

APPEAL NO. 950151

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 October 21, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the respondent (claimant herein) sustained compensable injuries to her right hand, neck and lower back on (date of injury); whether the claimant timely notified her employer of the neck and lower back injuries; and whether the appellant (carrier herein) timely contested compensability of the neck and lower back injuries or contested compensability based on newly discovered evidence that could not reasonably have been discovered earlier. The hearing officer determined that the claimant did not sustain any compensable injuries on (date of injury); that the claimant did not timely report her neck and lower back injuries;¹ and that the carrier failed to timely dispute the compensability of the neck and lower back injuries and thereby waived its right to do so. The carrier appeals the hearing officer's findings of fact and conclusions of law that it waived its right to contest the compensability of the neck and lower back injuries arguing that the relevant findings of fact and conclusions of law are not supported by sufficient evidence; that the order of the hearing officer to the carrier to pay benefits for these injuries is irreconcilable with findings that the claimant did not sustain any injuries; and that the failure of the Texas Workers' Compensation Commission (Commission) to timely issue the decision and order of the hearing officer in this case as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.16(d) (Rule 142.16(d)) invalidates that decision and order. No response from the claimant has been received.

DECISION

We reverse and remand.

The claimant's employer conducted cattle auctions on Wednesdays. As a convenience to the patrons, the employer had a restaurant on the premises which was only open on auction days. The claimant managed this restaurant. Typically, she worked two days a week. On Tuesdays, her duties included cleaning the restaurant and purchasing supplies. On Wednesdays, she waited tables, ran the cash register and did whatever was necessary to serve food. She claimed that she suffered two separate injuries on Tuesday, (date of injury). Sometime before 9:00 a.m. that day, she said she injured her right hand while removing cooking oil from a vat. Later around noon the same day, she said she injured her right arm, neck and lower back when she lifted two five gallon cans of cooking oil from the trunk of her car and carried the cans into the restaurant.

¹ Neither party addressed at the hearing the possible issue of good cause for failing to give timely notice, nor has either party appealed the failure of the hearing officer to make this alternative finding. See Texas Workers' Compensation Commission Appeal No. 92589, December 14, 1992.

In findings of fact and conclusions of law which have not been appealed and have now become final pursuant to Section 410.169, the hearing officer determined that the claimant did not sustain any injuries on (date of injury); that she timely reported and the carrier timely disputed only the hand injury; and that the claimant did not timely report the neck and lower back injuries, but the carrier did not timely dispute the compensability of these injuries. He therefore ordered the carrier not liable for treatment of the right hand and arm, but only for treatment of the neck and back injuries and for income benefits as appropriate resulting from these injuries.

In its appeal, carrier contends that there was insufficient evidence to support a finding that it did not timely dispute compensability of the neck and lower back injuries thereby waiving its right to do so. Sections 409.021(c) and (d) provide that a carrier which does not contest compensability of an injury by the 60th day after being notified of the injury waives its right to contest compensability absent a finding of new evidence that "could not reasonably have discovered earlier." With regard to a timely dispute of compensability, Rule 124.6 states that a carrier must dispute the claim on or before the 60th day "after the carrier received written notice of the injury. . . ." (Emphasis added.) This written notice can consist of the employer's first report of injury, notification by the Commission, or "any other written document, regardless of source, which fairly informs the insurance carrier of the . . . injury, and facts showing compensability." Rule 124.1(a)(3). Whether a written notice "fairly" informs the carrier is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93120, decided April 2, 1993. We have also held that, whenever an issue involves timely filing, "findings of fact as to when the period began, and when the required notice was given, are essential." Texas Workers' Compensation Commission Appeal No. 950100, decided February 28, 1995.

In the case now appealed, written notice of injury included an Employer's First Report of Injury or Illness (TWCC-1) signed by the claimant and an employer's representative on January 19, 1993. This was date stamped as received by the carrier, but the date of receipt is illegible. The injury claimed was to the "hand" between noon and 12:30 on (date of injury), as a result of carrying two five-gallon cans of liquid oil. The only Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in evidence was dated February 25, 1993, and states: "The right hand injury is disputed as not within course and scope of employment." On March 3, 1993, the claimant signed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation" (TWCC-41) which refers to an injury to the "back, neck, & right hand" at about 12:30 p.m. on (date of injury), from "lifting 5 gals of oil." This was received by the Commission on March 4, 1993. On October 5, 1993, the claimant signed an "amended" TWCC-41 in which she claimed an injury to the "right hand, arm, shoulder, neck lower back and body generally," sometime in the "a.m.," which she said happened "while in course & scope of my employment . . . when carrying 2 5-gallon liquid oil." There is no indication when this form was received by the Commission. Based on this evidence and official notice "that

the carrier filed only one TWCC-21, as described above, the hearing officer made the following findings of fact and conclusions of law:

FINDINGS OF FACT

- 12.The Carrier timely disputed the Claimant's alleged injury to her hand on the date of injury.
- 13.The Carrier has not disputed the Claimant's alleged injuries to her neck and lower back.
- 14.More than ninety (90) days has (sic) elapsed since the Carrier received actual notice that the Claimant was alleging injuries to her neck and lower back.
- 15.The Carrier's dispute of the Claimant's alleged injury to her neck and lower back is not based [sic] newly discovered evidence that could not reasonably have been discovered at an earlier date.
- 16.The Carrier has waived its right to dispute the Claimant's alleged injury to her neck and lower back.

CONCLUSION OF LAW

- 4.The Carrier waived its right to contest any injuries alleged to have been sustained to the Claimant's neck and lower back.

We decline to speculate about what in this case the hearing officer thought constituted written notice of an injury to the neck and lower back because there were no findings of fact as to when the carrier first received written notice of the neck and lower back injuries and what that notice consisted of. Thus, we have no way of knowing when the 60-day period for disputing compensability of these injuries commenced. For this reason, we reverse and remand the issue of whether the carrier timely contested compensability of the claimed neck and lower back injuries to the hearing officer to make specific findings of fact to support appropriate conclusions of law as to when the 60 day-period for contesting compensability began and whether and when the carrier contested compensability of these injuries based on this triggering event. See Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993, and Texas Workers' Compensation Commission Appeal No. 93120, decided April 2, 1993.

The carrier also contends that the order of the hearing officer to pay benefits for the neck and lower back injury should be reversed because it is inconsistent with findings of fact that the claimant did not sustain any injury to her neck or lower back on (date of

injury). In Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993, the Appeals Panel discussed at length the underlying rationale for the requirement to timely dispute compensability, as well as what is expected of carriers, and concluded that the waiver of the right to contest compensability by not doing so within the prescribed time limits "has the effect . . . of a confession of compensability." This means only that under these circumstances a claimant need not prove that his or her injury occurred in the course and scope of employment. There must, however, be an underlying injury that justifies medical treatment and potentially other authorized income benefits whose existence must be established by the claimant. See, e.g., Texas Workers' Compensation Commission Appeal No. 941157, decided October 10, 1994, and Texas Workers' Compensation Commission Appeal No. 93491, decided August 2, 1993. In the case now under appeal, the hearing officer's choice of language that the claimant "did not sustain any injury . . . on the date of injury" (Findings of Fact Nos. 17, 18, and 19) may perhaps be misleading. We do not, however, read this language to mean that the claimant has no neck or lower back injury, an interpretation clearly contrary to the medical evidence introduced at the hearing, but only that these injuries or conditions did not happen on (date of injury), while the claimant was engaged in "the furtherance of the affairs or business of the employer." Section 401.011(12). Thus we find no merit in carrier's argument that the findings of fact and order of the hearing officer are "irreconcilable."

Finally, the carrier contends that the decision and order of the hearing officer should be reversed and the case remanded because the Commission failed to comply with Rule 142.16(d) which provides in pertinent part that "[n]o later than seven days after filing the decision [of the hearing officer], the division [of hearings] shall furnish to the parties . . . a file-stamped copy of the decision. . . ." The decision and order of the hearing officer were date stamped as being received by the division of hearings on November 1, 1994, and furnished to the parties on January 13, 1995. Clearly, Rule 142.16(d) was not complied with and no reason is apparent in the file. The carrier, however, identifies no prejudice it suffered as a result of this delay, but argues that, as a matter of law, the decision and order are invalid. We addressed this question in Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992, and determined that the time limits of Rule 142.16 are not mandatory. Thus, absent a showing of substantial prejudice, failure of the Commission to comply with this rule and distribute a decision and order of a hearing officer no later than seven days after receipt does not in itself render that decision invalid, void or subject to reversal.

The decision of the hearing officer that the carrier failed to timely dispute compensability of the neck and lower back injury and his order to pay benefits for these injuries are reversed and the issue remanded to the hearing officer for further proceedings as set out above. The decision and order of the hearing officer on the other disputed issues have become final.

A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge