

APPEAL NO. 92503
FILED OCTOBER 29, 1992

A contested case hearing was held on August 25, 1992. [The hearing officer] determined the respondent-cross appellant (hereinafter called claimant) did not injure his back on _____, when he stepped in a hole at his work place and that he has not reached maximum medical improvement (MMI) for an injury to his ankle on the same date.

She ordered the payment of temporary income benefits (TIBS) pursuant to Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). Appellant (hereinafter called carrier) agrees with the determination of the hearing officer on the back injury issue but asserts error in the hearing officer's determination that claimant has not yet reached MMI and ordering that TIBS be paid. Claimant urges error by the hearing officer in her determination that a compensable back injury was not sustained on _____, and requests affirmance of the determination that MMI has not been reached.

DECISION

Concluding that the hearing officer's determination that a compensable back injury was not sustained by the claimant on _____, is against the great weight and preponderance of the evidence and is manifestly wrong, we reverse and render. The hearing officer's decision concerning MMI, being erroneous based only on the ankle injury, is necessarily reversed by our determination that a compensable back injury has been sustained. The matter of MMI should appropriately be addressed anew in the dispute resolution process.

Initially, we note that the issues before the hearing officer as stated and agreed to at the beginning of the hearing were (1) whether the claimant injured his back as well as his ankle in the course and scope of his employment on _____ and (2) whether he is entitled to TIBS up to the date MMI was certified by the designated doctor or only up to the date that MMI was certified by the carrier's choice of doctor. Although we need not determine this issue under the circumstance of this appeal, we have previously held that certification of MMI by a carrier's choice of doctor alone does not authorize the immediate stoppage of TIBS otherwise due. See Texas Workers' Compensation Appeal No. 92374, decided August 28, 1992. In this same vein, the hearing officer based her determination that MMI had not been reached in this case because the TWCC Form 69 (Report of Medical Evaluation) offered in evidence from the designated doctor and carrier selected doctor had not been signed. We have previously held that an unsigned TWCC Form 69 is insufficient to certify MMI or an impairment rating. See Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992; Texas Workers' Compensation Commission Appeal No. 92027, decided March 27, 1992. However, we also have held that a doctor certifying MMI and an impairment rating on a TWCC Form 69 may, under appropriate circumstances, amend or otherwise correct a previously rendered TWCC Form 69. See Texas Workers' Compensation Commission Appeal No. 92441, decided October 8, 1992.

There is no contest in this case that the claimant sustained a significant injury on _____. According to his testimony, as he was rushing to get to a control to shut down a machine that was not functioning properly, he accidentally caught his foot in a hole where a pipe had been. He severely twisted his ankle and caught a vertical beam to prevent himself from falling and injured his back in doing so. He saw the company nurse and subsequently saw a Dr. S who took him off duty for a week. His ankle did not get better and he returned to Dr. S. He states that he was also having pain in his back at this time but thought it was from the strain when he fell. He did not mention the back pain to Dr. S. He testified that he worked for approximately a week (apparently light duty) and when he was not better he again went to see Dr. S. A cast was placed on his ankle and he was put on crutches for a short period and then returned to work in the cast. He states he was still having problems with his back but thought it was because of having to walk in the heavy cast (the cast had to be strengthened after a week). Since the ankle did not get better, Dr. S referred him to Dr. C, an orthopedic surgeon who saw the claimant on October 9, 1991. Dr. C felt the claimant had a ligamentous injury and recommended that he stay off work for another two weeks. He did not mention to Dr. C that he was suffering back pain at the time. Dr. C returned the claimant to work on October 28th. The claimant states the pain in his back got worse and on November 6th he attempted to see Dr. C but was advised that he was not available until November 11th (the attempt to see Dr. C on November 6th was verified by his office). He saw Dr. C on November 11th and was told he probably had a strained ligament in his back. The claimant was taken off work and on November 27th, according to a report from Dr. C, an MRI showed the claimant had a herniated disc at L4-5 and he was put on "therapy and a conservative course."

Medical reports in the record indicate that the claimant was seen at the (Healthcare Provider) by a Dr. G in March 1992. An opinion was rendered that the claimant had a "posterolateral L4-5 disc prolapse extending into the intervertebral foramen." A recommendation was made for a laminectomy discectomy and a spinal fusion at L4-5. Dr. C advised the claimant to be very cautious about surgery and the claimant decided to wait. Dr. C prescribed medication to help him sleep and told him to return in a month.

The claimant was subsequently seen on "5-4-92" by a carrier selected doctor, Dr. L, who found MMI effective "10-28-91" and assessed a whole body impairment rating of "0%." He indicated in his report as follows:

IMPRESSIONdiagnosis--1. Post sprained ankle, resolved. 2. Low back complaints, referable to degenerative disc disease without radiculopathy or focal signs of nerve root compression either on the physical exam or upon imaging. The medical records which have been presented do not support any lumbar injury in association with the incident of _____.

A subsequent letter from Dr. G of the (Healthcare Provider) dated June 4, 1992 indicates that he reviewed the report of Dr. L. Dr. G states the following:

Thank you for forwarding a copy of [Dr. L's] assessment of [claimant]. I

have reviewed [Dr. L's] notes and note that he was of the view [claimant's] back condition was unrelated to his work related injury. My notes are unclear as to the exact onset of this man's back pain, but it appears to have come on within the first three weeks following the injury.

I also note that (Dr. L) did not find any significant disc prolapse on the CT Scan; however this finding is quite clear, there is a definite disc prolapse.

A report of Dr. H, who was appointed as the designated doctor, provides as follows:

[Claimant] states that in (month) (year) he injured his ankle and back on the the (sic) job. His workers (sic) included a negative myelogram but a CT Scan demonstradt (sic) a HNP at L4-5. This herniation appeared to be enroaching (sic) on the nerve root. Without further surgery, [claimant] has reached his MMI.

Dr. H's report goes on to give an MMI date of "6-15-92" and assigned an impairment rating of 5 percent.

The claimant introduced into evidence statements of various family members and acquaintances who attested to his suffering back pain following his accident of _____ . Also introduced was a statement of his wife dated August 25, 1992, which provides:

I, [wife] would like to make this statement and have it entered as testimony in this hearing. After the accident, my husband is limited in his ability to do normal everyday activities. Several changes have taken place in our life because of his inability to work. The pain and pain medication have changed his personality and his attitude in general.

A statement from the claimant's doctor, Dr. C dated August 7, 1992, provides as follows:

[Claimant] has ask me to make a statement regarding the possibility of whether his back was injured at the time of his original left foot and ankle injury, and when asked that question I would have to say that it was a possibility. As I have stated before, I did not have that history on (one month after date of injury) when I first saw him and, of course, this was approximately one month after his original injury.

The carrier introduced testimony of a receptionist of the employer who testified that the claimant's wife called in on November 8, 1991 and indicated the claimant could not come to work because of back problems. She also testified that she saw the claimant with his wife the next evening at a local club and that he did not appear to her to be having difficulty.

The hearing officer indicated in her discussion that the claimant "made a generally credible witness," however, she deemed the claimant's explanation "unconvincing" for not complaining about the back injury for nearly two months as indicated by the medical records. Accordingly, she found that he did not injure his back on _____, when he stepped in the hole at his place of work.

From the evidence set out above, we are convinced that the great weight and preponderance of the evidence is against her finding and that it is wrong. See In Re King's Estate, 244 S.W.2d 660 (Tex. 1981). We do accord appropriate deference to a hearing officer in his or her fact finding role and are instructed to do so as clearly set forth in Article 8308-6.34(e) which provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. However, where our careful and thorough evaluation of all the evidence in the record compellingly leads us to conclude that the evidence in opposition to a finding is so great in weight and preponderates against the finding, we must set aside such finding on a legal sufficiency basis. See Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991. This is the situation in this case.

The matters we find to be so persuasive in this case to warrant our reversal include the following: (1) the undisputed fact that the claimant experienced a significant accident and sustained a rather serious injury on _____ which shortly thereafter required a cast and use of crutches for a short period; (2) his description of the incident, also unrebutted, which indicates a somewhat traumatic force on the body in stumbling in the hole in the floor and taking action to prevent a fall to the ground; (3) the absence of anything in the record to suggest this incident would in any way be inconsistent with the type of injury claimed, both the ankle injury and back injury; (4) that, given the type of incident experienced, common knowledge and experience would tend to lend support to the reasonableness of claimant's assertions regarding his subsequent back pain and his immediate thought that it was not separately serious but was connected to the ankle injury and the cast on the ankle; (5) the presence of evidence, other than the claimant's testimony, that he was experiencing back pain several days following the incident; (6) the fact that a serious back condition, a disc herniation, was eventually diagnosed during the course of the claimant's continued and uninterrupted treatment following the accident on _____; (7) the statements of both Dr. C and Dr. G which are consistent with the causal relationship of the back injury and the on-the-job accident; (8) the report of Dr. L, which did not acknowledge the findings of the other doctors regarding the disc prolapse, appears to base the conclusion that any back injury was not related to the incident of _____ on the absence of support in the medical records reviewed; and, (9) the statements of Dr. G and Dr. C which were rendered subsequent to the report of Dr. L. Furthermore, in the case of a back injury, which is a matter of more common experience, medical or expert evidence is not essential to establish a causal connection between the injury and the employment. See Houston Independent School District v. Harrison, 744 S.W.2d 298 (Tex. App.-Houston [1st Dist] 1987, no writ). In sum, an incident occurred, it could reasonably cause the type injury claimed, the claimant shortly thereafter experience

back pain, he subsequently went to the doctor for the back problem when his ankle problem appeared to be resolved, he was subsequently diagnosed with a herniated disc, nothing indicates any other cause of the herniated disc, and doctor's statements indicate the possibility of the job relationship together with the claimant's testimony relating the injury to the job. That a compensable back injury was sustained is, in our view, where the great weight and preponderance of the evidence lies in this case.

The decision and order of the hearing officer are reversed. We render a new decision and order that a compensable back injury was sustained by the claimant and that he is entitled to all medical and income benefits provided under the Texas Workers' Compensation Act and Commission Rules for his compensable injuries of _____.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge