APPEAL NO. 93864

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). This case is before us again following our remand in Texas Workers' Compensation Commission Appeal No. 93226, decided May 13, 1993. The remand was predicated on our holding that the hearing officer failed to make a finding on the actual issue on which the parties tried the case: whether a subsequent non-compensable injury was the sole cause of the claimant's present condition. We remanded the case for further development and consideration of the evidence in order to resolve that issue.

On August 17, 1993, a contested case hearing (CCH) on remand was held in (city), Texas, with (hearing officer) presiding as hearing officer. No additional testimony was taken at this CCH on remand, even though both parties were given an opportunity to present additional evidence. Each side argued its position based on the evidence admitted at the original CCH. The appellant (carrier herein) argued: 1. the issue coming out of the benefit review conference (BRC) was disability; 2. sole cause cannot be an issue because it is an inferential rebuttal; 3. the claimant must prove that the compensable injury is a producing cause of the injury before sole cause becomes an issue. The respondent (claimant herein) argued: 1. the medical evidence in the case established that the claimant's physical problems and need for medical attention relate back to the (date of injury), injury; 2. the evidence established that the claimant has incapacity because he cannot perform his previous job, even if he does not have disability; 3. the evidence established that the only reason that the carrier disputed the claim was because of the subsequent injury. The hearing officer, while still questioning if the remanded issue was properly before her, ruled that the subsequent non-compensable injury was not the sole cause of the claimant's current condition and ordered the carrier to pay income and medical benefits pursuant to the 1989 Act and the Rules of the Texas Workers' Compensation Commission, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.2 *et seq.* (TWCC Rules). We are at a loss as to why the hearing officer remains in doubt about this being an issue before her. Clearly, the claimant set forth this exact issue in his response to the BRC report, and by definition of Statement of Disputes it became an issue. TWCC Rule 142.7(b).

The carrier appeals contending that the hearing officer erred in concluding that the claimant's subsequent non-compensable injury was not the sole cause of the claimant's current condition. The carrier argues that this issue was not certified as the issue out of the original BRC, that sole cause is not an issue but an inferential rebuttal, and that the hearing officer correctly determined the correct issue of disability at the original CCH. In response, the claimant argues that the uncontradicted medical evidence in the case shows that the claimant's left shoulder condition relates to his compensable injury, that the carrier failed to present any evidence that the claimant's subsequent non-compensable injury was the sole cause of the claimant's current condition and that the burden was on the carrier to prove sole cause. The claimant also argues this issue was raised by the carrier's dispute of the claimant's injury alleging the subsequent non-compensable injury was the sole cause of the claimant's condition, by the parties positions at the BRC, by the claimant's response to the BRC report, and by the parties at the original CCH.

DECISION

The decision of the hearing officer is reformed in that her Finding of Fact No. 18 and Conclusion of Law No. 3 in her original Decision and Order dated February 23, 1993, adopted and incorporated as part of her Decision and Order on remand dated August 30, 1993, are held to be disregarded as unnecessary to the decision. As reformed her decision on remand is affirmed.

The essential facts of the case prior to our earlier remand are detailed in our opinion in Appeal No. 93226, *supra*. To briefly summarize them we note that it was stipulated by all parties that the claimant suffered a compensable injury on (date of injury), when he lifted and attempted to empty a heavy trash can in the course and scope of his employment. The claimant testified that as he lifted the heavy trash can he felt his left shoulder pop and as he lowered the can his shoulder popped again. The claimant was treated at a local hospital, and later at his employer's occupational health clinic, for a strained shoulder muscle, spending three days on light duty work.

In January 1992, the claimant was promoted to a lighter duty, higher paying job as a dairy worker. On (date), after working his regular shift, the claimant went to the (amusement park) where while he was on a roller coaster he lifted his arms and his left shoulder popped out of place. The claimant was treated at an emergency room that evening where he was diagnosed as having a dislocated shoulder and where his shoulder was popped back into place. Claimant was off work until May 1, 1992, when a doctor at the employer's occupational health center placed him on light duty and referred him to (Dr. Mo).

When the claimant tried to see Dr. Mo, he was told that the insurance company had not verified his appointment. The claimant then returned to his employer who sent him to see (Dr. R), an orthopedic surgeon. Dr. R stated in his initial report that the claimant was suffering from recurrent subluxation--dislocation of the shoulder--and stated that it was his opinion based upon a reasonable medical probability that this began when the claimant injured his left shoulder on (date of injury). Dr. R also expressed the opinion that the claimant "will not improve until the shoulder is repaired surgically." Dr. R then continued the claimant on light duty work until an arthroscopy could be done to determine "what type of repair should be performed on the shoulder."

The employer's occupational health center then sent the claimant for a second opinion to (Dr. C), an orthopedic surgeon, who diagnosed a subluxation of the claimant's shoulder and who prescribed physical therapy because "[o]ccasionally this will settle down the symptoms and prevent recurrent subluxation." Dr. C further expressed the opinion that if physical therapy did not resolve the problem that the claimant would need to have a "capsular shifting operation to restore stability."

The carrier has refused to pay for the treatment recommended by either Dr. R or Dr. C. The carrier's handling adjuster testified, by bill of exceptions, that the carrier's refusal to

pay for treatment was because the carrier disputed the claim on the basis that the (date), occurrence was a new injury that was not work related.

At the time of the hearing, the claimant remained on light duty work, as recommended by all the doctors he has seen since May 1, 1992. Due to his January 1992 promotion he is still at a higher wage than prior to his (date of injury), injury. The only time claimant has lost from work is the period between (date), and May 1, 1992. Hence, though there may be some tangential matter regarding disability as defined in Section 401.011(16), no temporary income benefits would be payable for those seven days. Section 408.082.

The hearing officer and the parties framed this case in terms of disability. We originally remanded, stating that disability was not in issue. Rather, the issue was one of the carrier's refusal to pay for further medical treatment, that is, benefits provided by the 1989 Act, recommended by both Dr. R and Dr. C, because it contends that the cause of the claimant's need for this treatment is the subsequent non-compensable roller coaster injury. Properly framed, this is the issue of whether the subsequent non-compensable injury is the sole cause of the claimant's current condition.

Both the carrier and the hearing officer seem to fail to appreciate why disability is not the issue in this case. Disability has a very specific definition under the 1989 Act. Section 401.011 (16) provides: "'Disability' means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." It is undisputed that the claimant continued to work for the employer after his compensable injury of (date of injury), at a higher wage than before his injury. By definition he cannot have disability (except as earlier indicated for the seven-day period when temporary income benefits would nonetheless not be payable) and this was clear before the claimant entered the dispute resolution process. While the 1989 Act has been described having an "issue-driven" dispute resolution process, we certainly do not think that this requires an issueless excursion through the system. As the claimant argued in his request for review, his reason for going into the dispute resolution process was to seek relief, and his actual problem was that the carrier was refusing to pay for his medical treatment. The hearing officer implicitly recognized the issue in this case was causation of the injury, and not disability, in her original Decision and Order, where after having already made findings that the claimant continued to work at a higher wage for the employer after his injury, she went on to make the following Finding of Fact:

18. The (date), roller coaster incident outside the Claimant's work place did not result in any injury to the Claimant which flowed naturally from the (date of injury) compensable injury.

The hearing officer is obviously going beyond the issue of disability in making this finding, particularly in light of the fact that this issue was resolved by her other findings in regard to wage. Our concern here is that while attempting to determine causality the hearing officer has applied a standard--flowing naturally--for which we find no support in either the statute, the rules, the case law or our prior decisions. The legal standard to

determine causality when the carrier argues a subsequent non-compensable injury is sole cause. We have held this in number of our prior decisions. *See* Texas Workers' Compensation Commission Appeal No. 91030, decided October 30, 1991; Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991; Texas Workers' Compensation Commission Appeal No. 91117, decided February 3, 1992; Texas Workers' Compensation Commission Appeal No. 92018, decided March 5, 1992; Texas Workers' Compensation Commission Appeal No. 92429, decided October 5, 1992; Texas Workers' Compensation Commission Appeal No. 92436, decided October 5, 1992; Texas Workers' Compensation Commission Appeal No. 92518, decided November 16, 1992; Texas Workers' Compensation Commission Appeal No. 92692, decided February 12, 1993; and Texas Workers' Compensation Commission Appeal No. 93767, decided October 8, 1993. We have done so based on a long and clear line of Texas case authority. *See* Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Indemnity Ins. Co. v. Staggs, 134 Tex. 318, 134 S.W.2d 1026 (Tex. 1940); Gonzalez v. Texas Employers Insurance Association, 772 S.W.2d 145, 148 (Tex. App.-Corpus Christi 1989, writ denied); Panola Junior College v. Estate of Thompson, 727 S.W.2d 677, 679 (Tex. App.-Texarkana 1987, writ ref'd n.r.e.); Liberty Mutual Insurance Company v. Peoples, 595 S.W.2d 135 (Tex. Civ. App.-San Antonio 1979, writ ref'd n.r.e.); Evans v. Casualty Reciprocal Exchange, 579 S.W.2d 353, 356 (Tex. Civ. App.-Amarillo 1979, writ ref'd n.r.e.); American Surety Company of New York v. Rushing, 356 S.W.2d 817 (Tex. Civ. App.-Texarkana 1962, writ ref'd n.r.e.); Zellerback v. Associated Employers Lloyds, 200 S.W.2d 653 (Tex. Civ. App.-Galveston 1947, no writ) and cases cited therein; Federal Underwriters Exchange v. Tubbe, 193 S.W.2d 563 (Tex. Civ. App.-Beaumont 1946, writ ref'd n.r.e.); Texas Indemnity Ins. Co. Arant, 171 S.W.2d 915 (Tex. Civ. App.-Eastland 1943, no writ). We must also disregard Conclusion of Law No. 3 in the original Decision and Order of the hearing officer because it is based upon Finding of Fact No. 18.

As far as the carrier's argument that sole cause cannot be an issue because it is an inferential rebuttal, we first note the carrier's failure to cite case authority in support of this proposition. The carrier does refer to the Texas Pattern Jury Charges. We question the applicability of the rules of special issue submission to the 1989 Act dispute resolution process. Further, the changes to which the carrier alludes in the Texas Pattern Jury Charges in regard to the submission issue of sole cause do not stand for the proposition that sole cause was removed as an issue (in the sense issue means disputed question) from Texas Workers' Compensation cases. The changes involved submitting the disputed question of sole cause to a Texas jury as an instruction, rather than a special issue. Evans, *supra*. This does not magically remove the disputed question of sole cause from Texas workers' compensation cases nor change the long-standing doctrine that the burden of proof is the carrier's to establish that a subsequent injury is the sole cause of a claimant's injury if it chooses to raise that defense. *See* Page, *supra*; Gonzalez, *supra*; Thompson, *supra*; Evans, *supra*; Rushing, *supra*; Tubbe, *supra*; Texas Workers' Compensation Commission Appeal No. 92242, decided July 24, 1992; Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992; Appeal No. 91030, *supra*; Appeal No. 91038, *supra*; Appeal No. 92018, *supra*, Appeal No. 92429, *supra*; Appeal No. 92436, *supra*; Appeal No. 93518, *supra*; Appeal No. 92692, *supra*; Appeal No. 93767, *supra*.

Finally, we note the strident tone of the brief accompanying the Request for Review adds little to the proper advocacy or adjudication of disputes under the 1989 Act.

We believe for the reasons discussed above that Finding of Fact No. 18 and Conclusion of Law No. 3 in the original Decision and Order of the hearing officer, which she adopts and incorporates into her second Decision and Order, fail to properly apply this standard. We, therefore, reform the decision of the hearing officer, disregarding Finding of Fact No. 18 and Conclusion of Law No. 3 as being erroneous and unnecessary to the decision. We affirm the decision of the hearing officer as reformed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge