APPEAL NO. 982930
FILED JANUARY 28, 1999

At a contested case hearing held on November 18, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act), the hearing officer, took evidence and heard argument on the following issues which the parties agreed were the disputed issues before her:

1. Was the claimed injury caused by the Claimant's wilful intent and attempt to unlawfully injure another person, thereby relieving the Carrier of liability for compensation;

2. Is the Carrier's contest of compensability based on newly discovered evidence that could not reasonably have been discovered at an earlier date, thus allowing the Carrier to reopen the issue of compensability; and

3. Did the Claimant have disability resulting from the injury sustained on _____.

The hearing officer, who noted at the outset that while both parties would argue the matter of the injury being in the course and scope of employment such was not an actual disputed issue, concluded that since the respondent's (claimant) injury on _____, was not caused by his wilful intent and attempt to unlawfully injure another person, the appellant (carrier) is not relieved of liability for compensation; that the carrier's contest of compensability is not based on newly discovered evidence that could not reasonably have been discovered at an earlier date, that the carrier thus cannot reopen the issue of compensability, and that claimant therefore sustained a compensable injury; and that claimant had disability resulting from the injury sustained on _____, from July 12, 1997, through the date of the hearing.

The carrier has appealed the determination that it cannot reopen the issue of compensability based on newly discovered evidence. The carrier asserts that the claimant, who also happens to be the covered employer, withheld certain information from the carrier in the Employer's First Report of Injury or Illness (TWCC-1) which would have caused the carrier to investigate the claim and did so with the intent to make compensable claimant's noncompensable injury, that this failure to provide the carrier with certain information could be construed as insurance fraud, and that the hearing officer held the carrier to an unfair and unreasonable standard for investigating the claim. The carrier also appeals the disability determination for the reason that there was no finding of injury in the course and scope of employment. Claimant's response urges the correctness of the hearing officer's decision, pointing to the carrier's failure to even interview claimant after receiving the TWCC-1, let alone otherwise adequately investigate the claim.

DECISION

Affirmed.

The hearing officer's determination that the injury was not caused by claimant's wilful intent and attempt to unlawfully injure another person has not been appealed and thus has become final by operation of law. Section 410.169.

At the outset of the hearing, the parties, who had apparently had some prehearing discussion of the matter, indicated their agreement with the hearing officer's statement that although they would make argument concerning whether claimant was injured in the course and scope of employment, such was not an actual disputed issue at the hearing. The hearing officer made a finding of fact that claimant was not in the course and scope of his employment at the time of the injury on _____. In its request for review, the carrier asks the Appeals Panel to add a corresponding conclusion of law to that effect. We decline to do so, noting the parties' agreement with the hearing officer that injury in the course and scope of employment was not a disputed issue. As for the carrier's sole basis for appealing the disability determination, that there was no finding that the injury was in the course and scope of employment, we find such contention to be without merit. Section 401.011(16) defines disability to mean the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Although the hearing officer found that claimant was not in the course and scope of employment at the time of the injury on _____, the hearing officer concluded that claimant did sustain a compensable injury because the carrier's contest of compensability was not based on newly discovered evidence that could not reasonably have been earlier discovered and thus the carrier cannot reopen the issue of compensability. Accordingly, we affirm the hearing officer's determination of disability.

Our discussion of the evidence will be confined to the other appealed issue, namely, whether the carrier's contest of compensability was based on newly discovered evidence that could not reasonably have been earlier discovered.

Claimant testified that on _____, he met his property insurance company's adjuster, Mr. DP, and his supervisor, Mr. RP, at a rental house he owned to review damage caused by a tenant who had recently vacated the premises. He stated that he operated a sole proprietorship business, (employer), which, through subcontractors, repaired damage to houses; that he did the estimating, hired the subcontractors, and dealt with the property insurers for claims payments; that his wife, Ms. TM, was the secretary; that his company was to do the repairs on his rental house; and that because Mr. DP had questioned the damage and repairs, he met with both Mr. DP and Mr. RP on July 11th. Claimant further stated that Mr. DP became abusive with him; that Mr. RP then took the file from Mr. DP and told him to leave the premises; that he and Mr. RP then completed the review of the damage and repairs and Mr. RP departed; and that as he was preparing to leave the house he saw Mr. DP at the patio door taking photographs of the interior of the house. He said

that Mr. DP saw him and began to move in a hurried fashion; that he went out the front door to go tell Mr. DP to get off the premises; and that as he proceeded toward the front gate, a wooden picket structure six to seven feet high, the door swung back and hit him and that he was knocked to the ground striking his low back on a landscape timber in a flower bed. He surmised that Mr. DP had just hurriedly gone through the gate on his way off the premises but could not see him given the height of the gate. He indicated that Mr. DP probably could not have known that the gate hit him as it swung back.

Claimant further testified that he went home, told his wife about the incident, sought medical treatment later that day, and eventually had to have spinal surgery. He indicated that he got some relief from the surgery but still has so much low back pain and leg pain he cannot walk far or stand for very long and has to have help getting his shoes, socks and trousers on. He also stated that his doctors have not released him to return to work and that he has not worked since _____.

Claimant further indicated that his wife, Ms. TM, the employer's secretary, prepared the TWCC-1 based on his report of the injury to her. The TWCC-1 is dated August 6, 1997, and describes the injury as follows: "Emp was hit full force with a six-foot gate/it knocked him down on his back." The form lists no witnesses and states over Ms. TM's name that the information was provided by Ms. TM "via telephone." Ms. TM testified to providing the carrier with the information about claimant's accident and to completing the TWCC-1. She said she listed no witnesses because, to her knowledge, there were no witnesses, not even Mr. DP. Claimant said he thereafter began receiving weekly income benefits from the carrier and continues to receive them and that some of his medical expenses have been paid but some have not yet been paid. Both claimant and Ms. TM stated that after Ms. TM submitted the TWCC-1, neither had any contacts or conversations with any carrier representative within 60 days and no request for a statement concerning the accident.

Ms. DM testified that she was a senior claims representative for the carrier's adjusting firm; that she does the medical coordination work on claims files that are usually at least six months old; and that she does not normally handle questions of the compensability of claimed injuries. She further stated that she had reviewed the claims file notes of the initial adjuster on the claim, Ms. W, who is no longer employed by the company, and that according to these notes, Ms .W asked Ms. TM if she "questioned" the claim and was advised she did not question it. Ms. DM said she came to question whether the injury was sustained in the course and scope of employment when, on August 15, 1998, she was provided excerpts from claimant's deposition in a bankruptcy proceeding which indicated that he was running Mr. DP off the premises on _____ when the injury occurred. She said that she felt Ms. TM and claimant told the carrier just enough to get coverage and indicated that the file did not reveal that claimant was at work for the employer on his own rental house when the accident occurred. Ms. DM said she then went to a supervisor who reviewed the file and that the carrier then filed its Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) on August 18, 1998. The TWCC-21 states the following dispute: "Carrier is disputing compensability of

the _____ injury due to newly discovered information. The claimant was not in course and scope of employment and was furthering his personal business. Carrier is disputing weekly indemnity benefits and medical benefits." Ms. DM further stated that Ms. W would have had no reason to obtain a statement from claimant or others because Ms. TM indicated the employer did not question the claim.

Section 409.021(d) provides that 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.

The hearing officer found that the carrier had notice of the _____, injury within one week by telephone and received a copy of the TWCC-1 in August 1997; that the carrier began paying benefits within approximately one week following the date of injury and that upon receiving the TWCC-1, a minimum investigation was performed; that the carrier did not speak with claimant regarding the circumstances of his injury and a minimum was asked of Ms. TM; that there was no fraud on the part of claimant or Ms. TM in filing the papers for the _____, injury; that the TWCC-1 and medical records had adequate information which could have been investigated by the carrier; that the information learned by the carrier in August 1998 was discoverable in August 1997 if an investigation had been completely timely; and that the carrier had accepted this claim as compensable in 1997 and cannot reopen compensability 1998 as all information was discoverable within 60 days. Based on these findings, the hearing officer concluded that the carrier's contest of compensability is not based on newly discovered evidence that could not reasonably have been discovered at an earlier date and, thus, the carrier cannot reopen the issue of compensability and claimant has therefore sustained a compensable injury.

In Texas Workers' Compensation Commission Appeal No. 92038, decided March 20, 1992, the Appeals Panel affirmed a hearing officer's determination that certain medical records did not amount to newly discovered evidence not reasonably discoverable earlier, noting that there was no evidence that the carrier ever inquired about medical records or made any attempt to obtain them. Our decision indicated that the matter of "newly discovered" evidence is one for the sound discretion of the hearing officer and we likened it to the discretion resting in a trial judge in granting a new trial based upon newly discovered evidence. We stated that "it must generally be shown, among other things, that the evidence was unknown and that failure to discover was not due to want of diligence. [Citation omitted.]" *And see* Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

The Appeals Panel is an appellate reviewing tribunal and will not generally disturb the factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer obviously considered the evidence that the total investigation of the claim by the initial adjuster apparently

amounted to simply asking Ms. DM if she questioned the claim and that no further investigation was undertaken until, a year later, the carrier was given some deposition evidence which it had not even sought.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge