APPEAL NO. 92071
FILED APRIL 10, 1992

On January 22, 1992, a contested case hearing was held. [The hearing officer] determined that the claimant, the appellant in this appeal, did not sustain a compensable injury on (date of injury 1), in the course and scope of his employment for ("employer"). The appellant has asked that we review this determination and find that the appellant sustained an injury in the course and scope of employment, and is entitled to medical benefits as a result of that injury.

Surprisingly, the appellant does not complain of the plain and obvious error in this decision: that the disputed issue left unresolved at the end of the benefit review conference was never litigated because the issue was redefined by the hearing officer.

DECISION

Because the disputed issue in this matter was not determined by the contested case hearing officer, and because the hearing officer redefined such issue, we reverse the determination of the hearing officer and remand the case for further development of the evidence on the disputed issue: whether the claimant suffered disability as a result of an injury that occurred in either (date of injury 3 month) or (date of injury 2 month) of (year), or whether the disability related to a later recreational injury that occurred off the job. While we believe the great weight and preponderance of evidence in the record as developed is against the hearing officer's determination that an injury in the course and scope of employment did not occur on (date of injury 1), we conclude that his findings are superfluous as determinations of a matter not in issue.

The problem in this case is that the parties to the contested case hearing, and the hearing, and the hearing officer, failed to focus on the real issue in dispute. The appellant contended that he sustained two injuries, one on (date of injury 1), and another that occurred on or around (date of injury 2). No time was lost from work after the (date of injury 1) injury, but time was lost apparently sometime after the contended second injury was sustained, beginning in early (month, year). A benefit review conference was held September 16, 1991; the appellant was not represented at that time. Although the conference report lists on its front page a date of injury of (date of injury 1), the positions of the parties within the body of the report are stated as follows:

> "CLAIMANT'S POSITION: Fell at work on [date of injury 2], didn't want to lose bonus so stayed at work. Reported injury the same day. Went to the doctor on (date). Could not have injured himself playing volleyball because his knees were bandaged up all weekend.
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> CARRIER'S POSITION: Acknowledged that [claimant] did fall on [date of injury 2] and did report the injury but did not have any disability or go to the doctor until re-injuring himself over the weekend.
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> EMPLOYER'S POSITION (IF APPLICABLE): [The claimant] did not show up for work Monday (after date of injury 2). Later advised co-workers he had hurt his leg playing volleyball over the weekend."

The benefit review officer reported that the issue raised but left unresolved was: "Did [claimant] suffer a subsequent injury over the weekend which is causing the disability?"

The respondent filed a response to this report, on October 15, 1991, which was included in the record as a hearing officer exhibit. In this, the respondent agreed that the issue was as stated by the benefit review officer. The respondent goes on to dispute the claimant's position, and states: "Insurance carrier agrees that its position is that there was an incident wherein claimant tripped, while working at [employer], but disagrees with the Benefit Review Conference report that said incident date was May 5, 1991. Instead, insurance carrier would state that the date of this incident was (date of injury 3). Additionally, insurance carrier agrees that claimant did report this (date of injury 3) incident, along with a (date of injury 1) incident wherein he alleged a pulled thigh muscle. But claimant did not sustain injuries resulting in disability nor did he lose any time from his employment as a result of either the (date of injury 1) or (date of injury 3), incidents." The respondent goes on to say that any disability/injury occurred during the weekend of _____ while appellant was engaged in an off-work recreational activity. The response also acknowledged that appellant had earlier reported a (date of injury 1), incident. The respondent concludes by agreeing with the recommendation of the benefit review officer finding that disability related to the "subsequent injury," to wit, a volleyball game injury.

Plainly, the issue left unresolved at the benefit review conference ("BRC") was one of disability. It appears that respondent did not contest then that an injury occurred in the course and scope of employment, but rather asserted that disability, if any, was due to an off-duty recreational activity. And, notwithstanding the date of injury being identified as (date of injury 1), on the report and subsequent correspondence, the report and response of the carrier clearly demonstrate that the substance of that BRC involved whether disability occurred due to an incident which occurred either (date of injury 2) or (date of injury 3), and not on (date of injury 1).

At the beginning of the contested case hearing, both parties initially agreed with the issue as expressed by the benefit review officer. However, after appellant's opening statement, as the hearing officer noted, *sua sponte*, that although the correspondence indicated a (date of injury 1) date of injury, the date everyone discussed was in (date of injury 2 month). The appellant's attorney noted the relevance of the incident on (date of injury 1), although the alleged disability did not occur because of this incident. Respondent's attorney asserted that respondent would appear only on the (date of injury 1) incident because that was the date on the BRC report and all correspondence, in spite of the fact that its own response confirms that the issue was whether disability occurred because of a subsequent (date of injury 3) or (date of injury 2) "incident" at the workplace. Respondent asserted that appellant would have to file a claim for the (date of injury 2) injury before the hearing officer could consider the matter. Appellant noted that he had filed a claim for such after the benefit review conference. The hearing officer then began to reconfigure the issue as one involving whether or not the (date of injury 1), injury occurred within the course and scope of employment. Appellant subsequently attempted to refocus the hearing officer on the actual issue before it: whether disability occurred because of an on-the-job injury or an off-the-job volleyball game, both of which allegedly occurred in (date of injury 2 month). The hearing officer nevertheless stated that he was concerned with "in essence" whether the appellant suffered a compensable injury to begin with. The appellant stated that, if this was the ruling of the hearing officer, he would present evidence on the (date of injury 1) injury as well, but that he viewed the issue as whether disability occurred

because of the (date of injury 2) injury or a volleyball game alleged by respondent. The hearing officer stated that "ultimately, we'll be looking at the overall issue of whether disability relates to an on-the-job injury or an injury off-the-job." Appellant's attorney was then instructed by the hearing officer to eliminate any evidence that didn't relate to this; appellant's attorney requested and received a recess to cull exhibits relating to the (date of injury 2) injury.

It must be noted that the hearing officer, during this discussion, admonished appellant that no one had made any motion to add additional issues to the contested case hearing. He was right; however, his remark was directed at the wrong party. The respondent had not moved the tribunal to accept, as a new issue, the issue of whether an injury occurred within the course and scope of employment. Indeed, its response to the BRC report stated that an (date of injury 3), incident occurred wherein appellant tripped "while working at [employer]." If there was any additional implied issue, it would be as to the date of the subsequent on-the-job injury, and not as to course and scope.

Appellant testified that he was injured as he lifted a 25 pound cable tray and fell back on (date of injury 1). He reported the accident and went to the safety area for treatment. He testified that he did not see a doctor until (date), following a second injury. He stated that he did not miss work until (date of injury 2), although his thigh was painful.

The appellant indicated that he worked three to four days of lighter duty following his (date of injury 1) injury. He unequivocally denied ever telling co-workers that he injured his thigh playing volleyball and stated that he did not play volleyball or softball. Two neighbors, Mr. S and Mr. F, testified that they saw appellant virtually every day and had never seen him play sports or jog after (date of injury 1). Both neighbors recalled that appellant told them in (date of injury 1 month) that he had been injured at work.

Having been instructed not to present evidence on the (date of injury 2) injury, the appellant's attorney objected to questioning by respondent's attorney about the (date of injury 2) injury on the basis that the injury was not before the tribunal. The hearing officer sustained the objection. The carrier sought to inquire as to a hernia that appellant stated he had; an objection was lodged on the basis that this occurred because of the (date of injury 2), rather than (date of injury 1), injury. Notwithstanding the respondent's assertion that it came prepared to try only the (date of injury 1) injury, it is clear from the record that respondent came prepared for the issue of disability relating to the (date of injury 2) injury. Near the end of the hearing, the respondent urged that it should be allowed to present evidence relating to events in (date of injury 2) as pertinent to whether "any disability" incurred by appellant from volleyball.

Over objection from appellant as to the relevance to the (date of injury 1) injury, respondent was allowed to submit four unsworn statements from employees of employer that claimed that respondent said he was hurt playing volleyball in (date of injury 2 month). Medical records presented by respondent show that appellant was treated on (date), for a thigh and knee injury.

It is worth reviewing the process by which issues come before the Commission. Within seven days after receiving written notice of injury (which may or may not be a claim filed by the injured employee), the insurance carrier must begin payment of benefits or file a written notice specifying the grounds for refusal to pay benefits. Article 8308-5.21(b) and (c); also, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § § 124.1, 124.6 (Rules). A benefit

review conference may then be held to attempt to reach agreement on disputed issues. Article 8308-6.12(a). The party requesting the BRC describes the disputed issue or issues. Rules 141.1(b) and (c). During the BRC, the benefit review officer elicits each party's position regarding each disputed issue. Rule 141.5(c)(5). The benefit review officer must issue a report that details each issue that was not resolved at the BRC. Article 8308-6.15(d). The contested case hearing may not consider issues that were resolved at the BRC, or issues that were not considered, unless there is consent of the parties to hear an issue, or a finding that good cause existed for not raising the issue at earier proceedings. Article 8308-6.31(a). The hearing officer will not consider issues not expressly included in this statement. Rule 142.7(a). The statement of disputes consists of the BRC report, the parties' responses to it (if any), written agreements by the parties to add disputes presented by a party, no later than 15 days prior to the hearing, only upon the hearing officer's determination of good cause. Rule 142.7(b) - (e). *See also* Texas Workers' Compensation Commission Appeal No. 92054, decided March 27, 1992. It is clear that the framing of issues brought before the Commission is a function of the parties themselves.

While the hearing officer is under a statutory duty to preserve the rights of the parties and fully develop the facts [Article 8308-6.34(b)], this does not mean that it is incumbent upon a hearing officer to raise disputed issues which the parties arguably could have raised, but did not. In this case, absent a clear dispute at the BRC that an injury occurred in the course and scope of employment, the hearing officer should not have heard an issue not considered at the benefit review conference without consent of the parties. Article 8308-6.31(a). Indeed, the hearing decision itself does not recite an agreement as the basis for changing the issue, but asserts it is predicated on the hearing officer's determination. It is worth noting also that the hearing officer went even beyond his recast issue, by issuing a gratuitous finding that no disability from the (date of injury 1), injury. Appellant's attorney indicated that he would acquiesce in the court's ruling, although he did not agree with it. This is not, we believe, the "consent" meant by the statute or the rules.

Both respondent and appellant used the term "disability" throughout the case and in closing argument to mean physical incapacity or injury. This may explain how the issue was lost. Under the 1989 Act, "disability" is defined as the "inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). Entitlement to temporary income benefits is predicated on a finding of "disability," as well as the state of not having yet achieved maximum medical improvement. *See* Article 8308-4.22; 4.23(a). Entitlement to medical benefits, however, does not depend upon "disability." Article 8308-4.61. *See also* Texas Workers' Compensation Commission Appeal No. 92064, decided April 3, 1992. Whether or not a claimant can perform the job as well after an injury is irrelevant to entitlement to temporary income benefits so long as the post-injury wage is not diminished due to the injury. Certainly, "compensable injury" is an element of the definition of "disability." However, when the existence of a compensable injury is not disputed, not tried as an agreed issue, or cannot be clearly inferred as an implied issue dealt with at the BRC, it should be accepted as a conceded fact for the purposes of determining disability. *See* Article 8308-5.21.

We order that this case be reversed and remanded to determine the issue brought forward through the BRC, and to develop evidence on it. We note that appellant has challenged the sufficiency of the evidence as it relates only to the determination that no injury was sustained on (date of injury 1), in the course and scope of employment, and the

further determination that no benefits are due. These findings were superfluous as made on the issues as redefined by the hearing officer.

A claimant's testimony alone may establish that a compensable injury occurred. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). In light of appellant's uncontroverted testimony that he was injured on the job on (date of injury 1), we could well find that the appealed determinations of the hearing officer on this injury were against the great weight and preponderance of the evidence. However, we need not decide these discrete findings in light of our decision here. We recognize that the appellant has not here specifically complained of the error that he complained of many times in the record. Nevertheless, because the entire decision under consideration fails because it adjudicates issues not raised at the BRC, and because it additionally failed to address the matter in issue at the BRC, we cannot merely consider only the isolated sufficiency of the evidence points raised in the appeal. The situation is analogous to that in Texas Workers' Compensation Commission Appeal No. 92006, decided February 19, 1992, and must therefore be reversed and remanded for further development of the evidence in accordance with this opinion.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge