APPEAL NO. 990209

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On October 14, 1998, and November 6, 1998, a contested case hearing (CCH) was held. The issues were:

1. Is [Carrier E] or [Carrier R] liable for the Claimant's injury sustained on _____?

2. Was [LJM] or [SS] the Claimant's employer for the purposes of the Texas Workers' Compensation Act at the time of the claimed injury?

3. Did [Carrier E] contest compensability on or before the 60th day after being notified of the injury and, if not, is the Carrier's contest based on newly discovered evidence that could not reasonably have been discovered at an earlier date?

4. Did the Claimant have disability resulting from the injury sustained on _____ from June 4, 1998 through the present?

The parties stipulated that claimant was an employee of LJM, thereby resolving issue number 2. Regarding the remaining issues, the hearing officer determined that Carrier R had provided workers' compensation insurance for LJM on _____, when claimant sustained a back injury, and was liable for benefits, that, while Carrier E had not timely contested compensability of claimant's injury where coverage is an issue, the waiver provision "does not apply to the issue of which of two workers' compensation policies covered the injury" and that claimant had disability from December 11, 1997, through the date of the CCH.

Carrier R appeals the determinations that it provided coverage or was liable for workers' compensation benefits, that Carrier E was not liable even though it failed to timely contest compensability and that claimant had disability. Carrier R requests that we reverse or remand the case for findings in its favor. Carrier E filed a lengthy, detailed response, generally urging that Carrier E never provided coverage for the employer and that the hearing officer's decision be affirmed. The file does not contain a response from claimant.

DECISION

Affirmed.

First, we will note that although this case is one of four cases, each of which have different claimants, different dates of injury and different injuries, each has as its common theme the issue of whether Carrier R or Carrier E provided workers' compensation coverage at the time the injuries occurred. The hearing officer provided a detailed Statement of the Evidence which the parties appear to have accepted as generally factually

accurate. ("[Carrier R] agrees with the evidence as outlined by the Contested Case Hearing Officer in the Decision and Order.") In an attempt to concisely address the arguments presented, we define some of the terms and background.

LJM is a staff leasing company and was the employer of the claimant in this case and of the claimants in the three companion cases. In December 1997, the then owner of LJM sold 60% of the business to Ms. DM and Mr. WD, who, the hearing officer found, each owned "50% of [SS]," another staff leasing company. (Apparently, one of the reasons for this sale was that SS would add LJM to its insurance policy with a common modifier, thereby reducing the insurance premium.) Prior to the sale, LJM had insurance coverage with Carrier R. In acquiring a 60 % interest in LJM, Mr. WD and Ms. DM, as owners of SS, would have an insurable interest in LJM and would, therefore, be allowed to provide workers' compensation coverage through their carrier, Carrier E. While the ownership of SS was in dispute, the hearing officer found, in an unappealed finding of fact, that Mr. WD and Ms. DM each owned 50% of SS.

Following the purchase of LJM, the owners of SS contacted their insurance agent ("soliciting agent"), Ms. PS, to request that LJM be added as an insured on the policy SS had with Carrier E. (There is some dispute regarding who Ms. PS was working for; her own company or another company.) On December 23, 1997, Ms. PS requested that Carrier E endorse SS's policy to include LJM as an insured. On that same date, Ms. PS began issuing "certificates of insurance" to LJM and other clients of SS, indicating that both LJM and SS were insured on Carrier E's policy with SS. LJM attempted to cancel its policy with Carrier R and began sending premium payments to SS. On April 2, 1998, Ms. PS purportedly renewed the policy with Carrier E. Apparently, some claims began coming in to WC, which was a general agent for Carrier E. Subsequently, Carrier E canceled its policy with SS on May 8, 1998, due to alleged fraud on the part of Ms. DM and Mr. WD.

Much of Carrier R's appeal tracks the contentions made in Texas Workers' Compensation Commission Appeal No. 990224, decided March 8, 1999, one of the companion cases mentioned earlier. Insofar as the arguments made in this case are the same as those in Appeal No. 990224, see our decision in Appeal No. 990224.

Claimant in this case was an employee of LJM (stipulation 1A) on _____, doing construction work for a client company of LJM. Claimant was injured when a cinder block fell from above striking him in the back. Claimant was sent to the (clinic) the next day where a largely illegible handwritten form report gives a diagnosis of lumbar contusion, thoracic strain and chest pain. Claimant was released to light duty for five days in that report. Subsequent reports of December 16, and December 23, 1997, essentially repeat the initial report and extend claimant's light-duty release. Claimant was seen by Dr. H on December 30, 1997, for an orthopedic consult. Dr. H diagnosed a bruise and declared claimant's work status "as per his treating physician" (*i.e.* the doctors at the clinic). Evidence and testimony (by Mr. VY, LJM's current owner, who acquired 100% ownership of LJM on June 15, 1998) indicates that LJM, in a letter dated January 13, 1998, offered claimant light duty verbally on December 22 and 29, 1997, based on the clinic's restrictions,

but that claimant refused the light duty. Claimant testified that he was in too much pain to work and sought treatment from Dr. Z, who initially saw claimant on January 15, 1998 (see Claimant's Exhibit No. 5). Dr. Z diagnosed lumbosacral radiculopathy and a herniated lumbar disk and took claimant off work. Claimant was apparently last seen by Dr. Z on March 10, 1998, where Dr. Z in a report of that date repeated his diagnosis and continued claimant off work. Claimant had been receiving physical therapy. Claimant testified that he cannot work due to the injury and as of the date of the CCH has not returned to work.

Ms. VM, the claims supervisor for (adjusting service), testified that the adjusting service was assigned the case by WC, which was the general agent for Carrier E, and that the adjusting service received notice of the claim on January 14, 1998. Ms. VM and the adjusting service were initially under the impression that claimant was employed by SS, which in turn was insured by Carrier E. Ms. VM testified that after getting the Employer's First Report of Injury or Illness (TWCC-1) she received a call from the Texas Workers' Compensation Commission (Commission) which indicated claimant was employed by SS and she called SS, who said they had sent the report to WC. Ms. VM testified that she received the TWCC-1 and the call from the Commission on the same day, apparently January 14, 1998. Carrier R pointed out on cross-examination that the employer listed on the clinic medical records was LJM, and that the adjusting service received the medical records on January 14, 1998. Carrier E apparently accepted liability and paid some temporary income benefits. On a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated January 22, 1998, Carrier E lists SS as the employer with the first written notice being January 13, 1998. Carrier E eventually filed another TWCC-21 dated June 5, 1998, still listing SS as the employer but disputing that claimant is an employee of SS and alleging that claimant is employed by an entirely different employer, LJM. Carrier R's position is that Carrier E received notice of the claim on January 13, 1998, and did not dispute the claim within 60 days as required by Section 409.021(c), and therefore had waived its right to dispute.

The hearing officer in her decision, cites "Houston General Insurance v. Association Casualty Ins. Co., 977 S.W.2d 634 (Tex. 1998) [sic, citation should be (Tex. App.-Tyler 1998, no pet. h.)]." The hearing officer discussed the facts of that case and commented:

> The appellate court held the issue was not one of compensability, rather one of which two Carriers had covered the claimant's injury. The appellate court in it's discussion determined that a statute declaring that workers' compensation insurer waives its right to contest "compensability" if it is not contested within 60 days after notice of injury does not apply to the issue of which of two workers' compensation policies covered the injury and remanded the case back to the trial court for further proceedings consistent with its opinion. According to the evidence presented [Carrier E] accepted the claim and began paying benefits but stopped when it discerned that Claimant was an employee of LJM and LJM was not insured with [Carrier E]. There is no dispute that the Claimant sustained a compensable injury. What is at issue is whether [Carrier R] or [Carrier E] provided workers'

> compensation insurance for LJM on _____. Thus, pursuant to the above cited case [Carrier E] did not waive its right to contest compensability, because compensability was not at issue.

Carrier R contends that the hearing officer erred in applying the Houston General case because in Houston General two carriers provided workers' compensation coverage for "one employer in succession without a gap in coverage" with the carrier that did not have coverage accepting the claim. Carrier R contends that in this case the adjusting service accepted the claim because they thought that claimant was an employee of SS when in fact the adjuster "received evidence on January 14, 1998 [the clinic medical records showing the employer to be LJM] that the claimant was not actually an employee of SS." Carrier R contends that Carrier E, through the adjusting service, was lax in investigating the claim. Carrier R "contends that the issue of who the employer actually is, and whether or not the carrier has coverage for this employer is an issue of compensability, for which the carrier must timely file their dispute." While recognizing that there are some factual distinctions between Houston General and the instant case we believe the principle of Houston General to be applicable. We have previously held that a carrier will not necessarily 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 which had coverage in effect on the date of injury. Texas Workers' Compensation Commission Appeal No. 971606, decided September 24, 1997. In that case we applied Service Farm Lloyds, Inc. v. Williams, 791 S.W.2d 542 (Tex. App.-Dallas 1990, writ denied) a non-workers' compensation case which contained an estoppel exception. Subsequently Houston General, a workers' compensation case, stated that there were no cases to date in which the Williams exception has been extended to workers' compensation cases and concluded that where two carriers are disputing coverage that was not an issue of compensability and no new coverage is created by waiver. Further, as Carrier E notes, the policies Carrier E issued to SS never provided coverage to LJM and there is no evidence that Carrier E paid benefits when it knew there was no coverage. Regarding Carrier R's assertion that the claim was inadequately investigated, that may or may not be so; however, as Carrier E notes, in that both LJM and SS were staff leasing companies the fact that another employer is listed on a medical report does not, in and of itself, give notice to a carrier that it may not have coverage for a leasing company which may have many employers as client companies.

Carrier R also contends that claimant does not have disability because claimant "was released to light duty on December 19, 1998," citing page 46 of the transcript. That citation is completely inaccurate; however, the clinic's reports of December 11, 19, and 23, 1997, all indicate claimant was released to light duty for five to seven days each. However, claimant testified that although he had been offered light duty he was unable to perform that work. The hearing officer noted claimant's testimony and claimant's change of treating doctors to Dr. Z in her Statement of the Evidence. The hearing officer found claimant had disability beginning December 11, 1997. The hearing officer could believe claimant's testimony about his ability to work as opposed to the clinic's reports placing claimant on light duty. LJM's offers of light duty in December 1997 were verbal and were recited in a "To Whom It May Concern" letter dated January 13, 1998. The hearing officer is the sole

judge of the weight and credibility of the evidence and as such could give greater weight to claimant's testimony than the Clinic's reports releasing claimant to light duty. We find sufficient evidence to support the hearing officer's findings on disability.

For other points raised in carrier's appeal, which were identical to the appeal in Appeal No. 990224, *supra,* see our decision in Appeal No. 990224.

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 clearly wrong or 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:

_____
Robert W. Potts
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge