

APPEAL NO. 92330

A contested case hearing was held, following several continuances, on June 17, 1992, at (city), Texas, (hearing officer) presiding as hearing officer. She determined that appellant had waived its right to contest the compensability of the claimed injury and that the injury of (date of injury), was compensable under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art.8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). Appellant urges error in the hearing officer's consideration of an issue involving a waiver of its right to contest compensability, the hearing officer's order to pay medical benefits, and the hearing officer's determination that the respondent sustained an injury in the course and scope of his employment. Respondent argues that the waiver matter was properly considered by the hearing officer or, alternatively, immaterial to the decision, that the order to pay medical benefits was properly based upon evidence of record and that the evidence supports the determination that the respondent sustained an injury in the course and scope of his employment.

DECISION

Finding error in the hearing officer's decision and being unable to determine that the hearing officer based her decision on a correct application of the law, we reverse and remand.

Succinctly, the respondent's claim is based upon an assertion that he suffered an injury or an aggravation of a prior injury when he pushed a hospital lunch or food cart into a door jamb on (date of injury). The sudden stopping of the cart jarred the respondent causing him to feel pain in his upper neck and arms. The next day, according to the respondent's testimony, he went to the emergency room of the hospital, was subsequently referred to a (Dr. M) who had a myelogram performed, was admitted to the hospital and two or three days later had surgery performed on a ruptured disc. The evidence of record also established that the respondent had been in an automobile accident in January 1991 and had sustained a ruptured disc injury to his neck. Indeed, this injury was the subject of considerable treatment with surgery planned apparently on at least one occasion. There is evidence in the record indicating that a potential June or July 1991 operation (a pre-admission form dated "7-8-91" was also in evidence) was not performed because, according to notations in a doctors report, the respondent was concerned about the limitation in his medical insurance. Other records indicated that the respondent saw the surgeon who ultimately performed the surgery on (date) as a "private patient" and that the respondent, on (date), indicated in a telephone call to a (Dr. L), who had been treating him for several months, as follows:

"The patient stated that he injured his dorsal back on (date of injury) while at work due to lifting. He called me stating that he was going to the Emergency Room and that he wanted to have neck surgery done at the (hospital), which was between (two streets). He wanted me to refer him to a doctor who operates in that hospital."

The respondent testified that he was managing his pain from the automobile accident and that he had decided not to have the surgery earlier, not because of inadequate insurance coverage, but because of his evaluation of the risk factors. He stated that the pain after the (date of injury) incident became more severe and unmanageable. In any event, there was considerable conflict in the evidence and a significant degree of controversy about the evidence in the divergent perspectives of the parties to this contested case hearing. It is from this backdrop that we address the troublesome issues before us.

The appellant indicated (and the matter was not disputed) that it first received written notice of the injury on "09/03/91" and filed a Notice of Refused or Disputed Claim on "09/10/91" (TWCC Form 21). The reason for refusal to pay is stated as:

Carrier denies benefits on the basis the employee did require cervical surgery for a prior injury, however refused to have same done due to personal reasons. (Surgery was not required as a result of the above mentioned injury). 2) Surgery was performed prior to carrier's 2nd surgical opinion as required by law under the new Texas Workers' Comp laws.

In the Discussion section of her Decision and Order, the hearing officer found this language to be "clearly an insufficient statement of controversion of compensability" and goes on to state that it "is clearly a dispute of claimant's entitlement to medical benefits rather an (sic) attempt to controvert the compensability of the injury itself" The hearing officer determined, based upon the inadequacy of the language used, that the appellant had waived its right to contest compensability. While we distance ourselves from this observation and determination, particularly under the circumstances of this case and given the background under which the parties were addressing this case, it is not the basis upon which we foot our holding. However, we observe there is no intent that particular or magic language be used to sufficiently contest, refuse or dispute a claim. The language required is:

(9)a full and complete statement of the grounds for the carrier's refusal to begin payment of benefits. A statement that simply states a conclusion such as "liability is in question," "compensability in dispute," "no medical evidence received to support disability" or "under investigation" is insufficient grounds for the information required by this rule." Tex. W. C. Comm'n, TEX. ADMIN. CODE § 124.6. (TWCC Rule 124.6)

TWCC Rule 124.6(d) goes on to provide as follows:

Payment, or denial of payment, of a medical bill shall be made in accordance with the Act, §4.68, and not under this section. However, a carrier that contends that no medical benefits are due because an injury is not compensable under the Act shall file a notice of refused or disputed claim set forth in this section

no later than the 60th day after receipt of written notice of injury.

The language in the appellant's notice, particularly under the somewhat unusual circumstances present in this case, would seem to fulfill the intent and purpose of the rule. *Compare* Texas Workers' Compensation Commission Appeal No. 92278 (Docket No. redacted) decided August 10 1992. We again emphasize, however, that notice requirements under the various articles of the 1989 Act should not be taken lightly. Texas Workers' Compensation Commission Appeal No. 92294 (Docket No. redacted) decided August 14, 1992. They should be as complete and specific as is known at the time.

Our remand is based upon our determination that the issue upon which the hearing officer's decision appears to be principally predicated was not an issue properly before her. Consequently, we are unable to conclude that the decision was not, or to what degree, based upon a misapplication of law. Texas Workers' Compensation Commission Appeal No. 92088 (Docket No. redacted) decided April 21, 1992.

The issue reported from the Benefit Review Conference by the Benefit Review Officer was stated as: "[w]hether or not (appellant) suffered an aggravation to a pre-existing condition thereby establishing a compensable injury on (date of injury)." Under the section concerning the claimant's position, among other matters, is the notation "[c]arrier failed to controvert the injury itself." The notes of the conference do not indicate notice was discussed as a disputed matter and that the conference involved only the appellant's contesting the claim because of the prior injury to the same area and, as a secondary matter, the lack of a second opinion for the surgery. There is no evidence that any responses or disagreements with the conference report were filed by either party. TWCC Rule 142.7(c). At the beginning of the contested case hearing the issue was announced as "whether (respondent) sustained a compensable injury, specifically an aggravation of a preexisting condition on (date of injury)." The respondent's counsel stated "its my understanding that the issue is whether the injury he suffered on (date of injury) was an aggravation, not whether there was an injury, the injury itself has never been controverted." The hearing officer responded "we may have a sub-issue as to whether or not their controversion was ever made or, if made, if it was adequate." The appellant's counsel responded that his understanding of "the issue today is whether or not he sustained a compensable injury on (date of injury)." The hearing officer responded "okay" and asked if both parties were ready to proceed. Respondent's counsel did state her concern regarding payment of medical bills in the context of reasonableness of medical bills. Nonetheless, the case proceeded on the single issue of whether the respondent sustained a compensable injury (the theory of both parties clearly appeared to be based upon an aggravation of a prior injury) on (date of injury). The evidence, opening statements, closing statements and focus of the parties were solely on this single issue, and not on any issue involving timeliness, adequacy or waiver of contesting compensability. The first indication that the focus of the contested case hearing was on this latter matter was when the hearing officer rendered her decision. And, this is the matter that causes us to reverse and remand.

Initially, we can not agree with the hearing officer's implication that notice of contest under Article 8308-5.21 is a "sub issue" under compensability. To the contrary, it is a distinct and separate matter that precedes getting into a dispute involving compensability. (This is not to imply in any manner that both issues, that is, notice and compensability, cannot or should not be raised in the same proceeding and considered, for example, as alternative disputes.) The language of Article 8308-5.21 makes it clear that one does not reach a compensability question (because of a waiver imposed by that article) unless the carrier contests the compensability of the injury on or before the 60th of being notified of the injury. Therefore, if there is an issue as to the timeliness of the notice contesting compensability, i.e., within the 60 days, or the adequacy of the notice within that period, such is a matter that is separate and distinct from compensability, and a resolution of the issue adverse to a carrier may preclude the necessity of considering an issue of compensability. In any event, we are convinced from the record before us that an issue involving the timeliness or adequacy of the notice contesting compensability was not properly before the hearing officer. And, since it appears to us to have been a basis, if not the principal basis, upon which her decision rests, we must reverse and remand for further consideration and development of the evidence, as deemed necessary by the hearing officer and not inconsistent with this opinion. Texas Workers' Compensation Commission Appeal No 92102 (Docket No. redacted) decided April 24, 1992; Texas Workers' Compensation Commission Appeal No. 92038 (Docket No. redacted) decided March 20, 1992; Texas Workers' Compensation Commission Appeal No. 91016 (Docket No. redacted) decided September 3, 1991.

The case is reversed and remanded. Pending the resolution of the matter on remand, a final decision is not rendered in this case.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge