

## APPEAL NO. 960671

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 February 29, 1996, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues from the benefit review conference (BRC) and as agreed by the parties were:

1. Whether Claimant reported an injury to the Employer on or before the 30th day after the injury, and if not, does good cause exist for failing to report the injury timely;
2. Whether Carrier contested compensability on or before the 60th day after being notified of the injury;
3. Whether Claimant sustained a compensable injury on (date of injury); and
4. Whether Claimant had disability resulting from the injury sustained on (date of injury), and if so, for what periods?

He determined that the respondent (claimant) sustained a compensable injury on (date of injury); that he did not timely report an injury, and without good cause; that the appellant (carrier) did not timely contest compensability after being notified of the injury; and that the claimant had disability. The carrier appeals urging, in essence, error on the part of the hearing officer in determining the carrier had failed to timely contest compensability on a defense neither urged by either party nor an issue before the hearing officer. No response has been filed.

### DECISION

Finding error, we reverse and render a new decision.

The claimant asserted that he sustained a back injury from an unwitnessed fall on (date of injury). The hearing officer determined that the claimant fell in the course and scope of his employment and sustained an injury to his back on (date of injury). The hearing officer further determined that the claimant failed, without good cause, to timely report his injury until July 7, 1995. These determinations have not been appealed and we affirm them as having become final. The challenge on appeal concerns the hearing officer's finding that "[t]he evidence submitted by the Carrier, TWCC-21 without the Texas Workers' Compensation (Commission) stamp, was insufficient to prove it timely contested compensability." Herein is where the confusion begins. Initially, we reject the implication, if such was intended, that only a copy of a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) with the "Commission stamp" can establish a timely contest. While a stamped copy may be the best evidence of a timely filing, it is not the only evidence that can establish a timely contest. Texas Workers' Compensation Commission Appeal No. 94292, decided April 26, 1994. However, our reversal is not predicated on the matter of a stamped copy.

As carrier urges, and as supported by the evidence before us, the hearing officer's determination was based upon a defense not in issue, not urged by either party, and not litigated. This may well have occurred from a misunderstanding or confusion in the way the issues were brought forth from the benefit review conference (BRC). However, the parties were not given any opportunity to address the matter on which the hearing officer's ultimate decision rested. That is, the finding set out above. We have reversed where a hearing officer based a decision to a significant degree on an issue to which the parties have not been given any opportunity to present evidence or refute. Texas Workers' Compensation Commission Appeal No. 93577, decided August 18, 1993; Texas Workers' Compensation Commission Appeal No. 960226, decided March 22, 1996. Here, in addition to the issue of whether an injury had been sustained, the focal issue was whether the claimant timely reported his injury, as he asserts he did. If it was determined that he did timely report his injury, then a potential issue arose, and was apparently discussed during the BRC, as to whether the carrier's refusal or dispute was broad enough to include contesting compensability, that is whether there was an injury in the course and scope of employment. The carrier's TWCC-21 in evidence stated the basis for the contest or dispute was "injury was not reported to employer within 30 days."

A carrier (and employer) is relieved from liability for benefits if notice of an injury is not given not later than the 30th day after an injury, absent actual knowledge, a showing of good cause, or the claim is not contested. Section 409.002. The benefit review conference report, an exhibit at the CCH, sheds light on the issues and positions of the parties in this case. Clearly, claimant urged he gave timely notice. The carrier urged that he did not and that it refused or disputed the claim on this basis. The benefit review officer (BRO) was of the opinion that timely notice of injury was given, according to his comments. He then indicates that there was an issue of whether the carrier contested "compensability on or before the 60th day after being notified of the injury." Under this issue, the BRO states that the claimant's position as: "[t]he carrier disputed timely report but did not contest compensability on or before the 60th day after being notified of the injury." The carrier's position was that they did. There is nothing in the record of this case to suggest that there was any issue about whether a TWCC-21 had been filed at all by the 60th day. To the contrary, the record establishes that the claimant's position was that the lack of 30-day notice was disputed but that the language in the TWCC-21 was not broad enough to dispute compensability, that is whether an injury occurred in the course and scope of employment. An injury is not a compensable injury, in the sense that a carrier is relieved of liability, where notice of injury is not timely filed and hence no liability accrues. Texas Workers' Compensation Commission Appeal No. 94388, decided May 12, 1994. However, the definition of "compensable injury" in Section 401.011(10) provides that it "means an injury that arises out of and in the course and scope of employment for which compensation is payable under this section." If a carrier prevails on an untimely notice of injury defense, it is relieved of liability. We found error in Texas Workers' Compensation Commission Appeal No. 950932, decided July 21, 1995, where a hearing officer effectively held that

regardless of the merits of an untimely notice of injury matter, that the carrier is nonetheless liable if it does not also contest compensability.

It is apparent in the case before us that the hearing officer rested his decision that the carrier was liable for benefits on his determination that the carrier did not show it disputed or refused the claim by filing a TWCC-21. As is clear from the benefit review officer's report, the issue reported involved not whether the TWCC-21 was filed, but rather, whether the TWCC-21 sufficiently contested compensability. This is apparent from the position of the claimant as set forth in the BRO's report: "[t]he carrier disputed timely reporting. . . ." For this reason, we do not believe that remand is necessary or appropriate in this situation. The hearing officer found, and it is not a matter on appeal, that the claimant failed, without good cause, to give notice of the injury. There being no issue before the hearing officer for his determination as to the timely filing of the TWCC-21, his finding is set aside. We reverse the finding and conclusions of the hearing officer insofar as they hold that the carrier did not timely contest the untimely notice of injury, and compensability based upon a lack of timely notice of injury. We reverse the decision and order of the hearing officer and render a new decision and order that the carrier is relieved of liability for medical and income benefits under the Texas Workers' Compensation Act.

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Stark O. Sanders, Jr.  
Chief Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge