APPEAL NO. 94224

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 was held on January 27, 1994. The issues at the hearing were:

1. Whether the appellant's [claimant] current right elbow problems and pathology are the result of the compensable injury she sustained on (date of injury).

2. Whether the claimant timely filed a claim for compensation with the Commission within one year of the original injury, and, if not, whether good cause existed for the delay in filing the claim.

3. Whether the carrier timely contested compensability of the injury no later than 60 days after being notified of the injury.

The hearing officer concluded that the claimant did not prove by a preponderance of the evidence that her current right elbow problems and pathology were the result of her compensable injury on (date of injury); that the claimant did not file a timely claim for compensation within one year of the injury; that good cause did not exist for this failure to timely file a claim for compensation; that the respondent (carrier) did not timely contest compensability of the original injury or current problems no later than the 60th day after being notified of the injury and problems; and that the claimant's failure to timely file a claim for compensation relieved the carrier of liability to the claimant.

The claimant appeals the decision of the hearing officer that her current elbow problems are not causally related to her injury of (date of injury), citing evidence in the record which she believes supports her position, and argues that as a matter of law the carrier's failure to timely contest compensability of the original injury and current problems excuses the claimant's failure to timely file a claim for compensation. The carrier replies that there is sufficient evidence to support the hearing officer's determination that the claimant's current condition was not caused by the injury on (date of injury), and that the decision and order of the hearing officer should be affirmed in all respects, or, alternatively, that the decision be reversed and a new one rendered that the carrier is not liable for the medical care performed in connection with the claimant's current condition and that the carrier timely disputed the claim for compensation based on the discovery of new evidence.

DECISION

We affirm that part of the decision and order of the hearing officer that the claimant without good cause failed to timely file a claim for compensation and the carrier did not timely contest the compensability of the claimant's current elbow problems. We reverse that part of the decision that the failure of the claimant to timely file a claim for compensation relieved the carrier of liability with respect to this claim and render a

decision that the claimant is entitled to workers' compensation benefits for her injury of date of injury, including her current elbow problems.

It is not disputed that the claimant injured her right elbow on (date of injury), when she fell and hit it while attempting to retrieve some inventory for her employer. There is also no dispute that she notified her employer of the injury the same day and did not lose more than one day's work as a result of the injury. She felt immediate soreness and tenderness. She said the elbow swelled up, but there was no break in the skin. She was seen by Dr. E, the employer's doctor at the place of employment, on the day of the injury. She next saw Dr. E in his office on January 10, 1991. X-rays showed no acute fracture. There was tenderness over the tip of the olecranon. There was no evidence of loose bodies, osteochondrotic lesions, bony destructive lesions, or soft tissue calcification. Dr. E diagnosed "contusion proximal olecranon right with olecranon bursitis, chronic." Flexion and extension and pronation and supination were normal.

The claimant testified that she saw Dr. E twice more at her place of employment over the next several months. According to her testimony, he told her the elbow would take a long time to heal. The claimant moved from the (City 1) area to (City 2) in December 1991 where she was first employed as a medical courier for an undetermined period of time. She stated that because this job did not involve any elbow strain, the pain subsided but never completely disappeared. Around August 1992 the claimant took another job in (City 2) which, though not described in detail at the hearing, apparently involved repetitive motion with the elbows doing assembly line kind of work. At this point, the pain in her elbow became increasingly severe. She testified that she was unable to get medical care in (City 2) because the doctors she consulted would not take a work-related case. She said she called Ms. T in March 1993 to get her former employer's approval to pay for more medical care. Ms. T reportedly told her to get a claim number from the Texas Workers' Compensation Commission (Commission). When she attempted to do this, there was no claim number because no injury had been reported. She said the Commission sent her the appropriate claims forms, but was non-committal about whether a claim would be considered untimely.

The claimant's next visit with a doctor in connection with her right elbow was at her own expense with Dr. W on July 7, 1993. She stated she made this appointment after discussions with an adjuster for the carrier led her to believe the carrier would ultimately pay for the subsequent care. She admitted that she had a gynecological examination and an examination for a knee injury in 1992, but in neither case told the examining physician about her elbow pain and injury.

The claimant completed an "Employee's Notice of Injury or Occupational Disease and Claim for Compensation" (TWCC-41) on August 29, 1993, on which she claimed a date of injury of (date of injury). She explained the delay in submitting this form as generally caused by her mistaken belief, based on past experiences with two other workers' compensation claims, that she had only to notify the employer of the injury and the paperwork for benefits would be taken care of and the delay from March 1993, when

she spoke with Commission officials about the need to file a claim, to August 29, 1993, when she filed her claim, was based on a "need to do more research." The employer filed its "Employer's First Report of Injury or Illness" (IAB Form E-1) on May 11, 1993, which the carrier conceded it received on May 12, 1993. The carrier filed a "Notice of Refused/Disputed Claim" (TWCC-21) on July 15, 1993. The reasons for disputing the claim included failure of the claimant to submit a claim for compensation within one year of the injury; lack of evidence that the claimant lost more than one day from work as a result of the injury; and lack of any medical treatment for the (date of injury), injury since January 10, 1991, or other information to show the claimant's current condition was related to the injury of (date of injury).

Ms. T testified that she was responsible for administering the workers' compensation program and completing the necessary forms. The claimant reported her injury to Ms. T on (date of injury). She noticed no broken skin, discoloration or swelling. Ms. T testified that she referred the claimant to Dr. E who saw her that date at the employer's location. She said that about a week later, the claimant complained of more pain so Ms. T arranged another appointment with Dr. E for January 10, 1991. According to Ms. T, the claimant never complained about her injury while still employed by employer. (The employment relationship apparently ended in March 1991.) Ms. T reported that the claimant called several times after her employment ceased to ask what she should do if she continued to have problems with her elbow. Ms. T said she advised her to see a doctor of her choice if necessary. About a year later (sometime in early Spring 1992), Ms. T said the claimant called to say she was having more pain. At this time, Ms. T found out the claimant was no longer living in (City 1), but she never left a forwarding address. In April 1993, the claimant again called Ms. T to say she was having pain in her elbow and was not able to function in her current job. According to Ms. T, the claimant said she was entitled to a settlement. Ms. T told her she had to file a claim because the employer never knew there was a problem. Though not altogether clear from the record, it was presumably as a result of this call the Ms. T completed the IAB Form E-1.[1] She said she did not file this form earlier because she only thought there was a bruise and there was no lost time.

Ms. W, the carrier's claims supervisor, testified that she supervised the handling of the claim. She said she first got written notice of an injury on May 12, 1993, on receipt of the employer's IAB Form E-1. She assigned an independent adjuster to the case because the employer had questions about the validity of the claim. According to Ms. W, it took the adjuster three weeks to do a report with much of this time consumed in trying to locate the claimant in (City 2). Because the adjuster received no medical reports on the claimant's current condition, a letter (not in evidence) was sent to Dr. W on June 28, 1993, asking for information about the claimant's condition. Ms. W said that about a month later Dr. W. sent them a report. Ms. W agreed that the carrier did not

[1]Ms. T also said this was the first and only workers' compensation claim the employer ever experienced and this is why she used the old form.

dispute the claim within 60 days of receiving written notice on May 12, 1993. (The TWCC-21 is dated July 13, 1993.)

WHETHER THE CARRIER WAS RELIEVED OF LIABILITY EVEN THOUGH IT FAILED TO TIMELY DISPUTE COMPENSABILITY BECAUSE THE CLAIMANT, WITHOUT GOOD, CAUSE FAILED TO FILE A CLAIM WITHIN ONE YEAR OF THE INJURY

With regard to this issue, the claimant appeals the following findings of fact and conclusion of law of the hearing officer:

FINDINGS OF FACT

19. After the Carrier was relieved of liability because of the Claimant's failure to file a claim within one year, and after the Claimant did not show good cause for her failure to file timely, the Claimant no longer had any right to any workers' compensation benefits, and her entitlement or claim had become extinguished.

20. There is no provision under these circumstances for the resurrection of her claim by her late filing, and there is no renewal of the obligation of the Carrier to contest a claim which has become extinguished, and when the Carrier has been relieved of liability.

21. Once the Carrier has been relieved of liability, there is no procedure for the reinstatement of liability.

CONCLUSIONS OF LAW

6. The Carrier's failure to contest the compensability of the injury timely was moot, because the Claimant's failure timely to file a claim for compensation with the Commission had relieved the Carrier of liability to the Claimant.

Various provisions of the 1989 Act determine the resolution of this issue. Section 409.003 provides in pertinent part that:

An employee . . . shall file with the commission a claim for compensation for an injury not later than one year after the date on which:

(1) the injury occurred; . . . .

Section 409.004 provides that:

Failure to file a claim for compensation with the commission as required under Section 409.003 relieves the employer and the employer's insurance carrier of liability under this subtitle unless:

(1) good cause exists for failure to file a claim in a timely manner; or
(2) the employer or the employer's insurance carrier does not contest the claim.

Section 409.021 provides in pertinent part:

(c) If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability.

(d) 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.

"Compensability" itself is not defined by the 1989 Act, but Section 401.011(10) defines "compensable injury" as an injury that arises out of and in the course and scope of employment for which compensation is payable. Compensation is the payment of a benefit. Section 401.011(11). We consider "compensability" to be synonymous with an entitlement to a benefit.

The claimant concedes that she did not file a claim for compensation within one year of her (date of injury), injury and does not appeal the hearing officer's decision that she did not have "good cause" for this failure. She asserts that, as a matter of law (Section 409.004(2), quoted above), the failure of the carrier to timely contest compensability results in the carrier not being relieved of liability with respect to her claim.[2] The hearing officer determined to the contrary that a claim for benefits not timely made within one year of the injury is extinguished and not revived by the carrier's failure to contest compensability within 60 days. We conclude that the hearing officer incorrectly applied the law to the facts of this case and begin our analysis with the proposition that a challenge to liability for paying a claim (Section 409.004) based on a failure by the claimant to timely file the claim is a contest within the provision of Section 409.021(c) which establishes time limits for making that contest.

The decision of the hearing officer on this issue, in effect, equates failure to timely file a claim with loss of jurisdiction in the Commission to award benefits and, according to this theory, it is therefore of no legal consequence what, if anything, the carrier does or does not do to contest compensability. This notion that the failure to timely file a claim is jurisdictional may have had some validity under the old Texas Workers' Compensation Law, where, at least for some purposes, *see* Scott v. Texas

[2]The hearing officer determined, and it is not disputed, that the claimant did not miss more than one day's work with the employer as a result of her injury. Therefore, the hearing officer found that the one year period for filing a claim was not tolled by the provisions of Section 409.008.

Employers Insurance Assoc. 118 S.W.2d 354 (Tex. Civ. App.- Ft. Worth 1938, writ ref'd), the filing of the claim set in motion the entire process of securing benefits. Under the 1989 Act the process of securing a benefit is initiated by the filing of a notice of injury within 30 days under Section 409.001, not the filing of a claim. Because in the case under consideration, the claimant gave timely notice of her injury, she had a right to benefits subject only to her timely filing of a claim for the benefits.

In our opinion, the failure to timely file a claim does not extinguish this claimant's right to benefits, but may relieve the carrier of the legal liability to pay those benefits. When such a claim is filed more than one year after the date of injury, it is payable only under two circumstances. Either, there is good cause for untimely filing (not a factor in this case) or the carrier does not contest the claim. Section 409.004(2). The 1989 Act in Section 409.021(c) and (d) specifies how and when a contest must be made: existing defenses (such as failure to file a claim within one year) must be raised by the carrier within 60 days of notice of the claim; other defenses not reasonably discoverable earlier may be raised by the carrier when discovered. A defense to liability is lost if not timely and expressly contested as required by Sections 409.004(2) and 409.021(c) of the 1989 Act. Our position is analogous to that of Rule 94 of the Texas Rules of Civil Procedure which requires that a statute of limitations defense must be affirmatively raised in a proper responsive pleading or be considered waived. *See also* Baca v. Transport Insurance Company, 538 S.W.2d 814 (Tex. Civ. App.-El Paso 1976, writ ref'd n.r.e.). Because the claimant's claim was not extinguished by the mere passage of time, the carrier, if it chose to rely on a defense of an untimely filed claim, had to affirmatively raise this defense to liability in a timely response to the claim. This it failed to do and may not now be heard to contest compensability.

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WHETHER THE CARRIER CAN REOPEN THE ISSUE OF COMPENSABILITY OF THE CLAIMED INJURY BASED ON NEWLY DISCOVERED EVIDENCE

The carrier, in its response to the claimant's appeal, notes that in accordance with Section 409.021(d) it did timely contest compensability based on the discovery of new evidence that could not have reasonably been discovered earlier. While not denominated an appeal but received within the time permitted for submitting an appeal, we treat it as an appeal of the hearing officer's findings of fact and conclusion of law that the carrier did not timely contest compensability after being notified of the injury.

Briefly, the carrier argues that it did not know of the claimant's current medical condition until it received information from Dr. W in late June 1993, and that it disputed compensability the following month. In its TWCC-21, the carrier stated that it based its contest of compensability, among other reasons, on the claimant's failure to file a claim within a year of the injury and "no medical or other indication" that would show a causal connection between the (date of injury), injury and the claimant's current condition. The hearing officer found that the carrier not only knew the date of the injury but also knew enough about the claimant's medical condition within 60 days of receiving notice of the claim for benefits to timely contest compensability. We agree. The claimant's TWCC-

41 states the date of injury to be (date of injury). The claimant can be presumed to have known this as of May 12, 1993, the date it received the TWCC-41. The exception for newly discovered evidence applies only in those cases where the alleged newly discovered evidence could not with the exercise of due diligence have been discovered earlier. Texas Workers' Compensation Commission Appeal No. 931112, decided January 21, 1994. According to the testimony of Ms. W, the carrier first received written notice of the claim on May 12, 1993. The assigned adjuster completed his report within three weeks, during which time we presume that carrier had located the claimant in (City 2). In any event, Ms. W further testified that the adjuster sent a letter to Dr. W on June 28, 1993, asking for a report. She also said that the carrier did not receive a response until a month later. There is no explanation of what efforts if any the carrier undertook to urge Dr. W to reply earlier. It is clear, however, that the carrier knew Dr. W was the claimant's treating doctor within a month of receiving notice of the claim. As we have observed, "[m]edical evidence obtained through want of due diligence and failure to follow-up on obtaining new information from a doctor whose identity is disclosed from the outset is not newly discovered evidence under Section 401.021(d)." Texas Workers' Compensation Commission Appeal No. 93967, decided December 7, 1993. Under the circumstances of this case, the hearing officer concluded that the carrier could have contested compensability within 60 days. Implicit in this finding is a determination that the carrier did not act with due diligence when it delayed contesting compensability pending further reports from Dr. W. In any case, what is beyond doubt is that the carrier knew well within 60 days of notice of the claim, that the affirmative defense of an untimely filed claim was available to it. If it was unsure of the viability of a medically based defense it could have based its defense solely on the lack of a timely claim. While this may have resulted in a waiver of the medical defense if later found not to be based on newly discovered evidence, at least the defense that the claim was untimely filed would have been preserved. *See* Texas Workers' Compensation Commission Appeal No. 931148, decided February 1, 1994. We find that the decision of the hearing officer that the claimant did not timely contest compensability based on newly discovered evidence is supported by sufficient evidence and we will not disturb it on appeal.

WHETHER THE CLAIMANT'S CURRENT CONDITION WAS CAUSED BY HER INJURY OF (date of injury)

With regard to this issue, the claimant appeals the following finding of fact and conclusion of law:

FINDING OF FACT

29. The claimant has not shown by a preponderance of the evidence, medical or otherwise, that her injury of (date of injury), is causally related to her present elbow problems.

CONCLUSION OF LAW

2. The Claimant's current right elbow problems and pathology are not a result of the compensable injury on (date of injury).

On April 14, 1993, Dr. W diagnosed right elbow tendinitis and lateral epicondylitis. In a letter of May 5, 1993, he stated that "[i]n all likelihood, the problem . . . is related to the initial injury." He amplified this conclusion in a letter of January 3, 1994, to Ms. W in which he acknowledges that it is difficult to establish the etiology of the claimant's current condition because of the "minimal amount of information" from a three year old injury. In particular, he points out that Dr. E's record of the January 10, 1991, visit does not indicate where exactly the claimant experienced pain, whether over the lateral epicondyle or over the olecranon. Nonetheless, based on the claimant's complaint of pain primarily over the lateral aspect of the elbow at the time of the (date of injury, injury, "I would conclude that her current symptoms are related to the injury of (date of injury)." He also acknowledges that her pain may be aggravated by repetitive movements.

At the carrier's request, Dr. E reviewed Dr. W's findings and in a letter of January 13, 1994, observed that at the time of his examination in 1991, there was no indication of "medial or lateral epicondylitis," and would have presumably noted the same if the claimant had complained of pain in the epicondylar areas.

Also in response to the carrier's request to review the medical records in this case, Dr. WT reported in a letter of December 13, 1993, that he did not believe that the claimant's current complaints of lateral epicondylitis stemmed from her original injury. He based his belief on the claimant's initial report of pain in a different area of the elbow from the lateral epicondylar region and Dr. E's findings of normal flexion. If she suffered a direct blow to this area, Dr. WT believes it is likely that pain would have been present from that time, and not developed later as the claimant appears to now claim.

The claimant asserts that Dr. W's opinion should be controlling in this case because of his skill and the extensive care he has provided. Because Dr. E has not seen her recently to evaluate her current condition and Dr. WT has never personally examined her, she submits that their opinions should be discounted. She insists again that she has had no new injury to her elbow and that, though unschooled in the medical terminology and distinctions being made by the various doctors, her current painful elbow was caused by her initial injury.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286(Tex. App.-Houston [14th Dist.] 1984, no writ).

To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Campos, *supra*; Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight 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 Company, 715 S.W.2d 629 (Tex. 1986). The hearing officer evaluated the evidence of both the claimant and the medical experts and found the view that the claimant's current condition was not caused by her original injury more persuasive. We believe the opinions of Drs. E and WT provide a sufficient evidentiary basis for the decision of the hearing officer that the claimant did not meet her burden of proving that her injury of (date of injury), is the cause of her present elbow condition. Nonetheless, where a dispute of compensability is untimely, and it is found by a hearing officer that there is no compensable injury, the claimant is entitled to benefits. *See* Texas Workers' Compensation Commission Appeal No. 931017, decided December 20, 1993, and cases cited therein.

The carrier is ordered to pay benefits in accordance with this opinion.

Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I am not able to agree that a carrier is required under Section 409.021 to contest within 60 days, the failure of a claimant to file a claim for which the claimant may take one year (or more) to file. *See* Sections 409.003 and 409.004. I do not interpret the words "claim" and "compensability" to be synonymous. I join in the result of the decision for other reasons.

Joe Sebesta
Appeals Judge

CONCURRING OPINION:

In concurring, I would add only that the point that the failure to timely contest a claim, and the resultant waiver of defenses, leaves the finder of fact only with evidence in favor of the claim. For this reason, I would not have discussed the "injury" issue along the standard of review we usually employ for such matters. Had the hearing officer not erred in his holding with respect to the untimely contest of compensability, there wouldn't be any evidence in the record from the carrier regarding the injury. Because I view the untimely contest as essentially a confession of compensability, I would hold that the hearing officer's determination that claimant's current condition was not related to her (date of injury), injury is against the great weight and preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993.

Susan M. Kelley
Appeals Judge