APPEAL NO. 002246

A contested case hearing was held on August 31, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), presiding as hearing officer to resolve the two disputed issues. The appellant/cross-respondent (self-insured employer) has requested our review of the sufficiency of the evidence to support the hearing officer's determination that the self-insured did not contest the compensability of the respondent/cross-appellant's (claimant) injury before the 60th day after being notified of the injury and that its purported contest of compensability on April 25, 2000, was not based on newly discovered evidence that could not reasonably have been discovered at an earlier date. The claimant has requested our review of the sufficiency of the evidence to support the determination that she did not have disability as a result of her compensable injury of _____. The self-insured employer filed a response urging that we affirm the no-disability determination.

DECISION

Affirmed.

The self-insured employer correctly asserts that the claimant's request for review contains a number of assertions not in evidence below as well as a medical report not offered below, although it was in existence prior to the hearing. Our review is restricted to the hearing record from below subject to certain limited exceptions not applicable here.

The parties stipulated that on _____, the claimant was the employee of the _____, a state government agency of the State of Texas, the employer, which had workers' compensation insurance through self-insurance; and that on _____, the claimant was involved in a motor vehicle accident (MVA) and sustained an injury to several body parts including her neck, brachial plexus, and lower back.

The hearing officer's Decision and Order contains a discussion of the evidence and thus our decision will only set out so much of the evidence as is necessary to support our decision. The claimant testified that on _____, while employed by the self-insured employer as a supervisor at a group home for mentally impaired clients, she was involved in a MVA while driving from the group home to the self-insured employer's center building which is across the city from the group home and about a 45-minute drive. She indicated that her duties required her to drive back and forth between the group home and the center building several times a day. The claimant further stated that she was also operating an adult foster care business out of her house which at the time of the accident had four clients and two employees. She testified stated that while driving from the group home to the center building on July 27, she happened to see one of her own employees and one of her clients standing on a street corner so she stopped to pick them up; that she advised them that she needed to deliver some papers to the center building and then would take them to her house; and that she then continued on her way to the center building and had the MVA at an intersection while in route. The claimant characterized her happening upon

her employee and client at the street corner as a "coincidence." She further stated that she called the self-insured employer's human resources office, spoke to Ms. T, and advised her of the MVA. The claimant also said she faxed a two-page police report of the MVA to Ms. T but did not list any witnesses on the accident report she completed for the self-insured employer because she did not regard the two passengers in her vehicle as witnesses.

Mr. S testified that in January 2000 he commenced employment with the self-insured employer as a claims examiner. He said he had previously performed this work for the self-insured employer until leaving the employment in July 1999; that he understood some lady was hired for the job after he left; that when he returned to the job in January 2000, no one was working on the claims files and the work that had been done on the files was "not to the extent" that he would have worked had he continued to work the files; and that he then began a review of the files. Mr. S further stated that notwithstanding that the self-insured employer had accepted the claimant's claim, he reviewed her file in February 2000 and noticed some discrepancies including the fact that the file contained only one page of the police report of the MVA. He said he arranged to obtain the complete report and that when he received it in March 2000, he realized there were two witnesses to the accident accompanying the claimant, namely, her employee and her client, who had not been contacted, and he learned that the claimant operates a health care center at her house. Mr. S indicated that the self-insured employer then arranged for an investigator who works for the self-insured employer to review the case and undertake an investigation. He also said that the self-insured employer has a policy against conducting personal business while at work.

Mr. G, the agency investigator, testified that the claim was referred to him as a possibly false claim on March 17, 2000; that his investigation revealed that the MVA occurred about 15 blocks and approximately 10 minutes from a direct route from the group home to the center when the claimant ran a stop sign; and that the claimant told him when he interviewed her that she was alone in the vehicle and took that route just because she felt like it. He further stated that when asked directly about it the claimant said she picked up her employee and a client on a street corner before having the MVA and that the employee had the client out for a doctor's appointment. Mr. G also said that the claimant was in another MVA on April 11, 2000, after which she was in the hospital for three days.

The claimant further testified, variously, that _____, was the last day she worked for the self-insured employer; and that she cannot perform her supervisor duties because of her pain; that the doctors say she cannot work at all due to her condition; that she did work in October and November 1999 but cannot recall the dates she could not work due to her injury; and that she did not work in January 2000 and has not worked since because she has a lot of pain and takes medications. The carrier introduced an August 13, 1999, slip from Dr. G stating that the claimant had been under his care from July 30, 1999, to the present and is able to return to work until further notice. Dr. G's September 30, 1999, slip has checked "light work." Dr. G's Specific and Subsequent Medical Report (TWCC-64) dated October 11, 1999, stated that the claimant can return to work with a

restriction against lifting over 45 pounds. A physical capacity and return-to-work form signed by Dr. S on November 23, 1999, reflects certain restrictions and states that "alternate duty" for three months is recommended for the claimant. The self-insured employer introduced payroll data showing the hours the claimant worked in October, November, and December 1999. The claimant's medical records reflect that she was admitted to a hospital on January 11, 2000, for lumbar spine surgery at the L5-S1 level by Dr. E and discharged on January 20, 2000. The preoperative diagnosis was right leg pain, thoracic outlet syndrome, and bulging disc at C2-3. The claimant said she is still operating her adult foster care business.

The self-insured employer challenges the factual findings that some pieces of information provided to it by the claimant were false; that had the risk manager made an inquiry to the police for a full copy of the MVA report, or had the self-insured employer checked the claimant's past history of reported and claimed injuries, it would have immediately found the falsities in the claimant's information; and that the evidence discovered in February 2000 by Mr. S and in March 2000 by Mr. G could easily have been discovered and obtained by the self-insured employer in August 1999 which was within the 60-day period of being notified of the claimant's injury of _____. The self-insured employer further challenges the legal conclusion that it did not contest the compensability of the claimant's injury on or before the 60th day after being notified of the injury; and that its purported contest of compensability on April 25, 2000, was not based on newly discovered evidence that could not reasonably have been discovered at an earlier date.

Section 409.021(d) 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. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(a)(3)(A) (Rule 124.3(a)(3)(A)) provides that if the carrier wants to deny compensability of or liability for the injury after the 60th day after it received written notice of injury the carrier must establish that the evidence that it is basing its denial on could not have reasonably been discovered earlier. The Appeals Panel has held that there is no good-cause exception to the requirements in Section 409.021; that the burden is on the insurance carrier to prove that it timely contested the compensability of the claim; that if the insurance carrier does not timely contest the compensability of the claim, the injury becomes a compensable injury as a matter of law; that when the new evidence becomes known, the carrier is required to act with reasonable diligence to contest the compensability of the injury; and that whether the insurance carrier acted with reasonable diligence is a question of fact for the trier of fact. *See* Texas Workers' Compensation Commission Appeal No. 971135, decided July 24, 1997, and cases cited therein.

The hearing officer's discussion of the evidence reflects his view that the information obtained by Mr. S in the February-March 2000 period, which would raise the defense of deviation from the course and scope of employment, was reasonably discoverable within 60 days of the self-insured employer's receipt of written notice of the claim had the carrier more diligently investigated the claim. We cannot say that the challenged findings on this

issue are against the great weight of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Disability, by definition, depends upon there being a compensable injury. In addition to the conclusion that she did not sustain disability as a result of her compensable injury of _____, the claimant challenges a portion of a finding which plainly infers she did not send a complete copy of the police MVA report to the self-insured employer. She also disputes the finding that from the minor medical restrictions and limitations placed on her by her doctors after July 27, 1999, and based on her three-day hospitalization for injuries sustained in the intervening MVA of April 11, 2000, the claimant was not unable to obtain and retain employment at a wage equivalent to her preinjury wage on and before July 27, 1999. The hearing officer makes clear in his discussion of the evidence that he had a concern about inconsistencies and vagueness in the evidence and that he did not find the claimant's evidence persuasive on the disability issue.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Kathleen C. Decker
Appeals Judge