APPEAL NO. 92531

On August 5, 1992, a contested case hearing was held in (city), with (hearing officer) presiding. The hearing officer determined that the claimant, (claimant), who is the respondent, sustained an injury in the course and scope of his employment with (employer), on (date of injury); that he had disability from this injury for the periods from (date of injury) through 3, 1992, and April 6 through 13, 1992; that the carrier, who is the appellant, has waived its contest of the compensability of that injury by failing to file a written dispute of same within 60 days after receiving written notice of injury; and that carrier failed to show newly discovered evidence that would justify reopening the issue of compensability of the (date of injury) injury. The hearing officer further found that the carrier is not liable for claimant's injuries sustained on (date) while he was undergoing medical treatment, finding that he purposefully fell on that date in order to exacerbate his injuries.

The carrier has appealed and argues that it was error for the hearing officer to hold that the claimant was injured in the course and scope of employment on (date of injury), and that the carrier had waived its right to contest compensability of that injury. The claimant filed a response that is essentially a cross-appeal, asking that the determination that he purposefully injured himself be reviewed and reversed. The claimant also asks that the amount of average weekly wage and periods of disability found by the hearing officer be reviewed and reversed. The claimant agrees with the hearing officer's decision concerning the injury of (date of injury) and the period of disability found for that injury. The carrier replies that the response cannot be considered as an appeal because it was filed beyond the 15 days allowed for an appeal.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

The claimant worked for the employer as an electrician's helper on (date of injury). In the course of working on a residence, the claimant tripped and fell over something he could not recall and fell flat on his face. He stated that he injured his knee, his groin area, and his hand, and that his back began to hurt a little while later. Claimant's contention that he fell that day was supported by affidavits from two painters who witnessed the fall and who were not employed by the claimant's employer nor personally acquainted with him. These witnesses stated that claimant tripped over a cord. Claimant's supervisor, (Mr. H), testified for the carrier and agreed that he heard a loud crash from the adjoining room where the claimant was working, found claimant sitting on the floor, and that claimant told him he fell and hurt his knee. Another coworker, (Mr. B), testified to seeing extension cords around the room where the claimant fell. All witnesses noted that there was paper covering the floor which was torn up in spots.

That day, the claimant went to a clinic suggested by the employer, the (Clinic). He consulted with (Dr. H), who took him off work and prescribed physical therapy at the Clinic. The record indicates that the claimant received therapy on his knee every weekday, and was set for re-evaluation of his condition after a scheduled treatment (date).

On (date), while trying to arise from a whirlpool bath where he received therapy, he fell. The circumstances of the fall were sharply disputed. The room at the Clinic where the tub was located was described by witnesses for both parties as small, around six feet by six feet, with a bath-tub sized whirlpool unit taking up most of the center of the room. A seating platform or bench was placed across one end of the tub so that a patient soaking an affected limb would be able to sit up out of the tub. The claimant stated that he had been soaking his right leg, and his left leg was outside the tub and supported on a stool. He stated that when his period of therapy ended, the physical therapist, (Mr. W), returned to the room, gave him a towel to dry his right leg off, and took hold of his right arm above the elbow. The claimant said that he could not dry off the entire leg, and his right foot was still wet. The claimant said that he turned on the bench to his left and set his right leg down on the floor. He stated that as he rose, his leg slipped or buckled and he fell back, to his left, hitting his head and back. The claimant maintained that he did not use his free left arm to brace himself on the edge of the tub because he was right handed, and that he could not use the right hand to brace because Mr. W had hold of his right arm. Claimant testified that Mr. W was on the other side of the tub from him, but that his head was also close to his. Claimant initially testified that it was his left leg that buckled; however, in cross-examination, he stated that his right leg slipped in water.

The therapist denied that there was water on the floor. Mr. W indicated that it was part of his responsibility to check that there was not any water, in order to prevent falls. He stated that he was supporting claimant on his right side because the injured leg was on that side, but indicated that he also was lending support against claimant's back with his left hand. Mr. W said that claimant went suddenly down to his left side, did not cry out or yell for assistance, and made no attempt to catch himself on the adjoining walls, the tub, or the therapist. Mr. W testified to his impression that the claimant pulled away from his efforts to support him. Mr. W had been a physical therapist for 34 years, and it was his experience that people who fall usually try to prevent being hurt by attempting to break the fall. He indicated that the claimant was able to dry his right leg without requesting assistance, and that he had done fairly well in therapy before. The claimant was taken from the area by wheelchair, examined by Dr. H, and told by Dr. H to call if he had further problems.

After (date of injury), at the same time he was going to the clinic, claimant consulted his family doctor, (Dr. M), who took him off work the remainder of the week and referred him to (Dr. A). A letter from Dr. A dated April 6, 1992, states that claimant injured his knee (a "mild to moderate" contusion), had only an old fracture to his hand, which was swollen, and muscle spasm in his low back. This letter notes treatment by the Clinic but states that he was "released" by that Clinic. Dr. A's letter does not state anything about claimant's ongoing physical therapy. Dr. A put him on "no work" status with a recheck scheduled in a week, and recommended he see another doctor for evaluation of a possible hernia. A letter from Dr. A to the carrier's adjuster on April 14, 1992 indicates that claimant changed his appointment with Dr. A and ultimately did not show up for his appointment.

