

APPEAL NO. 012101-s  
FILED OCTOBER 22, 2001

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 July 31, 2001. There were numerous issues. The hearing officer held that the respondent/cross-appellant (claimant) had not injured herself in the course and scope of employment, that she had not proven that she gave timely notice of her injury to her employer within 30 days of her alleged injury, and that she did not make a binding election of remedies against workers' compensation insurance benefits. There were no findings as to whether the claimant had good cause for not making a timely report.

On two other issues presented, the hearing officer found no disability (due to the lack of a compensable injury), but he found that the claimant was unable to obtain and retain employment due to the injury to her lumbar spine for the period from February 7, 2001, through March 19, 2001. He further found that the appellant/cross-respondent (carrier) was liable for accrued benefits pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3) from the date it received written notice of injury to the date of the CCH, because the carrier did not show a "proper filing" of its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) prior to the date of the CCH.

Both parties have appealed. The claimant appeals the determinations that she did not sustain a compensable injury or give timely notice of the injury to her employer. The claimant argues that the evidence proves that she was injured on \_\_\_\_\_, and that she notified her employer within 30 days. The carrier points out that there was sufficient evidence to uphold the hearing officer's findings. The carrier appeals the decision holding it liable for accrual of benefits to the date of the CCH, and argues that the hearing officer should have found the filing date of its TWCC-21 to be the date indicated on that document, or should have taken official notice of the date it was filed with the Texas Workers' Compensation Commission (Commission), rather than find that there was no "proper" filing date established. The carrier also argues that because the injury was found not to be compensable, it should be relieved of any liability for accrued benefits under Rule 124.3. There is no response to the carrier's appeal.

**DECISION**

Affirmed in part, reversed and remanded in part.

**FACTS**

In some respects, the imprecision in the hearing officer's decision as to the date of injury or date the employer received notice is a reflection of the testimony. Briefly, the claimant said that she hurt her back when assisting another employee, Ms. O, in lifting a container of keypads. She testified both that her back hurt right away, and that it did not hurt for a couple of days. The claimant readily admitted to failures of recollection, which

she attributed in part to her antidepressant medication that she had been taking at the time of the alleged injury.

The claimant, who had initially filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) contending that she hurt her back "on or about" \_\_\_\_\_, came to the CCH asserting failure of memory as to the date the injury occurred, but eventually concluded that the day of accident had to be \_\_\_\_\_, because she knew it occurred the first week of the month of whenever it happened. Part of the controversy about the actual date apparently arose at the benefit review conference when the claimant was shown in the employer's records to have been on vacation on \_\_\_\_\_. In any case, the claimant said that she saw her doctor for back pain on April 19, 2000, and reported her injury the next day. The claimant's testimony was also confused in that she said she believed at that visit that she likely had a kidney infection and did not realize she injured her back. However, she said she reported to Ms. O that she hurt her back, but Ms. O was not a supervisor; the supervisor was alerted sometime the week after this.

When the supervisor testified, he confirmed that "in \_\_\_\_\_" 2000, the claimant reported that she hurt her back lifting keypads, but he had no recollection of the date in \_\_\_\_\_ that this occurred. However, he said that after talking to Ms. O, he ascertained that the accident had occurred sometime during the previous 30 days, and that he told the claimant that workers' compensation would not cover it. He also did not report the asserted injury at this time to the carrier. He confirmed that the claimant was terminated effective June 30, 2000, for excessive absenteeism. Thereafter, the claimant filed for unemployment compensation benefits.

Ms. O was able to confirm the keypad-lifting incident, but she said that she recalled it as occurring in February or March. She said that the claimant complained about back pain "a month or more" later. The record demonstrates that the claimant missed a considerable amount of time as whole or half days off from work, from January through \_\_\_\_\_ 2000, as sick, vacation, or personal leave.

In a TWCC-41 dated March 5, 2001, the claimant filed a claim for workers' compensation. There is also in the record a TWCC-21, admitted without objection, that is dated March 16, 2001, and asserts that notice of the injury was received on March 8, 2001. The claimant did not assert that the carrier waived the right to dispute compensability by filing this document later than 60 days after the date it received notice of injury. The copy of the TWCC-21 in the record is not date-stamped by the Commission.

The claimant was initially treated by her treating doctor, Dr. B, on April 19 and May 1, 2000, for non-specific back pain. No work-related injury is recorded in the history. Dr. B treated the claimant for back pain in August and then the next month for her depression. The claimant returned with acute pain in January 2001. The claimant underwent a myelogram in late January 2001 and was found to have a large herniation at L5-S1. She had back surgery on February 7, 2001, which was paid for through Medicaid. The claimant

testified that she had not been released back to work since her surgery; however, one letter from her surgeon dated March 19, 2001, released her from his follow-up care. He noted that she was asymptomatic and had full range of motion of her back.

### **THE INJURY ISSUE**

The injury issue in the CCH was phrased in terms of whether the claimant sustained a compensable injury “on or about” \_\_\_\_\_. The hearing officer noted the claimant’s failure of recollection and varying testimony, as well as the lack of medical evidence showing when the lifting incident took place or that it caused the back injury for which the claimant was treated. He noted the unhelpful testimony of other witnesses in lending clarity to the matters at hand. He found the claimant unpersuasive in proving that she sustained a work-related injury. Given the record we have reviewed, we cannot agree that this determination is against the great weight and preponderance of the evidence as to be manifestly unfair or unjust, and we affirm the determination that the claimant did not sustain an injury in the course and scope of employment.

### **NOTICE TO THE EMPLOYER**

The hearing officer did not err, given this record, in finding that the claimant did not prove that she gave timely notice to her employer within 30 days of the alleged injury. Although issues relating to good cause are ordinarily subsumed in notice issues, it was the claimant’s position that she gave timely notice and therefore evidence relating to good cause was not developed.

While there is confusion in the decision as to the date that the hearing officer believes that the employer received notice (two different dates are set out in the discussion), the hearing officer could believe the supervisor’s testimony that when he investigated, the supervisor found out that the incident that allegedly caused injury occurred over 30 days before he was informed. We accordingly affirm the decision that notice was not timely given.

### **PAYMENT OF ACCRUED BENEFITS**

We agree that the hearing officer erred by holding that the carrier failed to prove a “proper filing” of the TWCC-21 or was liable for “accrued benefits” for an unspecified period of time. We remand for official notice of the date that the TWCC-21 was filed with the Commission, as well as an order specifying the period of time for which the carrier is liable for accrued benefits under Rule 124.3.

Section 409.021 requires a carrier to either pay benefits as required by the 1989 Act or notify the Commission in writing of its refusal to pay and the reasons therefore, not later than seven days after receiving written notice of injury. Effective March 13, 2000, Rule 124.3 was amended to provide some financial consequences where this seven-day time frame is not met. In pertinent part, Rule 124.3(a) states:

- (1) If the carrier does not file a notice of denial by the seventh day after receipt of the written notice of injury, the carrier is liable for any benefits that accrue and shall initiate benefits in accordance with this title.
- (2) If the carrier files a notice of denial after the seventh day but before the 60th day after receipt of written notice of the 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 then is it permitted to suspend payment of benefits.
- (3) If the carrier wants to deny compensability of or liability for the injury after the 60th day after it received written notice of the injury
  - (A) the carrier must establish that the evidence that it is basing its denial on could not have reasonably been discovered earlier.
  - (B) the carrier is liable for and shall pay all benefits that were payable prior to and after filing the notice of denial until the Commission has made a finding that the evidence could not have reasonably been discovered earlier.

Whether there was an express-waiver issue or not, an issue was plainly raised as to the applicability of Rule 124.3 and whether accrued benefits were due prior to the date that the TWCC-21 was filed. The date of filing of the TWCC-21 is critical to knowing whether Rule 124.3(a)(2) or (a)(3) applies in computing the amount of any accrued benefits that are due from the carrier. In Texas Workers' Compensation Commission Appeal No. 941171, decided October 17, 1994, we held that where timeliness or sufficiency of the TWCC-21 was in issue, the hearing officer should take official notice of that form and the date it was filed, if necessary, to ensure full development of the facts in accordance with Section 410.163(b).

Although both parties gave relatively short shrift to this issue, the claimant did not assert that the notice had been filed more than 60 days after the written date of notice or that the carrier was required to prove "newly discovered evidence" as the basis for this dispute. Consequently, it is reasonable to infer that the parties understood the TWCC-21 to have been filed within 60 days after the date of written notice. We cannot, however, render on an inference or make findings of fact. We remand so that official notice of the date that the TWCC-21 was filed with the Commission may be taken and the period for which the carrier is liable for benefits may be amended accordingly.

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 Texas Workers’ Compensation Commission Appeal No. 002220-S, decided November 7, 2000.

For the reasons stated above, we affirm the decision of the hearing officer but reverse and remand for redetermination of the period for which the carrier is liable for payment of benefits pursuant to Rule 124.3(a).

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

**CORPORATION SERVICE COMPANY  
800 BRAZOS  
AUSTIN, TEXAS 78701.**

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Robert E. Lang  
Appeals Panel  
Manager/Judge

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Michael B. McShane  
Appeals Judge