APPEAL NO. 021558
FILED AUGUST 7, 2002

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 May 20, 2002. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury in the form of an occupational disease on _____; that she had disability from September 4 through October 7, 2001, and again from April 18, 2002, through the date of the CCH; that the claimant timely notified the employer of the injury; and that the appellant (carrier) did not contest compensability in accordance with Section 409.021, and has waived the right to contest compensability. The carrier appeals, arguing that the determinations of the hearing officer were not supported by any evidence or, alternatively, were against the great weight and preponderance of the evidence. The appeal file did not contain a response from the claimant.

DECISION

Affirmed.

TIMELY NOTICE OF INJURY

The claimant had the burden to prove that she timely reported her injury to her employer. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). The claimant testified that she reported the injury to her employer on _____, and took the written restrictions issued by her doctor to her employer on April 5, 2001. Although she did not remember the exact date, there is a recorded statement in evidence from a customer service manager which states the claimant told the customer service manager that she had been to the doctor, that he said it was “carpal tunnel,” and the claimant thought her condition was related to her work. There is sufficient evidence to support the determination of the hearing officer that there was timely notice to the employer.

COMPENSABILITY AND DISABILITY

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Disability is also a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ).

There was conflicting evidence presented on the disputed issues in this case. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find no grounds to reverse the factual findings of the hearing officer.

WAIVER ISSUE

It was the carrier's position that it timely disputed compensability, once it received written notice of the claimant's injury, not that it had newly discovered evidence allowing it to reopen the issue of compensability. The evidence reflects that the claimant filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) with the Texas Worker's Compensation Commission (Commission) on January 8, 2002. The Dispute Resolution Information System (DRIS) notes for the claim (Claimant's Exhibit No. 4 and Carrier's Exhibit No. 2) show that on January 8, 2002, an "EES-11," Notice to Carrier of Injury, was printed, and that it was mailed on January 9, 2002. The carrier contended at the CCH and on appeal that it never received the EES-11, citing to Carrier's Exhibit No. 7, an e-mail entered into evidence at the CCH from "carrier's board representative" to the effect that a search of the records did not find the form. The carrier maintained that it first had proper written notice of the claim on March 28, 2002, and that the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) it filed on April 2, 2002, was timely.

The carrier asserts that the claimant did not report an injury to the employer, so the employer would not have prepared an Employer's First Report of injury or Illness (TWCC-1). The hearing officer found that the claimant did report the injury to the employer; any further concern the carrier has about not timely getting a TWCC-1 from the employer is a matter for the carrier to resolve with the employer. The carrier next asserts that the Commission never sent written notification of the injury to the carrier. That contention will be addressed in the next paragraph. The carrier lastly asserts that the benefit review conference (BRC) Set Notice does not adequately meet the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(3) (Rule 124.1(a)(3)) for providing written notice to the carrier by "any other communication regardless of source" because it does not give "information that asserts the injury is work related." In answer to that contention, we consider a BRC Set Notice sent out

from the Commission as adequate notice to a carrier that a work-related injury has been alleged. Arguments to the contrary by the carrier border on being frivolous, and we reject them.

As to the written notice from the Commission, public officials are presumed to have performed their duties. Sanchez v. Texas Industries, Inc., 485 S.W.2d 385 (Tex. Civ. App.-Waco 1972, writ ref'd, n.r.e.). The presumption of regularity arises from the DRIS notation that the letter was created and sent. Rule 102.5(d) provides that communications from the Commission which require action by a certain date shall be "deemed" to have been received five days after mailed, unless the great weight of evidence indicates otherwise. Rule 124.1(a)(3) indicates that any communication regardless of source may serve as written notice of injury if it fairly informs the carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and information which asserts that the injury is work-related. Given that the hearing officer could determine that the carrier had the EES-11 on the deemed receipt date of January 14, 2002, under Rule 102.5(d), the hearing officer did not err in finding that the carrier failed without good cause to timely dispute the claim.

EVIDENTIARY RULING

The carrier additionally argues that the hearing officer improperly excluded an affidavit from the carrier's compliance officer. The carrier maintains it had good cause for failing to exchange the affidavit prior to the CCH. We note that in order to obtain a reversal for the admission of evidence, the carrier must demonstrate that the evidence was actually erroneously excluded and that "the error was reasonably calculated to cause and probably did cause rendition of an improper judgment." Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. Civ. App.-San Antonio 1981, no writ). It has also been held that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mut. Ins. Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). In the excluded exhibit, the compliance officer essentially denies receipt of any notice of the claimant's injury until the BRC Set Notice was received on February 25, 2002, and asserts that it was even later that the carrier learned that the claimant had filed a TWCC-41 on January 8, 2002. In this case, we cannot agree that the hearing officer erred in excluding the exhibit based on the carrier's failure to timely exchange it. However, we note that even if error had been shown in the exclusion of the exhibit, it would not rise to the level of reversible error.

INTERLOCUTORY ORDER FINDING

Although not a factor that has any bearing on the issues to be resolved in this case, the carrier on appeal asserts that the hearing officer erred in making the following Finding of Fact:

> 14. Carrier deliberately and contemptuously refused to comply with the Interlocutory Order issued on April 17, 2002.

While we would not normally address such a contention by a carrier, we do so in this case because of the carrier's audacity in attempting to justify its blatantly outrageous conduct in defying the interlocutory order.

Section 410.032 and Rule 141.6 specifically authorize a benefit review officer to issue an interlocutory order. The interlocutory order in question was admitted into evidence at the CCH as part of Carrier's Exhibit No. 1 (as well as Hearing Officer's Exhibit No. 1) and ordered payment of temporary income benefits and medical benefits in the amount and for the duration specified:

> All accrued benefits from date of injury until the Carrier first disputed compensability (2/25/02) pursuant to Rule 124.3 and AP Decision 00220 [sic Texas Workers' Compensation Commission Appeal No. 002220-S, decided November 7, 2000]. Average weekly wage is $241.06. Disability period is _____-10/8/01.

We note that medical benefits are payable from the date of the compensable injury (Section 408.021(b)), and even before the date of injury for an occupational disease (Section 401.011(31)(A)). Income benefits begin to accrue on the eighth day of disability. Section 408.082. The claimant testified that the adjuster for the carrier told her that the carrier would not pay pursuant to the interlocutory order and the carrier's attorney acknowledged that no payment has been made.

First and foremost, we hold that the carrier was not at liberty to violate the terms of the interlocutory order, and may not violate any interlocutory order which it believes is wrong for any reason.

Second, the carrier's argument concerning the interlocutory order is fatally flawed. The carrier appeals Finding of Fact No. 14, arguing that it did comply with the interlocutory order because it "paid the Interlocutory Order based upon an Appeals Panel decision." The carrier cites one sentence from our decision in Texas Workers' Compensation Commission Appeal No. 012101-s, decided October 22, 2001, as authority for their position, quoting: "The rule clearly provides that up until a carrier joins issue on compensability, benefits will 'accrue' for purposes of this rule when **the claim** is made that a work-related injury has occurred." (Emphasis added.) The carrier argues that "the claim" does not begin on the date of injury, but rather it begins when the claimant files a TWCC-41 or reports it to the employer. The carrier asserts there was no report to the employer to start the claim, and argues that the claim did not start until the TWCC-41 was filed on January 8, 2002. Under this logic, the carrier takes the position that it is only liable for benefits that accrued from January 8, 2002, until the date the TWCC-21 was filed on April 2, 2002, and that since there was no disability during that period, there was no obligation to pay any benefits.

The carrier is misreading the quoted sentence from Appeal No. 012101-s. The words "the claim" in the quoted sentence mean "the contention," or "the assertion," and do not refer to the actual claim form being submitted. Appeal No. 012101-s dealt with

the issue of carrier liability under Rule 124.3. The Rule and the case provide that the carrier must pay any benefits that accrue if it did not dispute the claim within seven days after receiving written notice of injury. Further, if a carrier's notice of denial is filed between seven and 60 days after receipt of written notice of injury, the carrier "is liable for and shall pay all benefits that had accrued and were payable prior to the date the carrier filed the notice of denial," and only after that has occurred will a carrier be permitted to suspend the payment of benefits. The clear holding of Appeal No. 012101-s is that a carrier is liable for benefits under Rule 124.3(a) as of the date of injury. Our decision in Appeal No. 012101-s could not, and did not, change the 1989 Act and the rules. The carrier is asserting a very strained construction of the sentence quoted above, as is apparent when the entire paragraph is considered rather than the sentence taken out of context.

> The carrier argues that benefits cannot accrue and become payable in cases where the claim is found not to be compensable based on a defense raised in a TWCC-21. However, that is precisely the opposite result of what is intended by Rule 124.3. The rule clearly provides that up until a carrier joins issue on compensability, benefits will "accrue" for purposes of this rule when the claim is made that a work-related injury has occurred. The preamble clearly indicates that the Commission expected that this provision of the rule would result in some overpayments of benefits in cases where compensability was ultimately denied. *See* 25 Tex. Reg. 2098, 2099 (March 10, 2000). *See also* Appeal No. 002220-S.

Appeal No. 002220-S rejected a carrier's assertion that the date it received written notice of the injury was the accrual date for benefits. We found no merit to that assertion, citing Section 408.082, and pointing out that Rule 124.3 did not change how the accrual date is determined.

The decision in Appeal No. 012101-s is in keeping with the oft-quoted holding of the Texas Supreme Court in Albertson's, Inc. v. Sinclair, 984 S.W.2d 958, 959 (Tex. 1999): "We liberally construe workers' compensation legislation to carry out its evident purpose of compensating injured workers and their dependents." The carrier is not without a remedy, however, if there is an overpayment of benefits based upon compliance with an interlocutory order. Section 410.209 provides that the subsequent injury fund shall reimburse an insurance carrier for any overpayments of benefits made under an interlocutory order or decision if that order or decision is reversed or modified by final arbitration, order, or decision of the Commission or a court. Under the circumstances of this case, there was sufficient basis for the hearing officer's finding regarding the interlocutory order.

As to the carrier's argument that there are "no Appeals Panel decisions or legal statutes that require the Carrier to pay benefits from the date of injury until the date they dispute the injury," we cite the carrier to Section 408.082(b) and (c) and to Section 409.021 as some of the "legal statutes" involved in determining when a carrier must pay benefits.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Michael B. McShane
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge