APPEAL NO. 991720

This appeal arises 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 July 19, 1999. The issues at the CCH were whether the respondent (claimant) sustained an occupational disease injury (hepatitis) on _____, and whether the appellant (carrier) timely contested compensability or if not, whether the carrier's contest was based on newly discovered evidence that could not reasonably have been discovered at an earlier date. Regarding the first issue, the hearing officer found the claimant did not establish by a preponderance of the evidence a causal link between his current hepatitis B condition and his duties with the employer and this issue is not on appeal. He also determined that the carrier did not contest compensability on or before the 60th day after being notified of the injury and that its contest was not based on newly discovered evidence that could not reasonably have been discovered at an earlier date. The carrier appeals the newly discovered evidence issue, disagreeing with two findings of fact in that they do not include the words "in part" in findings that a statement from Dr. B and a determination by Mr. S were based on, respectively, an investigative report and information from a Ms. T. Carrier also argues that no work-related injury was found; therefore, the Williamson case (Continental Casualty Company v. Williamson, 971 S.W.2d 108, 110 (Tex. App.-Tyler 1998, no pet. h.)) should apply in relieving it from liability, and further urges that the evidence shows newly discovered evidence that could not reasonably have been discovered earlier since the report and opinion relied on to contest was not in existence. Claimant responds, countering the arguments and urging that there is sufficient evidence to support the decision of the hearing officer and asking that it be affirmed.

DECISION

Affirmed.

The claimant worked in a health care facility performing duties including housekeeping, janitorial, maintenance, and some hands-on activity with patients. There was evidence that some hepatitis was present in the facility. In any event, in late October or early November 1998, the claimant began having symptoms including nausea, fatigue, and vomiting, and saw Dr. B. Medical notes of November 16th from Dr. B indicate that he saw the claimant in November 1998 and made a diagnosis of clinical hepatitis B and that "I am awaiting confirmatory laboratory information" and sending a copy of the lab studies to the medical directors attention (apparently the (SAMHD)). In any event, Dr. B continued treating the claimant and in a note of November 24, 1998, stated that the claimant has been away from his job since November 6, 1998, and it is not clear when he will be able to return. In any event, the injury was reported to the employer, and the carrier on December 3, 1998, in a TWCC-21 (Payment of Compensation or Notice of Refused/Disputed Claim) dated December 10, 1998, initiated workers' compensation benefits. An interview with the claimant was conducted on December 8, 1998, generally concerning his duties, any other persons who had hepatitis, any cuts or scratches he might have had at work, and other general information.

Apparently, as a result of Dr. B's sending information to SAMHD, an investigation was conducted and in a letter dated April 2, 1999, to Dr. B, Mr. S, an epidemiologist, indicated he had spoken to Ms. T regarding the matter, that she had indicated the claimant did not handle any material that could have been contaminated with blood, nor had there been any report of a needle-stick or other possible infectious accident. Because of these facts and other circumstances, Mr. S stated he "did not feel that there was any ongoing transmission of Hepatitis-B in this institution." In a note of March 29, 1999, Dr. B related the information that Mr. S had "informed me that [claimant's] illness was not work related." On April 1st, in a TWCC-21, the carrier disputed the claimant's injury as not being compensable based on Dr. B's note which it received on March 30, 1999.

In his Decision and Order, it is clear that the hearing officer based his determination that the carrier was liable for benefits on the clause allowing for reopening of a compensability issue if there is a finding of evidence that could not reasonably have been discovered earlier. (Emphasis ours). Section 409.021 provides that an insurance carrier that does not contest compensability of an injury on or before the 60th day after the date of written notice, waives its right to contest compensability. However, subparagraph (d) of that section also provides that an insurance carrier "may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier." It is that narrow issue upon which the decision hinged.

Initially, we do not find merit to the argument that the Williamson, *supra*, case applies to the factual situation under review. The hearing officer did not find there was no injury in this case and there is evidence that indeed there is an injury. However, the hearing officer determined that the causality was where the evidence was lacking; that is, the evidence did not reach a preponderant level that the claimant's hepatitis injury resulted from or was caused by his work. This clearly raises the issue of compensability as opposed to whether the claimant had any injury at all. If there is no injury at all established and the evidence supports that finding by the hearing officer, Williamson holds that the issue of compensability is not reached. We have reached this very issue in several cases and find them dispositive of that issue in this case. Texas Workers' Compensation Commission Appeal No. 990223, decided March 22, 1999, and cases cited therein.

Regarding the matter of whether the carrier could have discovered the evidence now claimed as a basis to reopen the compensability issue earlier, the hearing officer found that it could, pointing to the sources of the new evidence, in essence, the information from Ms. T as to the claimant's work, his lack of activity involved in contamination, and lack of report of an infectious accident. It is readily apparent that Ms. T's information served as the basis for Mr. S's conclusion, and this information was relayed in the March 29, 1999, note from Dr. B. There was evidence that Ms. T was a long-time employee, was available at the time the claimed injury was first reported, and that she could have provided the same information from the outset if inquiry had been made. We have stated that the 60 days runs from the date of the notice of injury, and does not extend to when there is enough evidence to suggest a defense. Texas Workers' Compensation Commission Appeal No. 950354, decided April 20, 1995. A carrier has a duty to investigate a claim properly and not

merely serve as passive repository of filed documents and provided information. Texas Workers' Compensation Commission Appeal No. 952153, decided January 31, 1996, citing Texas Workers' Compensation Commission Appeal No. 94224, decided April 1, 1994. Where a carrier disputed outside the 60-day period because of additional evidence of intoxication that had been mentioned in earlier reports, we upheld the hearing officer's determination that the intoxication was reasonably discoverable within the 60-day period, and thus the carrier waived its right to contest. Texas Workers' Compensation Commission Appeal No. 941203, decided October 24, 1994; Texas Workers' Compensation Commission Appeal No. 960208, decided March 19, 1996. In Appeal No. 941203, *supra*, Texas Workers' Compensation Commission Appeal No. 93774, decided October 15, 1993, was cited where the Appeals Panel stated that the issue of whether evidence could have been reasonably discovered earlier was up to the sound discretion of the hearing officer and reversible only where an abuse of discretion is shown. We do not find that to be the situation here. We also do not find error in the hearing officer's findings; to the contrary, we conclude there is sufficient evidence to support his findings, conclusions, and decision. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Accordingly, the decision and order are affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Judy L. Stephens
Appeals Judge