APPEAL NO. 961993
FILED NOVEMBER 21, 1996

This appeal is brought 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 April 25, 1996, in [City], Texas, with [hearing officer] presiding as hearing officer. The disputed issues at the CCH, with their resolution, were:

1. Did the respondent (claimant herein) sustain a compensable low back injury on [date of injury]?

The hearing officer found that the claimant did sustain the claimed injury.

2. Did the claimant file an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) within one year of the [date of injury], injury?

The hearing officer found that the claimant did not.

3. Did the claimant's injury occur while the claimant was in a state of intoxication, thereby relieving the insurance carrier of liability for compensation?

The hearing officer determined that the claimant was not in a state of intoxication at the time of the injury.

4. Did the claimant notify the employer within 30 days of the date of injury?

The hearing officer found that he did not.

5. Is the claimant entitled to medical benefits?

The hearing officer found that he was entitled to medical benefits.

6. Did the appellant (carrier herein) waive the right to contest the compensability of the claimed injury within 60 days of notice of the injury?

The hearing officer found that the carrier failed to timely contest compensability thereby waiving its right to do so.

The carrier has appealed the determinations that the claimant's back injury was compensable, that the claimant is entitled to medical benefits, and that it

waived its right to contest the compensability of the injury, alleging both legal error and that the decision on these issues is against the great weight and preponderance of the evidence. The claimant, through his attorney, has not appealed any portion of the decision of the hearing officer, but replies that the decision is correct and should be affirmed.

DECISION

Except as to the matters decided by the hearing officer which were not appealed and which have become final, we reverse and remand.

Some preliminary comments are in order. We do not construe this appeal to be a request to review the findings that the claimant injured his low back in the course and scope of his employment on [date of injury], which we consider to have become final by virtue Section 410.169. Rather, as more fully discussed below, we believe the focus of the appeal is on the compensability of that injury. Second, although the intoxication issue was solely in terms of drug (cocaine) intoxication and the hearing officer mentioned this in her discussion of the evidence, her finding of fact was that the claimant "did not have an alcohol concentration of 0.10 or more." (Emphasis added.) And her conclusion of law was simply that the claimant was not "in a state of intoxication" without referring to the nature of the claimed intoxication. This finding of fact is contrary to the theory of intoxication presented by the carrier and defended against by the claimant since at least the benefit review conference and has absolutely no support whatsoever in the evidence. Because the carrier did not appeal this finding of fact and conclusion of law, we assume for purposes of this decision that the carrier has withdrawn the question of intoxication as an issue for resolution. Third, the issues of timely notice of an injury and timely filing of a claim for compensation records were neither framed nor decided in terms of the subsumed issue of whether the claimant had good cause for the failures to give timely notice or timely file the claim. See Texas Workers' Compensation Commission Appeal No. 951346, decided September 27, 1995; Texas Workers' Compensation Commission Appeal No. 941722, decided February 6, 1995. Because the claimant has not appealed these determinations and because he has never relied on the good cause excuse for an otherwise untimely action, see Section 409.002(2), we find no reversible error in the resolution of these issues.

The claimant's real name is [PC]. This is critically important because he intentionally, by his own admission, received some temporary income benefits (TIBS) under the false name and identity (including social security number) of [RW], who, he said, was a real person and the ex-husband of his ex-girlfriend. The details are somewhat vague, as was most of the evidence on the disputed issues. In any case, the claimant admitted he used the name of RW in order to avoid being arrested for DWI in

[County 1]. When and how the name RW came to be entered into the workers' compensation as the claimant in this case is unclear. Information developed at the hearing in the form of unsworn statements of the carrier's attorney and admissions of the claimant under oath was to the effect that checks for TIBS were issued beginning about 13 weeks after the injury and continuing for about 41 weeks in the name of RW, some of which, the claimant said he cashed, and others of which he said were stolen from him while he was in prison for 47 days in early 1994. The falsehood apparently became known sometime in 1994,1 at which time, according to the carrier's attorney, the carrier was advised by someone in the Texas Workers' Compensation Commission (Commission) that it could or should stop payments of TIBS on the basis of fraud by the claimant and that the matter would be taken up by the Division of Compliance and Practices. According to the carrier's attorney, the carrier requested a BRC in June 1994 to address the false identity matter, but the claimant "essentially disappeared" or at least did not attend the scheduled BRC. The claimant said he was not aware of the BRC. The claimant then reportedly requested a BRC in 1995, for reasons unknown, but did not attend that BRC either. Finally, the BRC that preceded this CCH was held on March 6, 1996. This BRC was apparently the first time any Commission record (at least records in evidence), while still listing this claim under the name RW, acknowledged that the real RW was not the claimant, nor was the claimant RW, but the claimant was in fact PC. Nonetheless, the set notice for the CCH was sent to RW at the claimant's address.

The critical issue to be resolved by this appeal, in our view, is whether the carrier timely disputed compensability of the claimed injury. Section 409.021(c) provides essentially that a carrier which does not dispute the compensability of an injury on or before the 60th day after receiving written notice of the injury waives its right to contest compensability. See Texas Workers' Compensation Commission Appeal No. 941387, decided December 2, 1994. The required written notice can be from any source and is sufficient if it "fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability." As alluded to above, very little probative evidence was presented on this issue, particularly as to what the claimant contended was the first written notice of the injury to the carrier and when it was received. The claimant, in fact, offered no evidence on this point. During closing argument, the carrier asked the hearing officer to take judicial notice of two Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) forms and a Request for Setting Benefit Review Conference (TWCC-45). The claimant did not object to this procedure and the hearing officer agreed to do so. She did not, however, discuss or include these forms as exhibits in her decision and

[1]The carrier may have discovered the false identity after the claimant called the carrier to say he had not received a number of checks.

order. She was not asked and did not announce that she would keep the record open for any reason. Inexplicably and quite astoundingly, she wrote in the Statement of Evidence portion of her decision and order:

> Information in the Commission's claim file showed that Claimant first filed a Notice of Injury and Claim for Compensation (TWCC-41) form with the Commission on July 23, 1996. The evidence was insufficient to show that Carrier contested the compensability of the claimed injury within 60 days of being notified of the injury.

The hearing officer then made the following pertinent Findings of Fact and Conclusion of Law:

FINDINGS OF FACT

> 8. Claimant first filed a notice of Injury and Claim for Compensation regarding the injury sustained on [date of injury], on July 23, 1996.
>
> 9. Carrier did not file a [TWCC-21] with the Commission specifically contesting the compensability of the claimed injury of [date of injury].

CONCLUSION OF LAW

> 6. Carrier has waived the right to contest the compensability of the claimed injury by not contesting compensability in accordance with . . . Section 409.021 and Rule 124.6.

We can only conclude from this that the hearing officer considered the claimant's TWCC-41 (not included as an exhibit) to be the carrier's first written notice of a claimed injury which triggered the 60-day dispute or waive provisions of Section 409.021. In its appeal, the carrier questions the authority and propriety of the hearing officer not timely issuing a decision and order, but some three months after the CCH going through the claims file and retrieving a document, not even in existence until three months after the hearing, and then finding that document to be the first written notice to which the carrier did not respond. We infer that the hearing officer did not expect the carrier to respond to this document at the CCH some three months before the document existed, but rather that she did not find a timely dispute to the TWCC-41 in her excursion into the claims file and assumed there was none. All of this she did without any notice to the parties of what she intended to do before she finally issued her decision and order the following September. Such a procedure in our view calls

into question basic due process and was, in effect, a continuation of the CCH, ex parte, with the hearing officer performing some functions of claimant and carrier. For this reason, we reverse the determination of the hearing officer that the carrier waived its right to contest the compensability of this claim and remand the issue for further proceedings on the basis of the evidentiary record established as of the end of the CCH on April 25, 1995. On remand, the hearing officer is to make express findings of fact of what constituted the first written notice of the injury to the carrier, when it was received to trigger the 60-day dispute requirement and when, if at all, it was disputed.

Both at the hearing and in the appeal and response, much is rightly made of the false name used by the claimant in processing his claim and securing benefits. The carrier argues that the admitted falsehood constitutes a fraudulent claim as a matter of law for which no benefits are owed. The claimant took the position that this was no more than a harmless alias, as least as concerns the insurance company, as if he could assume a new name willy-nilly to suit his purposes and this should be of no account. In his appeal, claimant asserts no harm in what he did because the employer knew his real name all the time. The use of a false name (and in this case also the social security number of RW) cannot be so lightly dismissed as the claimant would have us do. If nothing else, the real RW now is listed as a claimant in the Texas workers' compensation system. More to the point, the claimant's argument of no harm to the employer completely ignores the fact that the carrier, not the employer, undertook liability for benefits in this case. What the employer may or may not have known about the true identity of the claimant may or may not have been known by the carrier, and, of course, no evidence was presented on this point. We hold that a written notice of injury to a carrier must, at a minimum, include the correct name of the claimant and, without this, that written notice is legally insufficient to trigger the 60-day response time. *See* Rule 124.1 which calls for the "name of the injured employer," not some alias. For purposes of this remand, the first written notice of injury, to be effective, must contain the name of PW as the claimant. *Compare* Texas Workers' Compensation Commission Appeal No. 952112, decided January 22, 1996, and Texas Workers' Compensation Commission Appeal No. 94292, decided April 26, 1994.

Because we have reversed the determination of the hearing officer that the carrier waived compensability of the claimed injury, we also reverse the determination that the claimant is entitled to medical benefits. The resolution of this latter issue must await the decision on remand on the issue of waiver.

For the foregoing reasons, we reverse the determinations of the hearing officer that the carrier waived its right to dispute the compensability of the claimed injury and that the claimant is entitled to medical benefits and remand these issues for further proceedings consistent with this opinion. The proceedings and issuance of a decision and order on remand should be expedited. The remaining determinations of a compensable back injury on [date of injury]; no timely notice to the employer; no timely filing of a claim, and no alcohol intoxication were not appealed and have become final.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's division of hearings pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Appeals Judge

Joe Sebesta
Appeals Judge