The claimant saw a few other doctors after the (date) incident. An MRI of the right knee, conducted May 1992, lists findings "suggestive of what appears to be a horizontal tear involving the posterior aspect of the medial meniscus. Clinical correlation is recommended." That same month, MRI exams of the cervical spine showed spur formation and bulging on the left side of C5-6; MRI of the lumbar spine found a L5-S1 protrusion indicating a "likely" central disc herniation. The claimant stated he has not worked since the accident on (date of injury). He stated that he was not aware, prior to (date of injury), that a civil suit had been filed against him and the employer. The hearing officer sustained the claimant's objection to further development of facts regarding the civil suit, on the basis that it was not relevant to the occurrence of an injury, although the carrier asserted that such evidence would supply a motive for what it contended were intentionally self-inflicted injuries.

The carrier filed three "TWCC-21" forms to indicate either payment or refusal of compensation. On April 10, 1992, the carrier began payment of temporary income benefits. On April 11, 1992, it supplied the employer's wage statement with this form. On May 12, 1992, the carrier disputed further liability, stating that "as of (date), claimant sustained an intentional injury further injuring himself to enhance his alleged injuries. Carrier denies further medical benefits and further temporary income benefits and requests a brc [benefit review conference]." Earlier, on April 27, 1992, the adjuster filed a request for an expedited benefit review conference, stating "[c]arrier has information that claimant has sustained an intervening injury on (date). Carrier does not feel that they owe for this new incident, according to our investigation. Carrier disputes continuing TIBs according to Article 3, Section 3.02(2)."

TIMELINESS OF CLAIMANT'S APPEAL

We cannot consider the claimant's appeal that is part of his response, because it was not filed within 15 days after the hearing decision was received, as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.41(a) (Vernon's Supp. 1992) (1989 Act). According to the rules of the Texas Workers' Compensation Commission (Commission), a request is presumed to be made timely if mailed on or before the 15th day after receipt of the hearing officer's decision, and received by the Commission not later than the 20th day after the date of receipt of the decision. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §143.3(c) (Rule 143.3). Rule 102.5(h) states:

> For purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the Commission shall deem the received date to be five days after the date mailed.

According to the Commission's records, the hearing officer's decision was mailed to the parties on September 18, 1992. Five days after that date yields a date of receipt of September 23, 1992. Counting fifteen days from the latter date means that an appeal had

to be filed by October 8th, and received by October 13th, to be filed timely. The claimant's response was both filed and received after October 13th.

WAIVER OF DEFENSE TO (DATE OF INJURY) INJURY

We agree with the hearing officer's findings and conclusions regarding the untimeliness of the carrier's dispute as to the compensability of the (date of injury) injury. Assuming *only for purposes of argument* that a carrier's request for a Benefit Review Conference (BRC) could be taken as a proper notice of dispute under art. 8308-5.21 and Rule 124.6(c), it is clear that even this document fails to assert that the claimant was not injured in the course and scope of employment on (date of injury). The documents filed by the carrier to justify the cessation of temporary income benefits do so because of the intervening (date) injury. Rule 124.6(a) and (c) expressly require a full and complete statement of the basis for refusal of a claim. In our opinion, this negates carrier's contention that there can be "substantial" compliance in setting forth the grounds of a dispute. The mere listing of the (date of injury) date of injury on its notice of refusal
does not put the compensability of the (date of injury) injury in dispute.

We will not impose upon the Commission a duty either to sift through the various carrier filings, or the language therein, to infer either that a dispute has been filed, or the nature of such dispute. In any case, how the alleged dispute was filed is not the primary determining factor in this case. Even had carrier filed a TWCC-21 form which used the exact language set out in its request for a BRC, it would still be limited in its defense to its contention that the intervening (date) injury was intentional, absent a showing of newly discovered evidence that could not reasonably be discovered at an earlier date. Article 8308-5.21(c). *See also* Texas Workers' Compensation Commission Appeal No. 92278, decided August 10, 1992.

WHETHER THE EVIDENCE SUPPORTS THE OCCURRENCE OF AN INJURY ON (DATE OF INJURY)

The hearing officer's affirmative findings that the claimant was injured in a fall on (date of injury), are more than adequately supported by evidence, not only from claimant, but from two disinterested witnesses and one of carrier's own witnesses, Mr. H. There is medical evidence (prior to the second fall) that corroborated this. In contrast to evidence presented regarding the (date) fall at the clinic, there was essentially no evidence that the (date of injury) fall was intentional or contrived. Although the carrier questioned the claimant somewhat as to his diligence or carelessness on (date of injury), the claimant's attorney correctly noted that such is not a defense to compensability. *See* art. 8308-3.01(a), 1989 Act.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the

evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

There being sufficient evidence to support the decision of the hearing officer, we affirm her decision.

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Susan M. Kelley
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge