APPEAL NO. 950050
FILED MARCH 1, 1995

This appeal is considered under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 29, 1994, a contested case hearing was held. With respect to the issues before him, the hearing officer determined: (1) that appellant/cross-respondent (claimant) did not have good cause for his failure to file a claim with the Texas Workers' Compensation Commission (Commission) within one year of his _____, compensable injury; (2) that respondent/cross-appellant (carrier) failed to raise claimant's failure to timely file his claim within 60 days of the date it received written notice of the claim, thereby waiving the defense; (3) that carrier did not release its right to receive a credit for the net amount of claimant's recovery from the settlement of his third-party action against claimant's future medical and income benefits and is, therefore, entitled to a credit up to $53,717.10; (4) that claimant had disability as a result of the compensable injury from March 18, 1991, through December 31, 1991, but any diminution of claimant's income after December 31, 1991, was not due to the compensable injury and accordingly, that his disability ceased; and (5) that claimant reached maximum medical improvement (MMI) on March 1, 1993, with an impairment rating (IR) of 36% in accordance with the report of the Commission-selected designated doctor. In his appeal, claimant argues that the hearing officer's determination that his disability ended after December 31, 1991, was against the great weight of the evidence as is the hearing officer's determination that carrier did not release its right to a credit against future benefits when it signed the release in the third-party action. In its appeal, carrier asserts error in the determinations that carrier lost its right to raise the defense to liability of claimant's failure to timely file a claim and that claimant had disability from _____, to December 31, 1991. In addition, carrier argues that the amount of the advance to which it is entitled because of the third-party settlement was incorrectly calculated in that it should not have been reduced by costs and attorney's fees. Neither party has appealed the determinations that claimant reached MMI on March 1, 1993, with an IR of 36% in accordance with the designated doctor's findings and those determinations have become final pursuant to Section 410.169. Similarly, claimant did not appeal the determination that he did not have good cause for his failure to timely file a claim and that determination has also become final.

DECISION

We affirm in part and reverse and render in part.

The facts are largely undisputed. On _____, claimant, an outside salesman for (employer), was involved in an automobile accident. Claimant sustained a spinal injury and a closed head injury in the accident. Claimant was off work until March 18, 1991. Claimant testified that he went back to work before he was really ready to do so, because he was working on several projects that needed his attention. Claimant stated that for over a month he was only able to work for about half a day and that his job performance suffered as a result of his injury throughout 1991. Claimant was paid strictly

on a commission basis and he stated that his income fell because he lost bids due to his inability to give projects his full attention and because he could not keep up with the contacts necessary to close sales. Claimant acknowledged that he returned to work at the same commission percentage (20%) and that no accounts were taken away from him; however, he stated that he nonetheless lost income because his income was directly proportional to the effort he could give to his job duties and that was diminished because of the physical and emotional problems he suffered as a result of the compensable injury. Claimant submitted tax documents showing that his 1991 gross income was $42,830.21, down from his 1990 gross income of $76,850.30. Claimant left his employment with the employer in January 1992 and started as a salesman for another floor covering company. Claimant testified that he left his job with the employer because he had been passed over for a promotion to Vice President of sales. He stated that he felt he was passed over because he was unable to work as well as he had before the accident. However, claimant also testified that he was excited about the prospects at his new job and that he expected a drop in income when he changed companies because he would lose part of his customer base and would have to develop a new one.

Claimant filed a third-party action and was represented by his brother, (Mr. WW), in that action. Carrier intervened in that action to pursue its subrogation rights. The third-party lawsuit was settled for $100,000.00. Carrier was paid $5,040.53 out of the settlement proceeds, representing the full amount of the medical and income benefits it had paid as of the date of the settlement. Carrier executed a release in the third-party action in exchange for the check which provides in relevant part:

> The undersigned Blue Cross and Blue Shield of Texas, United Services Automobile Association and Travelers Indemnity of Rhode Island [carrier], all acknowledge full payment of and release of their respective claims and liens, and consent to the entry of a take nothing judgment.
>
> This agreement is executed on the ____ day of _____, 199__, and constitutes a complete, full and final release of all possible claims for injuries known or unknown. The sum paid is all that will ever be paid whether the condition gets better or worse, and the parties signing this release fully understand it and acknowledge that no other representations or promises have been made other than the payment of the amount stated herein.

Claimant received a check in the amount of $53,717.10 as his portion of the settlement. Mr. WW's law firm received a check in the amount of $26,487.04 for costs and attorney's fees and another lawyer received a check in the amount of $6,912.00 for legal fees and expenses. Mr. WW testified that his intent in drafting the release which carrier signed in the third-party action was that carrier would be cut off from seeking a credit against future benefit payments in this case. However, he acknowledged that he did not have a conversation with the attorney representing the carrier's interest in the third-party action apprising it of that purpose. Nonetheless, Mr. WW testified that that is what the language

says in his opinion and that is what it meant, irrespective of what interpretation carrier gave to the release at that time or currently.

Claimant filed his Notice of Injury and Claim for Compensation (TWCC-41) on August 6, 1993. The claim is date stamped as having been received by the carrier on August 9, 1993. Carrier raised claimant's failure to timely file a claim on October 18, 1993.

Initially, carrier disputes the hearing officer's determination that it lost its defense to liability related to claimant's failure to timely file a claim, by failing to raise the defense within 60 days of the date it received written notice of the late filing. Carrier argues that the 60-day rule contained in Section 409.021 applies only to issues of compensability and was improperly applied to the relief from liability provision of Section 409.004. In Texas Workers' Compensation Commission Appeal No. 94224, decided April 1, 1994, the majority determined that carrier had waived its defense to liability related to claimant's failure to timely file a claim by not raising it within the 60-day period established in Section 409.021(c). In Appeal No. 94224, the carrier received the first written notice of injury, triggering the running of the 60-day period more than one year after the date of injury; therefore, we decided that it had to raise the defense of claimant filing an untimely claim within the 60-day period for contesting compensability, as it would any other available defense, or risk waiver. However, in this instance, the carrier received written notice well before the one-year period for filing a claim had passed, initiated and continued to pay benefits based thereon and, as such, could not have raised the failure to file a claim within the statutorily provided period for contesting compensability. Accordingly, we believe that the hearing officer incorrectly determined that a second 60-day period was triggered in this case when claimant filed his written claim, during which period carrier could assert a defense related to claimant's failure to timely file a claim. Instead, the defense at issue here was more in the nature of a "newly discovered" defense in that it matured after the 60-day period had passed and as such, carrier was required to raise the defense within a reasonable time after it is discovered.

Although, the hearing officer incorrectly determined that claimant's filing of a claim in this instance triggered a second 60-day period, we nonetheless believe that he correctly determined that carrier had waived the defense of failure to file a timely claim. In Texas Workers' Compensation Commission Appeal No. 94557, decided June 21, 1994, we affirmed the hearing officer's determination that carrier was not relieved from liability by claimant's failure to timely file a claim, because the evidence established that the carrier recognized that a claim had been filed by its actions. Specifically, we stated:

> There is evidence that the carrier continued to pay for medical treatment from the date of the incident and while the claimant was under treatment, that the carrier paid [temporary income benefits] to the claimant, that contact and communication was made with the carrier's agent regarding various aspects of the claim while the claimant was undergoing treatment and that there was no indication of any dispute with regard to the claim until 1994. In short, there was every indication that the parties treated the situation as if it

> was a normal workers' compensation claim. The hearing officer found, and there is evidence in support thereof, that the provisions of Section 409.004(2) apply. That section provides that if a party fails to file a claim not later than one year after the injury, the carrier is relieved of liability unless "(2) the employer or the employer's insurance does not contest the claim." From all indication, the claim was not only not contested, it was recognized and benefits were paid.

In this instance, as in Appeal No. 94557, the written claim was filed more than two years after the date of injury. Similarly, the evidence indicates that carrier seemingly recognized that a claim had been filed and acted as if a claim had been filed. It paid temporary income benefits until claimant returned to work and only stopped paying income benefits because of its belief that disability had ceased. It did indicate that it was stopping income benefit payments because the injury was not compensable. In addition, carrier paid medical bills as long as they were submitted to it. Apparently, at some point, claimant's attorney in the third-party action requested that the medical providers submit medical bills to him rather than to the workers' compensation carrier. Thus, although it appears that at some point carrier no longer paid for medical treatment in this instance, it did so because the bills were not submitted to it for payment. Again, there is no evidence that payment of medical bills ceased because carrier was disputing a claim. In addition, we note that carrier enforced its subrogation interest against claimant's third-party settlement, which is an action wholly inconsistent with the position that there was no claim.

Carrier's reliance on Texas Workers' Compensation Commission Appeal No. 94192, decided March 31, 1994, is misplaced. In Appeal No. 94192 we reversed and remanded the hearing officer's decision and order, noting that the hearing officer could consider "whether claimant had a duty to act with reasonable prudence in filing a claim after the time of carrier's contesting the claim." Thus, in Appeal No. 94192, we recognized the possibility that a carrier might waive the defense of failure to file the claim. Following remand, we reconsidered that case in Texas Workers' Compensation Commission Appeal No. 94781, decided August 3, 1994, where we reversed and rendered a new decision that the carrier was relieved of liability by claimant's failure to file a timely claim. However, that decision specifically noted that it was not reaching the issue of whether circumstances could exist where the failure to file a timely claim would not be determinative. In that case, the issue of whether carrier could waive the defense was not decided by the hearing officer on remand and as such, the decision on appeal likewise could not reach the issue. However, in this case, the hearing officer determined that the defense had been waived by carrier; thus, unlike in Appeal Nos. 94192 and 94781, the waiver issue was squarely presented for our review here. Under the reasoning of Appeal No. 94557, we find that under these circumstances the carrier waived the defense of failure to file a claim by performing and paying benefits as if a claim had been filed in this instance.[1] Accordingly, we affirm the

[1]The bulk of Texas case law which addresses the issue of failure to file a claim where the carrier did not contest compensability of the claim discusses carrier's payment of benefits in terms of whether such conduct constitutes good cause for claimant's failure to timely file a claim. Continental Cas. Co. v. Cook, 515 S.W.2d 261, 263 (Tex.

hearing officer's determination that carrier had waived the defense of failure to file a timely claim, albeit for reasons different than those given by the hearing officer. *See* Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied)(Judgment of lower court should be affirmed, if it can be sustained on any reasonable basis supported by the evidence.)).

Next we turn to the issue of disability. Both parties appealed the hearing officer's disability determination. Claimant asserted error in the determination that his disability ceased when he left his employment with the employer and became a salesman with another company. Specifically, he takes issue with the determination that he resigned voluntarily, noting that he left only because he was passed over for a promotion, which he attributed to his diminished work performance related to the physical and emotional problems he suffered as a result of the compensable injury. Carrier argues that the great weight of the evidence indicates that claimant did not have disability after he returned to work with the employer on March 18, 1991. Specifically, carrier emphasizes that claimant returned to work at the same commission percentage with the same accounts. In addition, carrier relies on the deposition testimony of (Mr. GW), employer's chief financial officer, that he observed no change in claimant's behavior after his accident, that no customer complained about a change in claimant's performance, that claimant received an award for salesman of the month in November 1991, and that salaries of commission salesmen fluctuate greatly.

Under the 1989 Act, the claimant has the burden of proving that he had disability as a result of the compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Whether claimant had disability is a fact question to be resolved by the hearing officer. The hearing officer is the sole judge of the weight, credibility, relevance and materiality to be given to the evidence. Section 410.165(a). As the fact finder, the hearing officer is charged with the responsibility for resolving the conflicts in that evidence. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer could believe all, part, or none of the testimony of any witness and could properly decide what weight he would assign to the other evidence before him. Campos, *supra*. As an appellate body, we will not substitute our judgment for that of the hearing officer where her determinations are supported by sufficient evidence. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

1974); Standard Fire Ins. Co. v. Morgan, 718 S.W.2d 880 (Tex. App.- Beaumont 1986, rev'd on other grounds 745 S.W.2d 310 (Tex. 1987); Employers Ins. of Wausau v. Schaefer, 662 S.W.2d 414 (Tex. App.-Corpus Christi 1983, no writ); Garcia v. Texas Employers Ins. Ass'n, 620 S.W.2d 716 (Tex. App.-Dallas 1981, no writ); Texas Employers' Ins. Ass'n v. Herron, 569 S.W.2d 549 (Tex. Civ. App.-Corpus Christi 1978, no writ). However, in this instance, claimant did not appeal the hearing officer's finding that he did not have good cause for his failure to timely file a claim; therefore, we are precluded from reaching that issue.

In this instance, the hearing officer determined that the claimant had disability from March 6 through December 31, 1991, but did not have disability thereafter, because the reduction in his earnings was attributable to his voluntary decision to change jobs rather than to the continuing effects of the compensable injury on his job performance. In so doing, the hearing officer chose to credit the portion of claimant's testimony that his lower wages in 1991 were related to his inability to be as effective a salesman as he had been prior to the injury over that of Mr. GW that claimant's lower earnings in 1991 were related to other factors, particularly the cyclical nature of sales opportunities. However, the hearing officer did not accept claimant's testimony that he did not leave his employment voluntarily, but was instead essentially forced out after he was passed over for a promotion due, in his opinion, to his inability to perform at the level he had prior to the injury. It was within the hearing officer's province as the finder of fact to so resolve the testimony and evidence in deciding the disability issue; specifically, he was permitted to accept only part of claimant's testimony. Campos, *supra*. Our review of the record indicates that the hearing officer's determinations are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, there is no basis for reversing the decision and order on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We now turn to carrier's argument that the hearing officer improperly determined that the "net" amount of claimant's recovery in the third-party action and concurrently, that the amount of its advance against future medical and income benefits under Section 417.002(b), was $53,717.10, the amount of the settlement claimant actually received after attorney's fees and costs were paid, rather than $87,116.14, the full amount of the settlement reduced only by the amount of the applicable subrogation liens. In Texas Workers' Compensation Commission Appeal No. 94589, decided June 22, 1994, we rejected the argument that in calculating the "net recovery" under Section 417.002(b) the hearing officer was precluded from subtracting out litigation costs and attorney's fees. Specifically, we stated:

> We view the plain language of the Section 417.002(a) term, "net amount," to mean just that, namely, the amount the claimant actually receives which can be used as an advance against future income and medical benefits by the carrier. Obviously, claimant did not actually receive from his third party settlement the amounts deducted for attorney's fees and case expenses, and just as obviously claimant could not be said to be thwarting the provision by enjoying a double recovery as regards those amounts.

See also Bridges v. Texas A & M University Sys., 790 S.W.2d 831, 833 (Tex. App.-Houston [14th Dist] 1990, no writ) ("The explicit language of Article 8307, Section 6a [the third-party advance provision of the predecessor statute], dictates that the carrier will be reimbursed for the *net* amount recovered from the third-party action, and clearly attorney's fees and court costs would be expenses incurred by the claimant in obtaining his third-party settlement and would not be included in calculating the credit.") (Emphasis in original).

Carrier cites three decisions interpreting the prior advance statute, which was not substantively changed in the 1989 Act, for the proposition that the amount of the advance was improperly reduced by attorney's fees and costs. Specifically it relies on Estate of Padilla v. Charter Oak Fire Ins. Co., 843 S.W.2d 196 (Tex. App.-Dallas 1992, writ denied); Goodman v. Travelers Ins. Co., 703 S.W.2d 327 (Tex. App.-Corpus Christi 1985, no writ); and Charter Oaks Fire Ins. Co. v. Currie, 670 S.W.2d 368 (Tex. App.-Dallas 1984, no writ). However, as we noted in Appeal No. 94589, the Padilla court did not decide the issue of whether the phrase "net amount recovered" for purposes of carrier's advance was the settlement amount minus only the carrier's subrogation interest, or whether it was the settlement amount minus not only the subrogation interest but also the attorney's fees and costs. Similarly, in Goodman, the court specifically stated "[w]hile the term `net amount' in the statute may arguably be ambiguous, we need not construe it in this case." Thus, contrary to carrier's assertion neither of these cases provide support one way or the other on the issue in that they specifically do not reach the question. However, as the carrier stated, in Currie, the court concluded that the entire amount recovered in the third-party action would constitute the advance fund. In researching this decision, we also found the decision in Home Indem. Co. v. Pate, 866 S.W.2d 277, 280 (Tex. App.-Houston [1st Dist.] 1993, error withdrawn) which stated that "carrier has a statutory right to reimbursement out of the first monies paid to an injured employee or his representative by a third-party tortfeasor, up to amount of the compensation paid . . . ."

There is conflicting authority from the Texas Appellate Courts interpreting the phrase "net amount" in the parallel provision of the pre-1989 Act. In addition, we have previously decided the issue in Appeal No. 94589, *supra*, holding that the net amount means the settlement proceeds less carrier's subrogation interest, costs and attorney's fees. We believe that Appeal No. 94589 correctly decided the issue and are disinclined to abandon that position in this case as we believe that interpretation, which is consistent with the decision in Bridges, gives the phrase "net amount" the meaning intended by the legislature in enacting Section 417.002.

Finally, we address claimant's argument that carrier waived its entitlement to the advance in this instance in executing the release in the third-party action. Carrier maintains that the release did not extinguish its entitlement to the advance, because the release does not "mention" that claim, citing Victoria Bank and Trust Co. v. Brady, 811 S.W.2d 931, 938 (Tex. 1991). That is, carrier argues that the release is ineffective because the advance is not "clearly within the subject matter of the release" and, therefore, was not discharged, particularly because the release is silent as to future medical and income benefits.

While we note that carrier correctly states that a release must specifically discharge a claim in order to be effective (Receiver for Citizen's Nat'l Assur. Co. v. Hatley, 852 S.W.2d 68 (Tex. App.-Austin 1993, no writ)), we cannot agree with its argument or the hearing officer's determination that the release executed by the carrier in the third-party action in this case was insufficiently specific to extinguish its right to claim an advance in

this case. The release specifically stated that the carrier "acknowledges full payment of and the release of [its] . . . claims and liens, and consent[s] to the entry of a take nothing judgment." In addition, the release states that the "sum paid is all that will ever be paid whether the condition gets better or worse, and the parties signing this release fully understand it and acknowledge that no other representations or promises have been made other than the payment of the amount stated herein." By the plain language of the release, carrier released its "claims and liens." This clearly refers to carrier's subrogation lien. We believe that the phrase "subrogation lien," which is what is created in Section 417.002 of the 1989 Act, includes both medical and income benefits already paid by the carrier and future medical and income benefits. *See* Foster v. Langston, 170 S.W.2d 250, 251 (Tex. Civ. App.-San Antonio 1943, no writ)("[t]here can be no doubt that the carrier of the workmen's compensation insurance is entitled to full reimbursement of all compensation paid before the injured party or his beneficiaries would be permitted to recover anything, but the provisions of this section do not prohibit such parties from contracting for a different reimbursement. . . ."). That is, a subrogation lien is a single claim, which includes both past and future benefit payments. As such, we believe that in using the term "lien" the release identifies both the past and future aspects of the subrogation lien with sufficient specificity to discharge carrier's right to claim an advance herein. *See* Texas Workers' Compensation Commission Appeal No. 950029, decided February 21, 1995, and Texas Workers' Compensation Commission Appeal No. 941530, decided December 8, 1994, for two other examples of release language which we determined was sufficiently specific to compromise a carrier's subrogation rights. We find that the hearing officer erred in determining that carrier did not release its claim or right to receive a credit against future medical and income benefits, by signing the release of its subrogation lien in the third-party action. Accordingly, we reverse that portion of the decision and render a new decision that carrier cannot claim an advance in accordance with Section 417.002 in this case.

We reverse the portion of the hearing officer's decision and order stating that carrier is entitled to a credit in the amount of $53,717.10 and render a new decision that it cannot claim a credit in this case. In all other respects, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge