APPEAL NO. 92079
FILED APRIL 14, 1992

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act) TEX. REV. CIV. STAT. ANN. arts 8308-1.01 through 11.10 (Vernon Supp. 1992). On January 30, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding. He held that respondent (claimant herein) has a disability and is due income benefits since November 5, 1991, and medical benefits relating to the compensable injury. Carrier only objects to Conclusions of Law Nos. 3 and 4 that relate to benefits due claimant arguing that an intervening injury on (date of injury), caused claimant's continued problems upon which these conclusions are based.

DECISION

Finding that the decision and order are based on sufficient evidence, we affirm.

I.

The request for review in this case was timely filed. Subsequent to receipt by the Commission of the response to that request, a Motion to Disregard Response was received from carrier. Thereafter each party submitted two additional letters on the timeliness question.

Carrier submitted a postal form 3849 showing a certified letter to claimant at (street number) was received by Mr. H on February 27, 1992. The next day, February 28, 1992, would start the 15 day time limit under Article 8308-6.41a of the 1989 Act and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §102.3 (Rule 102.3). The last day for the response would then be March 13, 1992. Since that day fell on a Friday, no additional time would be allowed.

Claimant did not directly dispute the accuracy of the copy of postal form 3849 submitted by carrier reflecting service on February 27th. Claimant did say that his office has a policy of dating each piece of mail on the date received and enclosed a copy of the cover letter of carrier's request for review received by his office; that cover letter is dated February 26, 1992, by the writer but also includes a date stamp reading FEB 28 1992. Claimant argues that the 15 days for his response began on February 29th and ended on March 14, 1992. Since March 14th is a Saturday, the final day to file would be the following Monday, March 16, 1992. *See* Rule 102.7.

The response was dated March 11, 1992, but was received by the Commission on March 16, 1992. Of significance, the cover letter to that response contains the typed words HAND DELIVERED in the top right corner. No envelope purporting to have contained that communication is present to infer use of the postal system as opposed to hand delivery on March 16, 1992.

With both a date received from the postal system, as shown by the form 3849 and a different date of receipt as stamped on the letter itself by the receiving attorney's office before us, the date received from the postal system will control and the date the response to the Commission was due was March 13, 1992. *See* Standard Fire Ins. Co. v. LaCoke, 585 S.W.2d 678 (Tex. 1979) in which the date documents were left in the custody of a clerk of court controlled over the date distributed within the courthouse. While the Texas Rules of Civil Procedure do not control the 1989 Act, we also note that this decision is consistent with Tex. R. Civ. P. 21a, "Methods of Service," which states in part, ". . . may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address. . . ."

Claimant did not timely file its response. Since a specific period for filing is set forth in Article 8308-6.41(a), the untimely response will not be considered by this panel.

II.

Claimant was employed by (employer) on (date of injury), when a piece of iron struck him on the back of the left wrist after it had been blown to the height of the oil derrick. No one contests compensability. The orthopedic surgeon, Dr. D, who he saw for a period of time beginning February 19, 1991, found an inflammation of the compartment that encloses the wrist tendons (DeQuervain's tenosynovitis). Claimant was placed on light duty for a period of time and then on March 12, 1991, Dr. D released him to full duty effective March 13, 1991. Claimant did not work for employer after that time although he did take the full duty release to his supervisor and at the hearing characterized himself as ready to go back to work at that time. Employer testified that work was not available the day claimant delivered the release, and thereafter when it sought to notify him of work, could not reach him through the telephone numbers he gave for that purpose. After two weeks carrier said it had to have a full crew and hired another in his place. Dr. D returned claimant to light duty on (date), but that status at such time was based on an injury incurred on (date of injury).

While the inflammation caused by the original injury had responded well to steroid treatment and Dr. D knew there had been an intervening injury on (date of injury), the doctor still characterized as "overwhelming" the possibility that the recurrence of tenosynovitis he saw on November 5, 1991, resulted from the accident of (date of injury).

Carrier showed that claimant on (date of injury), struck a female repeatedly with both hands. While the use of fists was controverted, evidence of the striking was strong, consisting of a police report and signed statement of the victim. This incident gave rise to and sufficiently supported the hearing officer's Finding of Fact No. 10 that stated:

10.Claimant injured his left thumb on (date of injury), in an incident unrelated to his compensable injury.

After claimant had seen Dr. D on four occasions, he sought another doctor soon after Dr. D would not prescribe different pain medication for him on July 10, 1991. Dr. H, an orthopedic surgeon with a subspecialty in hand surgery, was seen beginning on July 18, 1991. Dr. H provided an extensive review dated July 18, 1991, which is not inconsistent with Dr. D's view of claimant's injuries. Thereafter on October 21, 1991, L&N wrote to Dr. D stating that TWCC requests that he see claimant again to report whether an injury being treated relates to the (date) accident on the job. As a result Dr. D again saw claimant on November 5, 1991, and provided his opinion by two letters to L&N dated November 5 and November 6, 1991. (The second was added in response to "verbal questions posed to me today. . . .") In these letters he not only ties the current problem of claimant to the initial injury but also states that the ". . . altercation did not result in any additional injury or aggravation to this patient's work related injury which was the DeQuervain's tenosynovitis." In the November 6th letter Dr. D adds that claimant can only perform light duty work.

Since an carrier only has to "rebut . . . the decision . . . on each issue on which review is sought," Article 8308-6.41(b) of the 1989 Act, no particular form of appeal is required. The panel does not require an assertion of whether the carrier agrees or disagrees/accepts or rejects each finding and conclusion of the hearing officer. In the appeal before us, however, the carrier states "Carrier agrees with the Findings of Fact as enumerated in the hearing officer's decision. Carrier disputes Conclusions of Law No. 3 and 4, to wit:" With this statement before us, we have no requirement under Article 8308-6.42(c) to review any finding of fact. However, in resolving the disputed conclusions of law raised by the carrier, we have considered each finding in light of the evidence of record and determine that all are based on sufficient evidence. We note that carrier provided no other medical evidence than that of Dr. D and Dr. H. No medical evidence indicates that the altercation of (date) is the cause of claimant's current medical condition.

Conclusion of Law No. 3 states:

3.Claimant is entitled to [TIBS] beginning November 5, 1991. (Article 8308-4.21).

This conclusion is supported by Finding of Fact Nos. 14, 16 and 17, which read as follow:

14.Although not now his treating physician, [Dr. D] rescinded his March 13, 1991, return to full duty on November 5, 1991, due to the compensable injury, directing that only light duties be performed.

16.Claimant has been off work due to his compensable injury since November 5, 1991.

17.Claimant still suffers a disability due to his compensable injury of (date of injury).

See Texas Workers' Compensation Commission Appeal No. 91045, decided November 2, 1991, as to payment of temporary income benefits (TIBS).

That no adjustment to TIBS is called for in Conclusion No. 3 is supported by Finding of Fact No. 15:

15.As Claimant had been terminated, no light duties were available to him on November 5, 1991.

See Appeal No. 91045, *supra*, in regard to the fact that no light duty was performed to adjust TIBS.

We note that Finding of Fact No. 14 may prompt a question of the ability of a hearing officer to consider an opinion of a doctor who is not the treating doctor. The hearing officer may consider all medical evidence as to the physical capability of a claimant. *See* Texas Workers' Compensation Commission Appeal No. 91023, decided October 16, 1991.

Conclusion of Law No. 4 states:

4.Claimant is entitled to medical benefits for all health care reasonably required by the nature of the compensable injury, to include the care provided by [Dr. H] for his compensable injury. (Article 8308-4.61).

This conclusion merely follows Finding of Fact Nos. 4, 11, and 12, which read as follow:

4.Claimant suffered a compensable injury to his left hand at the wrist on (date of injury), while working for employer.

11.[Dr. H] was Claimant's second choice of treating physician, as authorized by the Texas Workers' Compensation Act.

12.Both [Dr. H's] treatment and diagnosis included consideration of both the compensable injury of (date of injury), and the non-compensable injury of (date of injury).

This conclusion is also based on sufficient evidence of record including the letters of November 5th and 6th of Dr. D. It is consistent with applicable law, Article 8308-4.61(a) of the 1989 Act which calls for payment of medical benefits "reasonably required by the nature of the compensable injury as and when needed." We note that medical benefits are not mandated only when disability exists so that Conclusion of Law No. 3, based in part upon Finding of Fact Nos. 16 and 17, is not inconsistent with Conclusion of Law No. 4 calling for payment of benefits prior to November 5, 1991.

The hearing officer is the sole judge of the evidence. Article 8308-6.34(c) of the 1989 Act. He weighs evidence and resolves conflicts. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). As trier of fact he could give more weight to the opinion of Dr. D that the basis for claimant's physical condition, observed on November 5, 1991, was the (date) injury than he did to any inference from the police report, statement of victim, and subsequent medical evaluation of (date) that the current injury may have stemmed from the (date) altercation. *See* Highlands Ins. Co. v. Clements, 422 S.W.2d 218 (Tex. Civ. App.-Corpus Christi 1967, writ ref'd n.r.e.).

The challenged conclusions of law are not so against the great weight and preponderance of the evidence as to be manifestly unjust or wrong. International Ins. Co. v. Torres, 576 S.W.2d 862 (Tex. App.-Amarillo 1978, writ ref'd n.r.e.). The decision and order are affirmed.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge