APPEAL NO. 92437

On July 17, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer asked the parties at the outset whether they agreed that the two disputed issues were (as stated on the disputed issue forms accompanying the benefit review conference (BRC) report) as follows: (1) "whether cervical problems are related to the (date of injury) injury and are compensable under this claim," and (2) "whether claimant has reached Maximum Medical Improvement (MMI) related to the cervical injury." Appellant asserted that the hearing officer's framing of the issues was inaccurate because the BRC report's disputed issue form stating the first issue indicated that appellant had contended at the BRC that respondent had not contested the compensability of his neck injury within 60 days of its first knowledge of a cervical problem, as required by TEX. REV. CIV. STAT. ANN. art. 8308-5.21 (1989 Act). According to the disputed issue form, appellant contended at the BRC that respondent had ample notice that his cervical injury was related to his compensable back injury claim, whereas respondent contended its contest of appellant's cervical injury was timely. The benefit review officer recommended that appellant did sustain a cervical injury in addition to the injury of his lumbar area resulting from his (date of injury) injury, and that respondent had ample knowledge of a probable cervical injury from certain documents. Respondent's attorney, who had not been present at the BRC, stated that he saw the references to the Article 8308-5.21 issue in the disputed issue form, and that while he was willing to argue whatever facts the Texas Workers' Compensation Commission (Commission) felt were covered at the BRC, he believed appellant had waived any issue which he felt should have been included in the BRC report. The hearing officer then stated: "I'll carry that along as part of that disputed issue and just have to listen to the proof on that . . . appears to me it's a question of whether the cervical injury was part of the (date of injury) injury . . . we'll just take that up as we come to it." The parties proceeded to present appellant's testimony, medical records and other documents, and argued their respective positions as to whether respondent had timely contested the compensability of the cervical injury. The hearing officer determined that while appellant had sustained a compensable injury to his lumbar spine on (date of injury), he had not then sustained a compensable injury to his cervical spine. Accordingly, the hearing officer decided that appellant's cervical problems were not compensable under the claim, and that he therefore need not decide whether appellant had reached MMI as to his cervical injury. In his request for review, appellant challenges the failure of the hearing officer to expressly address the issue of respondent's timely contest of the cervical injury with findings of fact and conclusions of law. Appellant says that the hearing officer must have impliedly found that respondent did timely contest the neck injury in order to determine that appellant did not sustain a compensable neck injury. Appellant also challenges the sufficiency of the evidence to support a determination that respondent did timely contest the neck injury. Respondent first asserts that because the hearing officer failed to mention the issue of its compliance with Article 8308-5.21 in his Decision and Order, it was therefore not a disputed issue at the hearing. Respondent then goes on to discuss the adequacy of the evidence to support its position that its contest of the compensability of appellant's neck injury was indeed timely.

DECISION

Finding that the hearing officer erred in failing to make appropriate findings of fact and conclusions of law regarding the issue of whether respondent timely contested the compensability of appellant's neck injury claim, we reverse and remand.

Appellant, the only witness, testified that while he resided in (city), Texas, more than 75 miles distant, he nevertheless desired that the hearing be held in (city) to reduce his costs. The hearing officer determined that good cause existed for the hearing to be held at a location more than 75 miles from the claimant's residence at the time of the injury. Article 8308-6.03 (1989 Act). In 1977 or 1978, appellant had fallen from a horse, injured his back, and undergone a lumbar laminectomy. Appellant said that on (date), while employed by (employer), he was in the process of setting up a drilling rig truck and hurt himself when he pushed on a cheater bar to tighten rig pole cables. He felt pain through his shoulders and down into his legs. He saw (Dr. G) the following Monday, (date of injury), complaining of back pain. (Dr. G's) records indicate appellant had pain for the past two weeks in his old laminectomy and fusion scar, and reported pain running down his left leg to his toes, but mostly in his left thigh. He was provided medications and taken off work for 10 days. He returned to (Dr. G) on January 23rd reporting pain radiating from his back down his left leg and an appointment was made for February 7th with another doctor. Appellant again saw (Dr. G) on January 28th and reported pain radiating from his back down his left leg. (Dr. G) reached a diagnosis of herniated lumbar disc. Appellant saw (Dr. M), an orthopedic surgeon, on February 7th and reported pain radiating down from his lower back into the buttocks, thigh, foot and toes. An x-ray of his lumbar spine showed his earlier fusion from L5 to S1. (Dr. M) diagnosed "left sciatic pain, probably related to recurring disc at 4-5 or 5-1." Appellant saw (Dr. M) again on February 21st, March 1st, and March 28th. His myelogram and CT scan of February 12th showed no obvious disc abnormality. His diagnosis was changed by (Dr. M) to "low back pain, probably musculoligamentous in origin." While appellant's post-myelogram headache had resolved, he still had low back pain and (Dr. M) intended for him to start a back rehabilitation program.

Appellant was interviewed by an employee of respondent on February 8th and when asked specifically what part of his body he injured he responded "the lower part of my back."

On March 1, 1991, appellant signed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) which stated his body parts affected as "head, neck, shoulders, back, arms, legs, hands, feet, and entire body in general." On that same form, when describing how the accident happened, appellant stated he was "tightening a walking boomer when I felt a sharp pain in my [neck] back." The word "neck" was crossed out and appellant offered no explanation therefore. Appellant testified that he had hurt all over, had a sharp, burning pain in his neck which ran down to his shoulders and hips, and that he believed his neck problem was related to his (date) injury.

On March 23, 1991, appellant was seen by (Dr. P) to receive an epidural steroid injection at S1. (Dr. P's) record indicates he examined appellant and that appellant

provided a history of low back pain and left leg and hip pain since his back injury at work in (month). In May 1991, appellant began treatment with (Dr. V), a rehabilitation and physical medicine specialist, and he said he told (Dr. V) he had shoulder pain as well. According to (Dr. V's) records, appellant gave a history of feeling sharp pain in his lower back radiating down his left leg when he injured himself on (date). (Dr. V's) impression was that appellant "more than likely has an annular tear of L4-L5." He noted appellant was in no acute distress and primarily had pain when bending forward and backward. (Dr. V) started appellant on a work fitness program and continued his steroid injections from Dr. Paige. On June 26th, (Dr. V's) records indicated that appellant was in his last week of his work fitness program, and that his pain was centralizing. (Dr. V) stated that appellant "had a 20% impairment level for lumbar disc disease which has been operated on in the past and now has had an exacerbation and left L5 radicular symptoms which have gone on for approx. a 6 month period of time." (Dr. V) saw appellant again on August 7th and encouraged him to continue with his exercise and strengthening program. (Dr. V) noted that appellant's primary problem was his "multi-level disc disease." (Dr. V) felt it was going to be nearly impossible for appellant to obtain complete relief from pain.

According to the records, appellant saw (Dr. M) again on July 25th, requested a second opinion from a neurologist, and was referred to (Dr. R) who saw and examined appellant on October 7th. According to (Dr. R's) report of that date, appellant was seen for evaluation of back pain with radiation into his left leg following his job-related injury of (date). (Dr. R) found appellant to be tense but in no acute distress. (Dr. R) noted that upon physical exam appellant's "neck appears to be supple without masses, adenopathy or megaly." (Dr. R's) report stated that appellant had apparently failed to respond to outpatient conservative treatment and even claimed the therapy may have worsened him. He reviewed appellant's prior myelogram and post-myelogram CT scan and it was his impression that appellant may have a ruptured disc in his back, but possibly some other form of radiculopathy. (Dr. R) ordered MRI and isotope bone scans. In his October 18th review of those scans, (Dr. R) stated they appeared to be normal. He said there was "a focal mild narrowing to 14 mm, the lower limit of normal, at the C5-6 level."

Appellant saw (Dr. V) again on December 17th, and on February 4, 1992. (Dr. V) noted on each of those visits that there were no new medical problems, that appellant continued to have problems "from more of a spinal stability standpoint," and that his impression was that appellant had approximately "a 12% impairment level for lumbar disc disease," but was employable so long as he avoided repetitive bending and lifting over 30 pounds. (Dr. V) signed a Report of Medical Evaluation (TWCC-69) which stated that appellant had reached MMI as of "2-4-92" with a 12% whole body impairment rating.

On April 10, 1992, appellant went to the minor emergency center of (Hospital) in (city) and was seen by (Dr. P). The record of that visit noted complaints of back pain, and of neck pain for one week, and also noted persistent neck and lumbar pain for one year. (Respondent contended this medical record was the first to reflect that appellant was complaining of neck pain.) (Dr. P) wrote respondent on April 27th advising of his review of an MRI done on April 10th. He said it demonstrated spondylosis and disc herniation at C5-

6 which was the probable source of appellant's pain. (Dr. P) felt appellant needed management by a multitude of specialists.

Respondent prepared a Notice of Refused/Disputed Claim on May 11, 1992 by which it refused treatment for appellant's cervical spine stating that there had been no mention of neck or cervical problems until ten months after the date of the initial injury, and that an examination by appellant's physician on February 14 (sic), 1992 did not indicate cervical problems.

At the BRC, the parties reached agreement that (Dr. V's) 12% impairment rating of the lower lumbar area was correct, and that respondent would pay impairment income benefits for the lumbar area based on 12%. At the contested case hearing, the parties indicated that if appellant were determined to also have a compensable neck injury stemming from the (date) incident, the 12% impairment rating would be increased to account for such. At the contested case hearing, appellant argued, in essence, that respondent had notice of his neck injury as early as October 1991 after (Dr. R)'s MRI showed some narrowing at the C5-6 level. Respondent contended it had no notice of a neck injury until it received (Dr. P) April 27, 1992 letter advising that the April 10th MRI showed a disc herniation at C5-6; and, that its May 11th contest of the compensability of appellant's neck injury was timely.

Article 8308-5.21(a) (1989 Act) provides, among other things, that "[i]f the insurance carrier does not contest the compensability of the injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability." *And see* Tex. W.C. Comm'n, TEX. ADMIN. CODE § 124.6 (TWCC Rule 124.6). In Texas Workers' Compensation Commission Appeal No. 91057 (Docket No. redacted) decided December 2, 1991, we considered a record which was devoid of there having been raised at the hearing an issue concerning the carrier's timely contesting of compensability. We there said that if the issue is not raised at the BRC, then it may not be considered at the contested case hearing except by consent of the parties or upon a determination of good cause. *See* Article 8308-6.31(a) and TWCC Rule 142.7. TWCC Rule 142.7(a) provides that "[a] dispute not expressly included in the statement of disputes will not be considered by the hearing officer." By contrast, we believe a fair reading of the first disputed issue form from the BRC in this case included the timely contest (Article 8308-5.21) issue, considering not only its reference to Article 8308-5.21, but also the positions of the parties and the benefit review officer's recommendation. The hearing officer appeared to recognize the existence of the issue when he said he would "carry that along as part of the disputed issue." *Compare* Texas Workers' Compensation Commission Appeal No. 92330 (Docket No. redacted) decided August 31, 1992, where under the circumstances of that case, we did not agree with the hearing officer's implication that the carrier's timely notice of contest was a "subissue" under compensability. *Also compare* Texas Workers' Compensation Commission Appeal No. 92268 (Docket No. redacted) decided August 16, 1992, where the hearing officer raised an Article 8308-5.21 issue *sua sponte*.

Article 8308-6.34(g) provides that the hearing officer shall issue a written decision that includes findings of fact and conclusions of law. Appellant's efforts at the hearing were directed towards establishing not only that he had sustained a neck injury on (date), but that respondent was notified of that injury as early as October 1991 yet failed to contest its compensability before May 11, 1992. Respondent's efforts were directed towards showing that it had no notice of the neck injury before receiving (Dr. P) April 27th letter with the new MRI results. Under these circumstances, we believe the hearing officer erred in failing to make any express findings on this issue and we remand for that purpose. It is possible that in expressly finding and concluding that appellant did not sustain a compensable neck injury, the hearing officer impliedly found that respondent did timely contest the compensability of such an injury. It is equally possible that the hearing officer overlooked the issue. Were the hearing officer to have found respondent's contest of the neck injury untimely, thus waiving its right to contest compensability, he may have then concluded that appellant had sustained a compensable injury. We refrain from weighing the sufficiency of the evidence to support the hearing officer's finding and conclusion that appellant did not sustain a compensable neck injury pending the return of this case after remand.

The decision of the hearing officer is reversed and the case is remanded for additional findings of fact and conclusions of law, as appropriate, and for reconsideration not inconsistent with this opinion. Pending resolution of the remand, a final decision is not rendered in this case.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Robert W. Potts
Appeals Judge