APPEAL NUMBER 94977
FILED SEPTEMBER 6, 1994

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. A contested case hearing was held in (City), Texas, on July 12, 1994, to resolve the following issues: did the claimant sustain a compensable injury on _____, and did the carrier properly contest compensability. The hearing officer, determined that the claimant did not sustain a compensable injury to her left shoulder and neck on _____, and the claimant appeals this determination, citing to evidence which she believes supports her position. The hearing officer also held, however, that the carrier did not contest compensability in a proper manner and therefore has waived their right to contest compensability under Section 409.022. The carrier appeals this determination.

DECISION

The decision of the hearing officer is affirmed in part and reversed in part.

The claimant was working as a dining room attendant at a senior citizens center. She testified that on _____ (all dates are 1994 unless otherwise indicated), as she lifted and then set down a tray of glasses, she felt excruciating pain in her left shoulder. She said she continued working for about an hour, until the end of her shift, then went home. The following day, she said, she went to see Dr. S.

The claimant had had a previous history of physical problems, including low back surgery in 1980, 1982, and 1986; she had four nonback related surgeries between 1986 and 1989. She was seeing Dr. B, a rheumatologist, at three-month intervals at the time of the _____ incident.

The claimant said she believed she told Dr. S at her first visit that she had hurt her arm and shoulder when lifting a tray of glasses at work, and that this pain was different from her usual pain. Patient notes from that visit observed that the claimant had "some arthritis in her neck with a trigger point in the suprascapular area," and that she was treating with Dr. B for her arthritis. Dr. S gave claimant a suprascapular steroid injection and told her to continue with the medicine she had been prescribed by Dr. B. Claimant also saw Dr. S on February 18th and 24th. On March 8th she had an MRI of the cervical spine which showed mild bulging at C3-4 and C4-5, a small focal disc bulge centrally and to the right at C5-6, affecting the right side of the cord, and a small to moderate size focal disc bulge centrally and to the left at C6-7 creating a moderate to severe left neural foraminal stenosis and deflecting the left side of the cord. Claimant apparently had been referred to Dr. F, who on March 16th noted the MRI results and advised evaluation by a neurosurgeon.

Dr. S's patient notes from March 29th state: "This is now apparently a workers comp case. I wasn't aware of that in the beginning." On April 6th, Dr. S completed an Initial Medical Report (TWCC-61) in which he recorded a history of pain upon claimant's

lifting racks of glasses. In a letter dated April 14th Dr. D, to whom claimant had been referred by Dr. F, stated that claimant had significant spondylosis at C6-7, which was the cause of her current symptoms. He said she also had significant disease at C5-6, and recommended an anterior discectomy and fusion at C5-6 and C6-7 to correct claimant's problems. Dr. DN examined claimant for a second opinion, found her to have a resolving C7 radiculopathy from a herniated nucleus pulposus at C6-7, and stated that indications for surgery were present, but that he would recommend re-examination by Dr. D due to her significant improvement.

The record indicates that the claimant reported her injury to her employer on March 9th, but that she requested, and on March 7th was granted, a medical leave of absence from her job. Coworkers gave written statements to the effect that they were aware that claimant was seeing a doctor for physical problems but did not know until later that it was work related. One coworker wrote that claimant told her that she really realized she was hurt when she went to her car and reached for the seatbelt; claimant's written statement given the same day says she felt a "twinge" in her neck when she lifted the glasses, and a sharp pain in her neck and down her left arm when she fastened her seatbelt.

Claimant's position was that the lifting incident produced a new and different pain from what she had previously experienced. The carrier introduced 1993 reports from Dr. B to the effect that the claimant has had a history of osteoarthroses, primarily of the neck and lower back. In addition, Dr. F wrote on March 2, 1994, that Dr. B had injected claimant's left shoulder "a couple of months ago for similar pain, but she said it was also quite swollen at the time."

The hearing officer held that the claimant failed to establish, by a preponderance of the evidence, that her left shoulder and neck symptoms were the result of a work- related injury on _____. Upon our review of the evidence, we cannot say that the hearing officer's determination of this issue was so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). As the hearing officer notes, there is no indication in Dr. S's notes that claimant's symptoms were caused by a work-related incident, until March 29th. Further, written statements of claimant and her coworker could lend an inference that claimant's onset of pain arose when she reached for her seatbelt and not while she was engaged in an activity in the furtherance of her employer's business. In addition, the medical evidence shows past and ongoing complaints regarding claimant's neck and Dr. F notes "similar pain" and swelling a few months previously.

The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). To the extent that any evidence is conflicting, the hearing officer is entitled to resolve such conflict and may believe all, part, or none of the testimony of any witness. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). We will not

substitute our judgment for that of the hearing officer where his decision is supported by the evidence and is not against the great weight of the evidence. Cain, *supra*.

With regard to the second issue, the hearing officer held that the carrier failed to properly contest compensability of the claim and thus has waived its right to contest compensability pursuant to Section 409.022 and Tex. W.C. Comm'n, TEX. ADMIN. CODE § 124.6 (Rule 124.6).

Section 409.022 provides in pertinent part that an insurance carrier's notice of refusal to pay benefits under Section 409.021 must specify the grounds for the refusal. Rule 124.6(a)(9) states that a carrier that refuses to begin paying temporary income benefits (TIBS) shall notify the Commission and the claimant, on a TWCC-21, of its refusal and such notice shall contain, among other things:

> 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.

Rule 124.6(c) provides that if a carrier disputes compensability after payment of benefits has begun, the carrier must 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, and that the notice must contain all the information listed in subsection (a), "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 carrier, which the benefit review conference report shows began payment of TIBS, filed a TWCC-21 on March 25, 1994. The reason for disputing the claim was given as follows:

> Claimant did not report an on-the-job injury to insured until 3/9/94. Insured and coworkers were aware of claimant having health problems, but claimant never mentioned work injury. Per (W) with [Dr. S's] office, claimant treating as Medicaid patient no knowledge of worker's comp. We are attempting to have the right to request a benefit review conference and to obtain additional information from a TWCC ombudsman at [telephone number] to get verification from Dr. Will get med authorization to obtain information.

The hearing officer found that the language used in carrier's TWCC-21 was vague and general, did not comply with the requirements of Rule 124.6(a)(9), and failed to set

forth a full and complete statement of the grounds relied on to justify the refusal to pay benefits.

This panel has held that "magic words are not necessary to contest the compensability of an injury under the [statute] and rule" and that we will "look to a fair reading of the reasoning listed to determine if the notice of refusal or denial is sufficient." Texas Workers' Compensation Commission Appeal No. 93326, decided June 10, 1993. The key point to be determined is whether, read as a whole, any of the reasons listed by a carrier would be a defense to compensability that could prevail in a subsequent proceeding and whether "the grounds listed, when considered together, encompass a controversion or dispute on the basic issue that an injury was not suffered within the course and scope of employment." Texas Workers' Compensation Commission Appeal No. 93533, decided August 9, 1993, citing Appeal No. 93326, *supra*, and Texas Workers' Compensation Commission Appeal No. 92145, decided May 27, 1992.

Thus, language found to be within the degree of specificity required by the statute and rule has included ". . . no medical to verify injury or disability . . . claimant told supervisor suffering from arthitic [sic] condition and when asked if injured, denied injury . . . An arthitic [sic] condition is an ordinary disease of life . . ." Appeal No. 92145, *supra*. And in Appeal No. 93326, *supra*: "[Claimant] reported his injury on 11-5-92 afer (sic) his termination on 10-30-92. Our investigation reveals the statements of three coworkers states [claimant] continued to work normally and never reported an injury up until his termination . . ." In Texas Workers' Compensation Commission Appeal No. 93302, decided June 2, 1993, the statement "is not work related" was held to be sufficient, and Texas Workers' Compensation Commission Appeal No. 93658, decided September 14, 1993, stated that language questioning whether an accident had happened was sufficient to show a dispute of compensability.

Compare Texas Workers' Compensation Appeal No. 93202, decided April 28, 1993, which held insufficient the language, ". . . was fired for failing to pass a drug test . . . made false statements on his job application, and . . . he now alleges an on-the-job injury." *And see* Texas Workers' Compensation Commission Appeal No. 92468, decided October 9, 1992, which held the language "no medical to support" and "compensability will be determined following further investigation" was insufficient.

We believe that a "fair reading" of the language in carrier's TWCC-21, when taken as a whole, was sufficient to convey a dispute over compensability, i.e., that claimant had health problems which, by carrier's investigation, did not appear to be the result of her job. This, to us, is the essence of a determination of compensability, as we note that the 1989 Act defines "compensable injury" as "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). While it certainly would have been preferable for the carrier to also summarize the basis of the dispute (e.g., to state that the injury did not occur in the course

and scope of employment), when the language of this carrier's TWCC-21 is compared with the language that prior Appeals Panel decisions have found sufficient (see above-cited cases), we believe that the hearing officer's determination that it does not comply with the rule and is vague, general, and a less than full and complete statement of the grounds for dispute, is in error and against the great weight of the evidence. We therefore reverse the hearing officer's determination on this issue and render a new decision that the carrier properly contested compensability and accordingly did not waive its right to contest compensability.

The decision and order of the hearing officer is affirmed in part and reversed and rendered in part, as provided herein.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

With all respect to my esteemed colleagues in the majority, I am constrained to dissent. I am simply of the opinion, as was the hearing officer, that the statement on the carrier's TWCC-21 fails to meet the requirement of the 1989 Act and the Rules of the Texas Workers' Compensation Commission (Commission) to dispute the claim in this case. I would therefore affirm the decision of the hearing officer.

Section 409.022 provides as follows:

(a)An insurance carrier's notice of refusal to pay benefits under Section 409.021 must specify the grounds for the refusal.

(b)The grounds for the refusal specified in the notice constitute the only basis for the insurance carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly

discovered evidence that could not reasonably have been discovered at an earlier date.

(c)An insurance carrier commits a violation if the insurance carrier does not have reasonable grounds for a refusal to pay benefits, as determined by the commission. A violation under this subsection is a Class B administrative violation.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(a)(9) (Rule 124.6(a)(9)) states that a carrier which refuses to begin payment of temporary income benefits (TIBS) shall notify the Commission and the claimant, on a TWCC-21, of its refusal and that such notice shall contain, among other things:

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.

The TWCC-21 filed by the carrier in the present case stated as follows its reason for disputing the claim:

Claimant did not report an on-the-job injury to insured until 3/9/94. Insured and coworkers were aware of claimant having health problems, but claimant never mentioned work injury. Per (W) with [Dr. S's] office, claimant treating as Medicaid patient no knowledge of worker's comp. We are attempting to have the right to request a benefit review conference and to obtain additional information from a TWCC ombudsman at [telephone number] to get verification from Dr. Will get med authorization to obtain information.

The hearing officer found that the language used in carrier's TWCC-21 was vague and general, did not comply with the requirements of Rule 124.6(a)(9), and failed to set forth a full and complete statement of the grounds relied on to justify the refusal to pay benefits.

While I agree that "magic words" are not required to comply with the rule, the statute and rules certainly contemplate the carrier "specify the grounds for refusal" by providing a "full and complete statement of the grounds." In the present case the carrier's statement fails to do this because it is so vague and general that it is unclear what its grounds for refusal are. The first two sentences of the carrier's statement would seem to indicate that it is denying the claim because the claimant failed to timely report the injury. The third sentence states that the claimant was treating under Medicaid, which would imply an election of remedies of defense. The remaining portion of the statement amounts to a

declaration that the carrier's investigation is continuing. Nowhere does the statement express the actual defense interposed by the carrier at the hearing--that the claimant was not injured in the course and scope of employment.

The majority would read the grounds listed by the carrier together to encompass a controversion of injury in the course and scope. I fail to see this, even by the operation of a gestalt reading of the carrier's controversion. The simple fact remains that an objective, reasonable person, reading the carrier's statement of controversion, could not discern that the carrier is denying an injury in the course and scope of employment because the carrier nowhere says directly or by reasonable implication, that this is its defense. The majority has, in my view, chosen to read this missing defense into the carrier's statement of controversion.

The cases cited by the majority in no way dictate the result in this case, because the language in those cases is different and distinguishable from the language used in the present case. While it might be argued that we have approved language in the past that is ambiguous, I would point out that such language might not be acceptable today. One would expect that as familiarity with the 1989 Act has increased carriers should be expected to comply more fully with the clear dictates of the statute and rules. Further, important considerations at the heart of the 1989 Act argue for strict enforcement of the requirements that a carrier clearly controvert a claim it chooses to dispute.

I described these considerations, as I see them, in some detail in my dissent in Texas Workers' Compensation Commission Appeal No. 94292, decided April 26, 1994, as follows:

> 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 promised 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. 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. 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.

I would therefore not require "magic words" for a carrier to dispute a claim, but I would require a carrier to sufficiently specify its reasons for disputing so that an objective, reasonable person could understand the basis on which the carrier is actually denying the claim. I do not believe that this places an onerous burden on carriers or adjusters. In fact, with the increased familiarity of carriers and adjusters with the defenses available under the 1989 Act, with the ability of carriers to internally train their personnel and in light of the fact that adjusters are licensed professionals who are experienced in applying legal principles to occurrences which may or may not result in liability depending on the law and the facts of a particular situation, I have every confidence that this is as practical as it is desirable. Believing as I do that it is also mandated by the 1989 Act and the Rules of the Texas Workers' Compensation Commission, I would affirm the decision of the hearing officer.

Gary L. Kilgore
Appeals Judge