

APPEAL NO. 92350

On June 18, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the respondent (claimant) had sustained a compensable injury to his shoulder on (date of injury), while employed as a construction worker for (employer). The issue for consideration at the hearing was whether the claimant was injured in the course and scope of his employment on (date of injury). Although the issue did not specify a part of the body, the respondent at the benefit review conference, and during the contested case hearing, asserted that he injured his back on (date of injury). The hearing officer has made no findings or conclusions relating to the asserted back injury or any injury on (date of injury).

Appellant asserts that, while it is willing to abide by the hearing officer's decision, the order has created confusion in that it makes no adjudication regarding the back. Appellant states that its interpretation of the order rendered is that no benefits are due as no medical bills have been submitted for respondent's shoulder, and there is no evidence of disability related to the shoulder. (Although this point is not entirely clear, appellant notes that the medical documents presented by respondent contain no evidence of injury to the shoulder but are solely relating to the back.) Appellant further complains that the hearing officer's Finding of Fact that respondent has not worked since May 24, 1991 was unnecessary to the decision and order, and states that it does not agree with this. Appellant asked that the case be remanded for consideration by the hearing officer in order to clarify ambiguity and its responsibilities. In summary, the Appeals Panel is asked to clarify a decision which did not appear to adjudicate the issue before the contested case hearing officer, and on which there appears to be insufficient evidence for the decision that was made, i.e., that a shoulder injury occurred. No response has been received.

DECISION

After reviewing the record, we reverse and remand the decision of the hearing officer for resolution of the issue which was presented, but not adjudicated by the hearing officer-- was claimant injured in the course and scope of his employment on (date of injury)? We believe that the evidence presented by respondent in his case in chief, which involves the back, requires the hearing officer to issue findings and conclusions concerning that injury, which has not been resolved in the hearing officer's decision.

The respondent was hired in (city), Texas by the employer as a laborer. He testified that on (date of injury), he was working for the employer, shovelling concrete, at (Base) in (state). Around noon, he began to hurt in his spine and lower back. Respondent stated that the triggering activity seemed to be the bending and shovelling that he was doing. He stated that he missed work the next day because of the injury. On (date), he reported back to work and reported to his foreman, (Mr. C), through a translator, coworker (Mr. M), that he had hurt his back. Mr. C asked him if he wanted to go to the doctor, but respondent said no, and said he thought perhaps the pain was only the wind. He stated that he was reassigned to light duty, putting chains on forms into which concrete was poured, for the

duration of his employment. Respondent stated that he was laid off May 24, 1991, and has been unable to get work since. He said that he returned and spoke to Mr. C on June 17, 1991 about returning to work; he said he was told to report for work the following Monday but when he did, he was not given a job. A statement of respondent was admitted into evidence which indicated that he began receiving unemployment benefits in the fall of 1991. Respondent stated that the first time he saw a doctor for his injury was September 12, 1991, because he did not have the money to go sooner. Respondent denied that he had ever told anyone that he injured his shoulder.

An initial medical report completed by (Dr. H) shows that respondent visited him on August 9, 1991, and was diagnosed at that time with thoracic sprain and lumbar discogenic syndrome. The date of injury is shown as (date of injury). A similar diagnosis is indicated in a subsequent medical report filed for an October 21, 1991, visit. There is no mention of a shoulder injury in either medical report or in physical therapy records included in the record. The benefit review conference report lists only a back injury as the injury in dispute.

Mr. M testified that he was asked, on a date that he could not remember, to translate for respondent, who wished to tell Mr. C that he had injured his shoulder. Mr. M stated that it was "his impression," or that he got "the idea," that respondent had just hurt himself pulling up stakes from concrete forms. On cross-examination, he stated that respondent could have been referring to his shoulder blade area. He could not recall which shoulder respondent complained about.

Time cards prepared by the employer which were admitted into the record through the company's shareholder, (Mr. W), show that on (date of injury), respondent was working at a project in (city), and was transferred to (Base) the next day. The records show that respondent was paid for working 10½ hours on (date). Mr. W acknowledged that Mr. C was told that respondent had a hurt shoulder. He stated that, to his knowledge, respondent remained employed as a laborer after (date of injury), the same position he held prior to that date. Mr. W said that approximately a dozen people were laid off May 24th because there was no more work for them.

The Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Article 8308-1.01 *et seq.* (Vernon's Supp. 1992) (1989 Act) provides for dispute resolution that begins with the benefit review conference (BRC). Article 8308-6.15. Matters not resolved in this mediation-style proceeding may be brought before a contested case hearing; the matters to be resolved by the contested case hearing officer are those not resolved at the BRC, raised by consent of the parties, or upon determination that there was good cause for not earlier raising an issue. Article 8308-6.31(a). The framing of issues brought before the Commission is a function of the parties, and a hearing officer is not free, outside the provisions of the 1989 Act, to recast the issues to be resolved at the hearing. Texas W.C. Comm'n, 28 TEXAS ADMIN. CODE §142.7 (Rule 142.7); Appeals Panel Decision No. 92071 (Docket No. redacted) decided April 9, 1992. As noted in that opinion, the hearing officer's responsibility to fully develop the record and preserve the rights of the parties "does

not mean that it is incumbent upon the hearing officer to raise disputed issues which the parties arguably could have raised, but did not."

We recognize that a hearing officer is not bound only to the date pleaded by a party as the date of injury, if the evidence indicates that the compensable injury occurred on another date. Texas Workers' Compensation Commission Appeal No. 92022 (Docket No. redacted) decided March 9, 1992. We acknowledge that there is evidence, albeit disputed by the respondent himself, that would support a finding of a shoulder injury. Nevertheless, we believe that the parties to a dispute may reasonably expect that the issues brought to the contested case hearing will be addressed, and that they need not be left to ascertaining disposition of those issues by inference. It was error for the hearing officer to totally substitute another injury, and another date, with no ruling on the date and injury actually brought through the dispute resolution process.

We would further note that the stipulations agreed to by the parties at the beginning of the hearing with regard to respondent's employment, insurance coverage, and residence, all agreed to a date of "(date of injury)" as an element of those stipulations. The hearing officer has unilaterally changed those stipulations to "(date)." While the hearing officer is free to make findings of fact along with stipulations, a hearing officer may not rewrite a stipulation and yet still present it as a stipulation.

As to appellant's point about the finding that respondent had not worked since May 24, 1991, we would agree that it was unnecessary to any issue before the hearing officer. However, as such, it does not preclude the appellant from asserting that the respondent was not disabled, as the order awards benefits "if any are due as a result of this injury." Therefore, any error is harmless.

The decision of the hearing officer is reversed and remanded. The case is remanded for further consideration and development of the evidence, if further evidence is deemed necessary by the hearing officer, not inconsistent with this opinion.

Pending resolution of remand, final decision is not rendered.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge