APPEAL NO. 950042
FILED FEBRUARY 23, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on July 7, 1994; the hearing was recessed and reconvened on December 6, 1994, with the record closing on that date. The issues before hearing officer were: which carrier is liable for the claimant's compensable injury sustained on _____; and did Carrier A contest compensability on or before the 60th day after being notified of the injury or if not, is Carrier A's dispute based on newly discovered evidence that could not reasonably have been discovered at an earlier date. The hearing officer determined that the employer did not comply with applicable statutory requirements when attempting to cancel coverage with Carrier A; that Carrier A received its first written notice of injury on October 14, 1991, and did not file a notice of refused or disputed claim within 60 days; that Carrier A's dispute is not based on newly discovered evidence that could not have been obtained at an earlier time; and that Carrier A is responsible for all income and medical benefits due the claimant under the 1989 Act.

Houston General Insurance Company (hereinafter Carrier A) takes this appeal, contending that it is undisputed that Association Casualty Insurance Company (hereinafter Carrier B) had coverage on the claimant's date of injury, that it accepted premiums during such period, and that to hold otherwise would unjustly enrich Carrier B. It further argues that the issues in this case were those of coverage and not of compensability, and as such Carrier A was not required to contest within 60 days pursuant to Section 409.021(c). Carrier B basically responds that the hearing officer's decision is correct in all respects.

DECISION

We affirm.

The facts of this case are relatively brief and not in dispute. The dispute is between two carriers, each arguing that the other is responsible for paying benefits. The claimant was employed as a secretary and bookkeeper by (employer), which had a policy of workers' compensation insurance with Carrier A. On July 18, 1991, employer's president, (Mr. M), wrote the Texas Workers' Compensation Insurance Facility (Facility) as follows:

> Effective _____, please recognize [Carrier B] as my agent of record for workers' compensation coverage. Please waive the 30 days notice required by the Texas Workers' Compensation Commission to cancel this policy.
>
> Please cancel coverage through [Carrier A] prorata [sic] as [Carrier B] has obtained our coverage in the standard market.

Carrier B also wrote a similar letter to the Facility, stating, "[p]lease cancel effective 08-01-91, the date of our replacement coverage." Neither of these letters, nor a Notice of

Insurance Cancellation sent by Carrier A to the Texas Railroad Commission, indicates that a copy was sent to the Texas Workers' Compensation Commission (Commission).

On August 22, 1991, Carrier A filed with the Commission a TWCC-20 (Insurance Carrier Notice of Cancellation of Coverage) stating that the effective date of cancellation was _____, although it gave August 26, 1991, as "Date Carrier Notified Employer of Cancellation" and "Date of Cancellation Recorded on Notice to Employer." The form was date stamped as received by the Commission on August 27, 1991.

The claimant testified that around June 1991 she began experiencing right thumb and wrist pain. When the pain became more severe she saw her family doctor, (Dr. M), on _____. On a second visit on August 27th, she said Dr. M told her the problem could be caused by repetitive motion but that she needed to have that confirmed by an orthopedist. He referred her to (Dr. W), whom she saw on September 11, 1991, and who confirmed a repetitive trauma injury. Claimant's date of injury was given on the Employer's First Report of Injury and the Employee's Notice of Injury or Occupational Disease as _____, and the parties did not dispute that this was the correct date of injury. The Employer's First Report, dated October 8, 1991, reflects that the employer received notice of claimant's injury on October 1st; it also names Carrier A as the employer's workers' compensation insurance company. At the hearing the attorney for Carrier A stated that it received written notice of this claim on October 14, 1991. On October 28, 1991, Carrier A filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on which it noted initiation of temporary income benefits (TIBS). The form does not state that the carrier was disputing compensability of the claim; indeed, Carrier A never filed a TWCC-21 disputing the claim, for which it paid claimant TIBS, impairment income benefits (IIBS), and supplemental income benefits (SIBS). In addition, it paid the medical bills for the claimant, who required two surgeries.

The attorney for Carrier B stated that it was first notified of claimant's injury on March 22, 1994; on May 9, 1994, it filed a TWCC-21 stating the following grounds for refusing or disputing payment:

> Per Rule 124.6, [Carrier A] did not file a notice of refused or disputed claim on or before the 60th day after receiving notice of injury. [Carrier A] waived their right to controvert claim by not disputing before 60th day after receiving notice. There is no newly discovered evidence causing [Carrier A] to reopen the issue of compensability.

At the request of the hearing officer, the carriers briefed the issues in this case. Carrier A contended that Carrier B provided workers' compensation coverage for employer beginning 12:01 a.m. on _____; that a waiver argument cannot apply because Carrier A did not provide such coverage during the time in question and, as such, had no rights to waive; that neither waiver nor estoppel can operate to create coverage over and

beyond the risk contractually assumed under terms of the policy; that because the issue is one of coverage and not of compensability Carrier A is not required to contest within 60 days; and that the 1989 Act provides that failure of an insurance company to give the required notice of cancellation or non-renewal extends the policy until the required notice is given, except when a subsequent workers' compensation carrier files a notice of coverage such as in the instant case. Carrier A argues that it is entitled to recoupment from Carrier B to prevent unjust enrichment on the part of Carrier B.

Carrier B contended in its brief that the critical determination was whether Carrier A waived its right to contest compensability of the claim by its failure to contest on or before the 60th day after the date on which the carrier was notified of the injury, as provided by Section 409.021 and Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6). It disputed Carrier A's argument distinguishing the issue of coverage, noting that the definition of compensable injury includes an injury arising out of and in the course and scope of employment for which compensation is payable; it argues that "[t]he determination of coverage indeed [is] the initial determination that must be made if indeed a claim is going to be payable for a course and scope injury arising out of employment." Further, it argues that Carrier A has shown no newly discovered evidence which could allow re-opening the issue of compensability, as provided by Section 409.021(d) and in fact has never filed a TWCC-21 disputing this claim. It argues that there is no good cause exception under Section 409.021 and states that carriers must use due diligence to investigate claims. Finally, Carrier B contends that to hold it liable would deny it due process, as it was without notice of the claim for a lengthy period of time and denied its right to conduct its own investigation and could potentially jeopardize the claimant's rights to future benefits.

In analyzing the case, the hearing officer wrote as follows:

> It is undisputed that the employer was attempting to terminate coverage. The employer's actions are controlled by Texas Labor Code § 406.007 and its predecessor Vernon's Texas Civil Statutes Article 8308-3.26. It is clear that the employer had a right to cancel coverage with Carrier A; however, the employer had to comply with statutory requirements when attempting to cancel the coverage. There is no evidence to indicate that the Employer filed a written notice with the Commission . . . within ten days of July 18, 1991. Assuming, without deciding, that the employer did file the required notice with the Commission, it could not be effective prior to August 17, 1991. Therefore the attempt to cancel coverage, with Carrier A, was ineffective and Carrier A had coverage on _____.

The hearing officer further wrote:

> It is undisputed that Carrier B issued a policy of workers' compensation insurance covering the employer and that the effective date of the policy was

> _____. Carrier B received their first written notice of injury on or about March 22, 1994 . . . It is clear that Carrier B's rights have been impaired, through no fault of their own, by the two year delay in receiving notice of the injury. It is also clear that Carrier A should, at least in fairness, be responsible for their failure to act in a timely manner. The undisputed evidence indicates that Carrier A received their first written notice of injury on October 14, 1991 . . . The carrier did not file a Notice of Refused or Disputed Claim within 60 days. In fact, Carrier A has never filed a Notice of Refused or Disputed Claim and has paid over two years of weekly income benefits.

The portion of the statute referred to by the hearing officer, Section 406.007, provides as follows:

Sec. 406.007. Termination of Coverage by Employer; Notice.

(a)An employer who terminates workers' compensation insurance coverage obtained under this subtitle shall file a written notice with the commission by certified mail not later than the 10th day after the date on which the employer notified the insurance carrier to terminate the coverage. The notice must include a statement certifying the date that notice was provided or will be provided to affected employees under Section 406.005.

