APPEAL NO. 971606
FILED SEPTEMBER 24, 1997

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 8, 1997, a contested case hearing (CCH) was held. With respect to the issues before her, the hearing officer determined (1) that the date of injury was _____; (2) that Twin City Fire Insurance Company, referred to herein as Carrier T, is not liable for respondent's (claimant) injuries sustained on _____, while employed by (employer) because Service Lloyds Insurance Company, referred to as sub-carrier at the CCH, but referred to as Carrier S herein, provided workers' compensation insurance for the employer on _____; (3) that claimant had sustained a compensable injury on _____; and (4) that claimant had disability from May 15, 1995, to August 30, 1995, and from October 21, 1996, through December 10, 1996.

Carrier S appeals several of the hearing officer's determinations, contending that claimant's statements, answers to interrogatories, medical reports and the benefit review conference (BRC) report all indicate a (date), date of injury and that Carrier T conducted an investigation, accepted the claim, paid benefits, did not timely contest compensability of claimant's claim and is now precluded from denying liability. Carrier S also appeals the hearing officer's determinations of an injury and disability. Carrier S requests that we reverse the hearing officer's decision and render a decision that Carrier T was legally required to contest compensability within 60 days of receiving written notice and, not having done so, is liable for his injury and that claimant did not sustain a compensable injury or have disability. Claimant and Carrier T filed responses, generally urging affirmance of the hearing officer's decision.

DECISION

Affirmed.

We note from the outset that claimant is very vague on dates and that there are material inconsistencies between claimant's testimony and the documentary evidence. By the same token, it is the responsibility of the hearing officer, as the sole judge of the weight and credibility of the evidence (Section 410.165(a)) to resolve those inconsistencies and conflicts in the evidence (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)) and the hearing officer may believe all, part or none of the testimony of any witness, including the claimant. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The parties stipulated that claimant was employed by the employer on both _____, and (date); that on _____, the employer had workers' compensation coverage with Carrier S; and that on (date), the employer had workers' compensation coverage with Carrier T.

The claimant testified that on both _____, and (date), he was a new and used car salesman; that on _____, he was with a customer in a demonstration ride when another vehicle, a van, was moving in reverse and struck the vehicle that claimant was riding in on the passenger side (the side claimant was sitting on). Claimant's description of the motor vehicle accident (MVA) is consistent throughout. Claimant testified, at the CCH, that this event occurred on _____, that he sustained injuries to his neck, low back, had right leg numbness and a swollen waist area, and that both claimant and his customer gave handwritten statements about how the MVA happened to (Mr. K), who was employer's general manager. Claimant's testimony is supported by a handwritten statement from the customer, on employer's letterhead, signed and dated _____, and signed as a witness by Mr. K. Also in evidence is a repair bill or estimate, dated December 14, 1994, for the car claimant was riding in, indicating replacement to the right front bumper, fender and lamps, painting, etc., in the amount of $1,929.00. Claimant's statement, although containing no dates and was not signed by a witness, was sent by facsimile transmission to someone on January 13, 1995. Claimant testified that, although he was in pain,[1] he continued working for the employer until mid-February 1995, when the employer discharged claimant for making application at another car dealership. Claimant testified that he went to work at the other dealership. Claimant testified he worked at that dealership until May (1995) when his pain became worse and the dealership was too far away.

Claimant said that he first sought medical care for his injury from (Dr. G) on May 15, 1995. In a handwritten progress note dated May 15, 1995, Dr. G notes an "MVA accident in [(date)]" and complaints of cervical and lumbar pain. Dr. G took claimant off work. We also note that the exhibits contain an Initial Medical Report (TWCC-61) also dated May 15, 1995, from (Dr. H) with a date of injury of "[(date)]," a history of an MVA and complaints of cervical, lumbar and right leg pain. Apparently, Dr. G ordered an MRI of the lumbar spine on June 16, 1995. A preliminary report indicated herniated discs at L4-5 and L5-S1, but a subsequent addendum of June 20, 1995, found no significant abnormalities. (The herniations turned out to be "artifact secondary to partial volume averaging.") Dr. G, on a Specific and Subsequent Medical Report (TWCC-64) of a July 19, 1995, visit, still noting a "[date]" date of injury, referred claimant to (Dr. Y). Dr. Y saw claimant on July 12, 1995, performed "EMG and NCV studies" with an impression of "a lumbar sprain status post an MVA." Dr. Y prescribed physical therapy and saw claimant on August 2, 16, and 30, 1995, for continued complaints of pain. Claimant apparently returned to work for another (third) automobile dealership around the end of August 1995.

In the meantime, claimant testified that he had retained an attorney ((Mr. AS)) in June or July 1995, although correspondence dated May 26, 1995, from Mr. AS to the employer advises the employer of his representation of claimant for a "Date of Accident: [date]." Claimant testified that he had never talked to Mr. AS, but only someone in his

[1]Claimant testified that his coworkers made fun of him because of his complaints and told him to take an aspirin.

office (apparently a paralegal), who had pressed him for a date of injury and (date), had been selected with the claimant to obtain documentation from his records of the exact date of injury. The time frames are confused, but claimant said that he did not get back to the paralegal with the correct information before Mr. AS died, sometime in the summer of 1995. The employer filed an Employer's First Report of Injury or Illness (TWCC-1) dated June 1, 1995, which did not list a date of injury and, about the accident, stated: "Unknown never reported." Another version of the TWCC-1, also dated June 1, 1995, lists a "[date]" date of accident and notation of an MVA written over the "Unknown never reported." An adjuster for Carrier T took claimant's recorded statement on August 16, 1995, where the adjuster addresses the date of injury, saying:

Q. Ok. Can you give me, um, the date, time and place of the accident that occurred? We have recorded an automobile accident that I - originally I got the information from your attorney that you had representing you, which I found out he's no longer representing you, but he originally told me, um, it was a date of injury of [date]?

A. Yes, ma'am.

Q. Um, can you give me the - is that the date?

A. Yes.

Claimant testified that he had told the adjuster before the interview started that (date), was not the correct date of injury but that is not apparent from the transcribed statement. Apparently, Carrier T requested a BRC in August 1995, but that BRC report is not in evidence. Also, claimant apparently stopped receiving income benefits checks at the end of August 1995 and went back to work for the third dealership.

In June 1996 Carrier T retained a private investigator to investigate the claim. The investigator contacted the customer that was driving the car on _____, obtained statements from employer's employees confirming the accident and interviewed Mr. K. According to the investigator's summary, "[Mr. K] conceded that an `incident' occurred" but he did not consider it an "accident," that Mr. K "stated he had observed the event," that Mr. K said no damage had been sustained by either vehicle, and "the three personnel involved" (claimant's customer, claimant and the driver of the van) "all three reported they were not injured." (Other employees had estimated the damage to the car claimant was in anywhere from $350.00 to $700.00.) In addition, the report notes that the employer had photographs of the vehicles involved.

Claimant testified that he hired his present attorney in December 1996 or January 1997 (the employment contract indicated a November 6, 1996, date of hire for a _____, injury).

The Texas Workers' Compensation Commission (Commission), in an Interlocutory Order dated December 29, 1995, indicating a (date), date of injury, ordered Carrier T to suspend payment of temporary income benefits (TIBS). Carrier T, on a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated December 29, 1995, suspended payment of TIBS pursuant to the Interlocutory Order. That TWCC-21 showed receipt of written notice of the (date), injury on "950601." Carrier T filed another TWCC-21, dated June 6, 1996, disputing liability based on newly discovered evidence of a _____, MVA and that Carrier T did not have coverage on that date. Carrier S was identified as the carrier having coverage on _____.

Carrier S filed a TWCC-21 dated July 18, 1996, showing a date of injury of _____, alleging first written notice on July 11, 1996, denying an injury in the course and scope of employment, disputing the extent and duration of any injury, and denying that claimant had filed notice of claim for compensation. Claimant filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) dated November 6, 1996, apparently on December 2, 1996.

A BRC was held on March 4, 1997, with the benefit review officer (BRO) citing the claimant's position on the date of injury to be "(date)," Carrier T's position was that the date of injury was _____, and Carrier S's position was a (date), date of injury. Claimant, in response to interrogatories dated April 16, 1997, filed by Carrier S, confirmed his position on the date of injury as listed in the BRC report.

Carrier S appealed the following determinations (and the conclusions based on those determinations):

FINDINGS OF FACT

2. On _____, while riding in a demonstration vehicle with a customer performing work related duties, for . . ., Employer, Claimant was involved in a[n] [MVA] and sustained injuries to his neck, back[,] right leg and waist area.

3. The date of injury is _____.

4. As a result of the injury Claimant has been unable to obtain and retain employment equivalent to pre-injury wage from May 15, 1995 to August 30, 1995 and from October 21, 1996 through December 10, 1996.

5. [Carrier T] is not liable for Claimant's injuries sustained on _____, while working in course and scope for . . ., Employer, because [Carrier S], provided workers' compensation insurance for Employer on _____.

6. [Carrier T] was not legally required to contest compensability of Claimant's claim within 60 days of receiving notice, because [Carrier T] was not the Carrier on the date of injury.

On the issue of date of injury, although the evidence is replete with dates of (date), it is unclear how that date became to be perpetuated. The hearing officer could certainly believe that there was only one MVA in which claimant was involved while in the employment of the employer and that was on _____. That date is supported by claimant's testimony at the CCH, which, as noted previously, the hearing officer was free to accept or reject in part or in whole, the customer's statement, dated and witnessed by Mr. K on _____, the car repair bill or estimate of December 14, 1994, and the investigator's summary as to what occurred. It would appear that that accident was not reported to Carrier S until July 11, 1996. We affirm the hearing officer's determinations of a _____, date of injury as being supported by sufficient evidence.

Carrier S argues that Carrier T had notice of the injury (albeit a (date), injury), conducted its investigation and accepted the claim. Carrier S argues that Section 409.021(c) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6) requires a carrier to contest compensability within 60 days of the first written notice "unless `newly discovered evidence' is found" and that Carrier T "knew in August of 1995, once it took the recorded statement from the Claimant, that the date of injury was not on or about (date)," citing a recorded statement by Mr. K and another employee. The hearing officer could read Mr. K's statement as merely denying a (date), accident and the other statement merely recites a recollection of a late (year) MVA. Carrier S, on one hand, argues a (date), injury, citing a multitude of documents to that effect and, at the same time, seeks to attribute knowledge of a _____, accident to Carrier T in essentially the same documents. Although the hearing officer made no determination on newly discovered evidence, under the circumstances, the hearing officer could have found the investigator's report newly discovered evidence in that Carrier T did conduct an investigation in the summer of 1995, having interviewed Mr. K, claimant and the other employee whose statement they took. We find no reversible error by the hearing officer on failing to make a determination on newly discovered evidence in that she did make determinations on the issues before her.

With respect to the issue of whether Carrier T's contest of compensability was based on newly discovered evidence, Carrier T, at the CCH, cited Texas Workers' Compensation Commission Appeal No. 960238, decided March 21, 1996, for the proposition that failure to timely contest compensability does create liability where no coverage existed. Carrier S responded that Appeal No. 960238 was a case involving an occupational disease and, therefore, was distinguishable. On appeal, Carrier S cites Texas Workers' Compensation Commission Appeal No. 950042, decided February 23, 1995, for the proposition that a carrier that failed to timely file a notice of controversion "waived its right to defend on that basis." Carrier S appears to espouse an estoppel-type theory against Carrier T by stating "[d]ue diligence was needed and [Carrier T] made no effort in investigating this claim properly and accepting in either a timely manner or

disputing this in a timely manner in regards to the [sic] their acceptance of compensability in this case." First, we note that Appeal No. 950042 involved a case where the employer and carrier unsuccessfully attempted to cancel coverage in order for the employer to obtain other coverage. That case largely turned on the interpretation of the coverage provisions of Section 406.007 and the extension of liability when there is a defective attempt to cancel coverage. Appeal No. 950042 distinguished Texas Workers' Compensation Commission Appeal No. 941595, decided January 12, 1995, which was a case "where the employer merely changes carriers but keeps coverage in force," which is the situation we have in the instant case. Furthermore, Texas Workers' Compensation Commission Appeal No. 960500, decided April 19, 1996, cautioned that Texas Workers' Compensation Commission Appeal No. 951489, decided October 17, 1995, distinguished Appeal No. 950042 "limiting that decision to its facts, and stating that we do not construe that decision `to mean that, in circumstances other than those which existed in Appeal No. 950042, a carrier will be liable for a claim for which it does not have coverage simply because it fails to timely contest compensability when there is another carrier who had coverage in effect on the date of the injury.'" As noted in Appeal No. 960500, and in the instant case, we have another carrier, Carrier S, that had coverage in effect and we apply the principles enunciated in Appeal No. 951489, *supra*, which cited Service Farm Lloyds, Inc. v. Williams, 791 S.W.2d 542, 550 (Tex. App.-Dallas 1990, writ denied), a case concerning a homeowner's policy, in which the court noted that the doctrines of waiver and estoppel cannot be used to create insurance coverage where none exists under the terms of the policy, but also noted that there is authority supporting an exception to that rule, that is, if the insurer assumes an insured's defense without declaring a reservation of rights or obtaining a nonwaiver agreement, and with knowledge of facts indicating noncoverage, all policy defenses, including those of noncoverage, are waived, or the insurer may be estopped from raising them. In the case at hand, Carrier T perhaps did an incomplete investigation in August 1995, but clearly did not have knowledge of the facts indicating noncoverage (which perhaps were contributed to by Mr. K's less than candid actions), and which were only disclosed in the private investigator's investigation in June 1996. We decline to apply a doctrine of estoppel against Carrier T under the facts and circumstances of this case.

On the issue of disability, the hearing officer could have found disability based on the claimant's testimony alone, if believed (Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.)); however, in this case, the May 15, 1995, through August 30, 1995, period of disability is supported by Dr. G's note taking claimant off work on May 15, 1995. The fact that this inability to obtain and retain employment occurred ___ months after the date of injury and after claimant had been discharged were factors for the hearing officer to consider. Whether there has been disability, as defined in Section 401.011(16), is a factual determination for the hearing officer to resolve. Nor is claimant precluded from having subsequent periods of disability after August 30, 1995, as the Appeals Panel has many times held that there can be periods of intermittent disability. *See* Texas Workers' Compensation Commission Appeal No. 961441, decided September 11, 1996; Texas Workers' Compensation Commission Appeal No. 941012, decided September 14, 1994. The October 21, 1996, through

December 10, 1996, period of disability is supported by claimant's testimony that during that period he was attending work hardening approximately eight hours a day, five days a week, as prescribed by Dr. G in a note dated October 16, 1996. We find the hearing officer's determinations on this issue supported by the evidence while observing that inferences different from those found by the hearing officer clearly find support in the evidence in this case. Garza, *supra*.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Judy L. Stephens
Appeals Judge