

APPEAL NO. 011659
FILED AUGUST 28, 2001

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 June 27, 2001. With regard to the four disputed issues before him, the hearing officer determined that the appellant/cross-respondent (claimant) had not sustained an injury on _____; that the claimant did not have disability; that the respondent/cross-appellant (carrier) had not timely contested compensability pursuant to Section 409.021; and that the employer had not tendered a bona fide offer of employment (BFOE) to the claimant. The hearing officer's decision on BFOE has not been appealed and has become final pursuant to Section 410.169.

The claimant appeals the injury and disability issues on a sufficiency of the evidence basis. The carrier, in a conditional appeal, appeals the failure to timely contest compensability based on newly discovered evidence occasioned by the claimant's deliberate false statement. The carrier responds to the claimant's appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant was employed as a forklift operator. He testified that on _____, he suffered a low back injury lifting a box. The claimant continued working until December 6, 2000, when he reported the injury and was sent to Dr. F. Dr. F diagnosed a low back strain and released the claimant to light duty. Subsequently, Dr. E, the claimant's treating doctor, took the claimant off duty all together effective December 11, 2000. The carrier began paying income benefits.

The parties stipulated that the carrier received written notice of the claimant's (alleged) injury on _____. The carrier's adjuster took the claimant's recorded statement on December 15, 2000. Some of the information the claimant gave was clearly erroneous, such as previous employers, length of time the claimant had worked for those employers, and the fact that the claimant had had only one prior back injury "[b]ack in '92." The carrier filed a Request for Record Check (TWCC-155) with the Texas Workers' Compensation Commission (Commission) requesting a record check on January 10, 2001. The Commission responded to the lifetime record check on February 13, 2001 (more than 30 days after it was requested and more than 60 days after the carrier had written notice of the injury). That record check (which the carrier contends was newly discovered evidence) disclosed that the claimant had had three prior workers' compensation claims, in January 1997, May 1991, and May 1998, instead of one in 1992, as stated by the claimant. On February 16, 2001, the carrier requested copies of the claimant's prior workers' compensation claims from the Commission (received by the Commission that same date), and on March 2, 2001, the carrier received the

confidential claim file materials. The parties stipulated that the carrier filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on March 7, 2001.

Subsequent investigation revealed that the claimant had at least one felony conviction (and had spent time in jail or prison in the last 10 years on three separate occasions) and had falsified his employment application with the employer by using a false social security number in order that his criminal background not be discovered. The hearing officer, in his Statement of the Evidence, commented:

Claimant was shown during his testimony at the [CCH] to have given false information to the Carrier, the Employer, his doctors, and the Hearing Officer. Claimant admitted using a phony social security number and lying to conceal his criminal record. Claimant's testimony was inconsistent both within itself and with most of the other evidence. Claimant was not a credible witness. He failed to prove that he sustained an injury on _____.

Regarding the issues of injury and disability appealed by the claimant, we will only note that the evidence was conflicting, the doctor's opinions were largely based on the medical history given by the claimant, and that the claimant's prior injury claims were similar to the claim at issue. The hearing officer weighed the credibility and inconsistencies in the evidence and the hearing officer's determination on the issues is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We affirm the hearing officer's decision on the injury and disability issues.

The hearing officer, without referencing Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no writ), makes the comment that:

Waiver will turn an injury not otherwise compensable into a compensable injury, but waiver will not create an injury where none occurred.

That principle, however, is not applicable to the case at issue because as the hearing officer notes, the claimant admittedly had "prior serious back injuries requiring surgery to the low back." In this case, there was an injury and the question was only whether it was compensable.

On the waiver issue, the hearing officer writes:

[T]he evidence does not support the conclusion that the Carrier should be allowed to reopen the issue of the compensability of the injury because of the existence of evidence that could not reasonably have been discovered earlier. The Carrier discovered Claimant's previous back injuries through a routine record check that was not, but reasonably could have been, undertaken earlier.

If so, the Carrier would have discovered the evidence that caused it to dispute the claim in time to do so within 60 days of the first written notice of injury. The point is not was evidence discovered too late to comply with Section 409.021 of the [1989] Act, it is whether the evidence could not reasonably have been discovered earlier. Here, the late-discovered evidence certainly could have been discovered earlier with a reasonably diligent investigation of the claim.

We disagree. In this case, the information the claimant gave to the carrier's adjuster on December 15, 2000, was untruthful and the information the claimant had given to the employer was outright designed to mislead the employer and, consequently, the carrier. The carrier began paying benefits within the 60-day period and requested a Commission lifetime records check. The Commission did not act on that request for 33 days, and the 60 days passed while the carrier was waiting for a Commission response to the carrier's lifetime record request thus it does not seem reasonable to charge that 33-day delay due to the carrier's lack of diligence. Upon receiving the requested information, the carrier, within three days, requested the claim files. It was subsequently disclosed that the claimant had lied when he said that he was working without problems due to his back when he was in fact incarcerated during that time. In Texas Workers' Compensation Commission Appeal No. 002229, decided November 9, 2000, a case in which the injured employee's "recorded statement" concerning his prior injury and claims history was inaccurate, the Appeals Panel affirmed a hearing officer's finding that a carrier could not have reasonably discovered the claimant's history earlier because "it was misinformed by the claimant [in that case] concerning his prior history of injuries and claims." To hold otherwise in this case would allow the claimant to benefit due to his own misconduct and deceit. Accordingly, we reverse the hearing officer's Finding of Fact No. 5 and render a new decision that the carrier had not waived the right to contest compensability of the claimed injury.

The hearing officer's decision and order on the injury and disability issues are affirmed, and we reverse the hearing officer's decision on the waiver issue and render a new decision that the carrier has not waived the right to contest compensability based on newly discovered evidence which could not reasonably have been discovered earlier.

The true corporate name of the insurance carrier is **Utica Mutual Insurance** and the name and address of its registered agent for service of process is

**RICHARD A. MAYER
11910 GREENVILLE AVE., SUITE 600
DALLAS, TX 75243.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge