is rendered that the claimant suffered a compensable injury on (date of injury), entitling him to benefits as provided by the 1989 Act. We affirm the hearing officer's finding on disability.

Gary L. Kilgore
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

DISSENTING OPINION

I respectfully dissent. An "injury" means "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm," and the term includes an occupational disease. Section 401.011(26). A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). Under Section 409.021(c), a carrier that does not contest the compensability of an injury on or before the 60th day after the date on which the carrier is notified of the injury, waives its right to contest compensability. In the instant case, the carrier failed to timely contest compensability and, therefore, waived its right to "contest compensability." However, the claimant has no injury. Without an injury, the question of whether the claimant sustained a "compensable injury," that is, an injury that occurred in the course and scope of employment, is not reached. There simply is no injury to which the concept of compensability can attach. I fully understand and appreciate the reasoning of the majority opinion that the 1989 Act requires prompt payment for or dispute of an injury, and I also share the majority's very real concern that carriers may well attempt to circumvent the provisions of Section 409.021 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6), if we were to decide in this case that the claimant does not have a compensable injury. However, I cannot read Section 409.021 or Rule 124.6 to make a nonexistent injury into a compensable injury when a carrier fails to timely contest compensability. I would affirm the hearing officer's decision and hold that the claimant is not entitled to workers' compensation benefits for his nonexistent injury. I would distinguish this case from Texas Workers' Compensation Commission Appeal No. 92278, decided August 10, 1992, by pointing out that in that case, the claimant had an actual injury, a heart attack, which the carrier failed to timely contest the compensability of. Thus, the injury became a compensable injury. In the instant case, there is no work-related or non-work-related injury to which compensability can attach by reason of the carrier's failure to timely contest compensability. As to possible circumvention of the statutory dispute requirements by carriers, I would think that an employee without any injury would not, in any event, be entitled to workers' compensation benefits.

Robert W. Potts
Appeals Judge