* * * *

(c) Termination of coverage takes effect on the later of:

(1) the 30th day after the date of filing of notice with the Commission under Subsection (a); or

(2) The cancellation date of the policy.

(d) The coverage shall be extended until the date on which the termination of coverage takes effect, and the employer is obligated for premiums due for that period.

We are constrained to disagree with the first prong of the hearing officer's analysis, namely, that the employer's failure to notify the Commission regarding cancellation of coverage extends the period of Carrier A's coverage. This argument was raised in a somewhat similar case, Texas Workers' Compensation Commission Appeal No. 941595, decided January 12, 1995, in which the employer cancelled coverage with one carrier while initiating coverage with a second. In finding the second carrier liable for coverage on the

claim, the hearing officer held that Section 406.007 extends liability of a previous carrier to the 30th day after filing of a notice of termination or the cancellation date of the policy only in those cases where the employer terminates workers' compensation coverage altogether, not in cases such as the one in Appeal No. 941595, where the employer merely changes carriers but keeps coverage in force. The Appeals Panel affirmed this interpretation of the law. We note that this conclusion is further buttressed by the applicable rule, Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 110.1 (Rule 110.1), which provides in pertinent part that employers are required to provide a TWCC-5 to the Commission if the employer elects not to be covered by workers' compensation insurance, or if the employer cancels coverage without purchasing a new policy or becoming a certified self-insurer (emphasis added); however, the effective dates of cancellation, and the extension of the policy period until an effective date has been established, are keyed to the cancellation of coverage.

The hearing officer also based his decision upon a determination that Carrier A waived its rights to contest this claim because it did not file a Notice of Refused or Disputed Claim within 60 days of October 14, 1991, when it received notice of the claim, nor did it attempt to file such notice at a later time based upon newly discovered evidence. Carrier A argues that it did not have coverage on the date of injury; that because this case involves a coverage issue, as opposed to an issue of compensability, it is not required to contest the claim under Section 409.021(c), which states in pertinent part that "[i]f 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 . . ."

We find that carrier's argument ignores the fact that whether or not a particular carrier had coverage on a claim, just like an issue of whether an employee suffered an injury in the course and scope of his employment, must be determined based upon the application of facts to the relevant law and is part of compensability (*see, e.g.*, Charter Oak Fire Insurance Company v. Dewitt, 460 S.W.2d 468 (Tex. Civ. App.-Houston [14th Dist.] 1970, writ ref'd n.r.e.)), which states, in interpreting the prior law's provision on contribution, that whether an employer is a subscriber to workers' compensation is one element under the concept of "compensability." This panel has commented many times upon the 1989 Act's "pay or dispute" scheme whereby a carrier is obliged to initiate benefits or timely set forth the basis for refusing to pay; likewise, even where a carrier elects to initiate benefits, it is held to a strict time period in which it must set forth with specificity the reasons it believes the claim should be disputed. Texas Workers' Compensation Commission Appeal No. 931131, decided January 26, 1994. (*And see* 1 Montford, A Guide to Texas Workers' Comp Reform, Section 5B.21 (1991): "As compared to the prior comp law, Section 5.21 [predecessor to Section 409.021] significantly accelerates the `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 . . .") It would be antithetical to the scheme of the Act, which calls for speedy dispute resolution, to

excuse a carrier from responding to a claim because of its own unilateral decision that it was not liable for benefits thereon. (And, carried to its logical conclusion, Carrier A's argument would allow it to merely ignore any claim presented for which it believed it did not have coverage.) Nor would the requirement to bring forward grounds for dispute work a burden upon a carrier in a case such as the instant one, as Section 409.021(d) allows an insurance carrier to reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

Based upon the foregoing analysis, we find no error in the hearing officer's findings and conclusions regarding Carrier A's liability based upon its failure to timely file a Notice of Refused or Disputed Claim, and we affirm the hearing officer on this ground.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge