APPEAL NO. 002193

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 August 21, 2000. A benefit review conference was held on July 12, 2000, and the issue reported as unresolved was did the respondent (claimant) have disability as a result of an April 18, 2000, compensable injury. At the CCH, the hearing officer added the following issues:

> May [appellant] carrier contest compensability based on newly discovered evidence that could not reasonably have been discovered at an earlier date[?]
>
> Did claimant suffer an injury in the course and scope of employment on _____[?]

The hearing officer determined that the claimant injured his neck in the course and scope of his employment on _____; that the carrier may not reopen compensability based upon newly discovered evidence; that the neck injury became compensable because the carrier did not contest compensability of the injury not later than 60 days after receiving written notice of the injury; and that the claimant had disability from _____, until the date of the CCH. The carrier appealed, urged that the determinations are against the great weight of the evidence, contended that the hearing officer erred in determining that the statement of Mr. G was not sufficient to reopen the issue of compensability, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor on all issues. The claimant responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm in part and reverse and render in part.

The claimant testified that he began working for the employer on March 31, 2000, as a painter; that beginning on about April 14, 2000, he was required to shovel sand and transport sand in a wheelbarrow; that he was required to push a wheelbarrow about 200 feet on a floating tank; that the tank went up and down putting additional stress on his arms and neck; that he had not done that type of work for years; that he was hurting on April 17, 2000; that on _____, his neck and upper back hurt so bad that he went to a doctor; that on that day Dr. A told him he had a strained neck and that he was released to return to work at light duty and should not lift over 10 pounds; that on April 24, 2000, he swept a floor for the employer for about 45 minutes and was paid for 3½ hours; and that on April 26, 2000, he swept a floor for about 45 minutes and was paid for 7 hours. The claimant said that he went to Dr. R on April 26, 2000; that he told Dr. R what had happened; that Dr. R told him that he had a strained neck; that Dr. R took him off work; that later Dr. R had an MRI performed that showed that he had herniated discs in his neck; that Dr. R recommended that he have surgery; and that Dr. R has not released him to return to work.

Medical records from Dr. R indicate that Dr. R saw the claimant on April 26, 2000; that on that day Dr. R diagnosed a cervical strain and took the claimant off work; and that on May 17, 2000, Dr. R diagnosed degenerative joint disease with probable herniated nucleus pulposus at C6-7 and recommended an MRI of the cervical spine. In a letter dated August 16, 2000, Dr. R stated that an MRI revealed that the claimant had posterior herniations at C3-4 through C6-7 and central canal stenosis at C5-6 and C6-7; that nerve conduction studies indicated radiculopathy at C5-6 and nerve root irritation at C4-5; that the claimant was being scheduled for two-level diskectomy and fusion; and that the claimant was in need of continued treatment for the injuries sustained while working for the employer on _____. Dr. W examined the claimant at the request of the carrier. In a report dated July 14, 2000, Dr. W said that his diagnosis was cervical disc disease with evidence of radiculopathy and that the claimant had not reached maximum medical improvement, that follow-up care was needed, that a second opinion on spinal surgery should be obtained, and that the claimant should not return to work even in a light-duty capacity.

The employer received an anonymous call about the claimant. On July 19, 2000, Mr. G was interviewed. A transcript of that interview reveals that Mr. G said that he guessed that the claimant was his common-law wife's father; that the claimant was lazy and lived off his daughters; that before the claimant began working for the employer, the claimant told him that he would work a couple of weeks and his back would be hurting; that the claimant hinted that he would be filing a false workers' compensation claim; and that his common-law wife later told him that her father said that his back was out and that he was not going back to work. The claimant testified that Mr. G has beaten his daughter several times, that the police had to be called, that his daughter has two sons, that Mr. G is the father of one of the sons, that Mr. G and his daughter are not living together now, and that child protective services have been involved concerning his grandson. A letter dated August 11, 2000, from the Texas Department of Protective and Regulatory Services signed by a children's protective services specialist states that she has been working with the claimant's daughter and her family for some time, that there appears to have always been a lot of animosity between the extended maternal and paternal sides of the families of the children, and that on numerous occasions she has experienced misrepresentation and incorrect information from Mr. G's family.

The carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated May 23, 2000, in which it disputed disability. In a TWCC-21 dated July 20, 2000, the carrier stated that, based on newly discovered evidence, it disputed the compensability, that no injury occurred in the course and scope of employment, and that the claimant suffered an ordinary disease of life unrelated to his employment.

We first address the hearing officer's determination that the carrier may not reopen compensability based on newly discovered evidence. Section 409.021(c) provides that if a carrier does not contest the compensability of an injury on or before the 60th day after the date on which the carrier is notified of the injury, the carrier waives its right to contest compensability. Section 409.021(d) provides:

> 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.

The hearing officer made a finding of fact that includes:

> [Mr. G's] statement is only his speculation that an on the job injury might not have occurred. Although the information from [Mr. G] would not have been discovered at an earlier date than July 19, 2000, the statement is not of sufficient probative value to reopen the compensability based on newly discovered evidence.

The carrier argues that Section 409.021(d) only requires a finding of evidence that could not have been discovered earlier, that the 1989 Act does not require that the new evidence have probative value, and that appellate court and Appeals Panel decisions, that require that the newly discovered evidence would probably result in a different result to obtain a new trial or new hearing, do not apply. The carrier stated that the hearing officer may choose to determine that the newly discovered evidence is not sufficient to find that the injury was not incurred in the course and scope of the claimant's employment, but that the hearing officer's analysis should be limited to determining the factual issue of whether the claimant was injured in the course and scope of his employment.

In Texas Workers' Compensation Commission Appeal No. 950655, decided June 2, 1995 (Unpublished), the claimant reported a work-related knee injury, the carrier did not contest compensability within 60 days of being notified of the claimed injury, later a coworker reported that the claimant told her that her boyfriend had pushed her down and kicked her leg, the claimant did not contend that the evidence could have been discovered earlier, the claimant testified that the information was false, the hearing officer determined that the evidence was sufficient to reopen the issue of compensability and the claimant was not injured in the course and scope of her employment. The claimant appealed, but did not appeal the determination concerning reopening compensability. The Appeals Panel affirmed.

In Texas Workers' Compensation Commission Appeal No. 951051, decided August 16, 1995, the claimant's daughter told a neighbor that the claimant did not hurt himself as claimed, but that he had hurt himself at a family outing at an amusement park. The neighbor called the carrier, the carrier interviewed other neighbors who generally repeated the daughter's account of the injury and added that the claimant was seen doing fairly strenuous activities at his residence. The claimant testified that he was not injured at the amusement park, that he did not perform the activities at his residence, that a dispute with his daughter motivated her to lie, and the neighbors have hostility toward him. It appears that the hearing officer concentrated on the newly discovered nature of the evidence in determining that the carrier could not reopen compensability of the claimed injury. The Appeals Panel reversed the determination of the hearing officer on newly discovered evidence, stated that the neighbor's unsolicited disclosure to the carrier of possible fraud constituted evidence that could not have reasonably been discovered earlier which entitled

the carrier to reopen compensability, and rendered a decision that the carrier's contest of compensability was based on newly discovered evidence which could not have been discovered earlier. The Appeals Panel commented on the conflicting evidence concerning whether the claimant was injured in the course and scope of employment and affirmed the determination that the claimant was not injured in the course and scope of his employment. The newly discovered evidence used to contest compensability need not be such that a hearing officer must determine that the claimant did not sustain a compensable injury. In the case before us, the determination that the carrier may not reopen compensability based on newly discovered evidence is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust and is reversed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We render a decision that the carrier reopened compensability of the injury based on newly discovered evidence.

We next address the determinations that the claimant was injured in the course and scope of his employment and had disability. In a case such as the one before us where both parties presented evidence on the disputed issues of whether the claimant was injured in the course and scope of his employment and whether he had disability, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. The hearing officer's determinations that the claimant was injured in the course and scope of his employment and that he had disability from _____, through the date of the CCH are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and are affirmed. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

We reverse the part of the hearing officer's decision that the carrier may not reopen compensability based on newly discovered evidence and render a decision that the carrier reopened compensability based on newly discovered evidence. We affirm the parts of the decision that the claimant sustained a compensable injury on _____, and that he had disability beginning _____, and continuing through the date of the CCH.

Tommy W. Lueders
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Robert W. Potts
Appeals Judge