

APPEAL NO. 950005
FILED FEBRUARY 15, 1995

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On November 17, 1994, a contested case hearing (CCH) was held. The issues stated at the CCH were whether the claimant, who is the respondent, sustained a compensable injury on _____; whether he gave timely notice to his employer within thirty days, and whether he suffered any disability as a result of his compensable injury.

The hearing officer determined that claimant had sustained an injury on _____. He further found, as fact, that such injury was aggravated on (subsequent date of injury), while claimant was driving his delivery truck, and that he had disability beginning March 6, 1994. The hearing officer found that when claimant reported the (subsequent date of injury) injury to his employer on March 12th, he was confused about exactly what his injury was and what caused it. Therefore, the hearing officer found that the claimant had good cause for not reporting the _____, injury because of his confusion about "what exactly caused" his sudden injury.

The carrier has appealed the decision for two main reasons: that the hearing officer went beyond the issue by making findings relating to a (subsequent date of injury) injury, which the carrier contends was abandoned by the claimant, and that claimant did not demonstrate "good cause" for the failure to give notice of his _____, injury because no evidence was offered on this point. The claimant responds that the decision should be affirmed.

DECISION

We affirm the hearing officer's decision that the claimant notified the employer on March 12, 1994, that he had a work-related back injury, and conclude as a matter of law that the employer had actual knowledge of a compensable injury thereby.

The claimant testified he had been a propane truck driver for the employer, for eight months at the time of his injury. Claimant began his testimony by explaining that he had driven from (City 1) to (City 2), Texas, on (subsequent date of injury), a Saturday, to deliver propane in a company truck. The truck in question was a long bed 1986 Peterbilt truck with an attached propane tank trailer. Claimant said that around Cotulla, as he was driving over a bumpy road, he hit a bump in the road that jolted him and caused him to have immediate numbness and pain in his lower back, which spread into his legs. He felt weakness and a sensation of liquid around his back, although he did not feel any liquid. The claimant went home to (City 3), Texas, and stated he went right to bed. He stayed on his side to relieve the pain and was unable to sleep. Claimant said he was scheduled to work the following Sunday but called in the early morning hours and stated he could not drive. He indicated he talked to two supervisors and told them he had back pain, but did not say it was work related.

The claimant was taken that Sunday night to the hospital emergency room; he had emergency surgery the next day for a herniated lumbar disc, and a hematoma. He was on that date partially paralyzed from the waist down, claimant has lost voluntary control over bodily functions, and he stated for the record that he was in a wheelchair and is unable to stand for more than a few minutes. Claimant further testified that he was 41 years old, and weighed 385 lbs. Claimant stated he had a previous compensable back injury in 1983, from which he lost two years of work.

The record clearly established, through claimant's testimony and that of the company owner, (Mr. K), and the secretary/treasurer of the company, (Ms. M), that claimant had given a report of injury to the employer on or about Saturday, March 12, 1994, which specifically identified (subsequent date of injury) and his ride on the bumpy road as the "cause" of his back injury. The claimant further filed a claim with the Texas Workers' Compensation Commission (Commission) on March 15th for the (subsequent date of injury) injury. The hearing officer evidently believed claimant's account of the (subsequent date of injury) incident, for he found, as fact, that claimant thereby "aggravated" his back condition.

For reasons never sufficiently explained, (and, according to the argument of the carrier, after at least one benefit review conference (BRC) that occurred prior to the BRC leading to this CCH), the claimant brought forward the issue that the cause of his injury and disability was really an earlier incident. Claimant stated that on _____, as he was delivering propane gas to an elementary school, the hose through which he delivered the product caught under the back wheel of his truck as he walked around it. Claimant stated that he was jerked back and experienced pain in his lower back that never entirely went away until (subsequent date of injury), when his back "gave away." Claimant said he thought he had a pulled muscle which he relieved with over-the-counter medication. A deposition of an employee of the school, (Mr. A), that was taken by the claimant indicates that Mr. A did not witness the incident. Mr. A said he came out later and found claimant sitting on one of the concrete blocks out in the yard, and claimant appeared to be in pain and he had just gotten hurt by himself pulling the hose.

Claimant stated at the hearing that he never told the employer that he was injured on the job on _____. Mr. K testified that the first he knew about a contended _____ date of injury was "the last hearing". (As there has been no other CCH in this matter, we assume for purposes of appeal that this is a reference to the September 29, 1994, BRC, which was attended by Mr. K, according to the BRC report).

Mr. K testified that when he hired claimant, he particularly asked him, because of his size, about any physical problems and claimant indicated that his back occasionally hurt but could be controlled by medication. Mr. K stated that when claimant called on early Sunday morning on March 6th to report that he could not drive that day, he told Mr. K it was due to pain in his knees.

Ms. M stated that, to her knowledge, claimant had never missed time from work for a back injury prior to the date he stopped working. Ms. M stated that claimant stated the (subsequent date of injury) road incident was the cause of his injury, and never reported the occurrence with the hose to her. There was conflicting testimony as to whether claimant also talked to Mr. K on March 2nd to report back pain and ask for a back support; however, claimant admitted in his testimony that he did not indicate work-relatedness of such pain in this conversation. Mr. K stated that the seat in the Peterbilt truck was new and had shock absorbers.

Claimant's doctor for his surgery was neurosurgeon (Dr. Z). Dr. Z's notes of a consultation on March 7, 1994, recited that claimant had back pain 7 years ago, and that two weeks ago he was pulling on a hose and felt a strain in his back "but nothing unusual."

Dr. Z then recited that claimant did well until driving back from (City 2) when he suddenly had the sensation of hot liquid pouring down his back and increasing pain and discomfort. A medical report dated March 29, 1994, by (Dr. B) recited a general history that does not include either specific incident about which claimant testified at the CCH. On May 13, 1994, Dr. B wrote in his medical report of a "related history" of pulling a cable while on the job which injured his back. A report from a psychologist dated in mid-April 1994 stated that claimant felt numbness and intensified symptoms following hitting a rock or depression in the road, but no date is listed.

In closing argument, claimant's attorney stated that the report of the (subsequent date of injury) injury began "the confusion" in this case, and it was now claimant's position that the injury occurred _____ and had only been "aggravated" on (subsequent date of injury). However, claimant never testified nor is there other evidence that he was confused or mistaken; in fact, no evidence was furnished as to why claimant failed to report the _____ incident to his employer. The record is devoid of any evidence that claimant was misdirected by physicians into maintaining that he was injured on (subsequent date of injury).

The hearing officer, in his decision, found the following pertinent facts:

FINDINGS OF FACT

4. Claimant injured his back while at work on _____ when a hose he was attempting to connect got stuck and caused him to slip.
6. Claimant began to suffer severe back pain on (subsequent date of injury) when the truck he was driving struck a bump in the road which jolted him around in his seat.
7. The bump experienced on (subsequent date of injury) aggravated the injury suffered by claimant on _____.

13. At the time claimant reported the cause of injury to employer on March 12, he was confused about exactly what his injury was and what exactly had caused it.
14. Under the circumstances, a reasonable prudent person may also have been mistaken as to what exactly caused the apparently sudden catastrophic injury.
15. Claimant knew by March 12 that claimant was claiming a work-related injury.

CONCLUSIONS OF LAW

3. Claimant suffered a back injury in the course and scope of his employment on _____.
4. Claimant notified employer on March 12, 1994 of the injury and that the injury was work-related, but may have been mistaken as to the exact cause of his injury.
5. Claimant established good cause for any failure to notify employer of the exact cause of his injury.

In our opinion, Finding of Fact No. 15 contains a clerical error and was intended to read "Employer knew . . ." etc. and we therefore reform this finding by substituting the word "Employer" for the first "claimant" in that sentence.

Section 409.001 requires that the injured employee give notice of a specific injury to a person in a supervisory or management capacity within 30 days. However, the notice given, while it need not be fully detailed, should at a minimum apprise the employer of the fact of an injury, its work-related nature and the general area of the body affected. Texas Employer' Insurance Ass'n v. Mathes, 771 S.W.2d 225 (Tex.App.- El Paso 1989, writ denied). In DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980), the Supreme Court noted that the need for notice could be dispensed with if the employer had actual knowledge of an injury, and the "actual knowledge" required by an employer that would obviate the need to give notice need not apprise the employer of the exact time, place, and extent of injury, but only the general nature of injury and the fact it was job related. The Supreme Court observed that such notice would enable the employer to develop the circumstances of the injury during investigation. The actual knowledge exception is contained in Section 409.002(1).

So, while we agree with the carrier that there is insufficient evidence in support of good cause, the findings of fact of the hearing officer that claimant conveyed, and the employer understood, that he had a work-related back injury, establish that the employer

had actual knowledge of injury within the DeAnda parameters such that actual notice of the _____ incident was not required.

Concerning the (subsequent date of injury) road bump, the hearing officer, as sole judge of the weight and credibility of the evidence under Section 410.165(a), evidently believed it had occurred. The hearing officer even characterized this occurrence as an "aggravation," which we have repeatedly emphasized is an injury own right. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.- Houston [1st Dist.] 1988, no writ). A claimant's testimony alone is sufficient to establish that an injury can cause disability. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). The hearing officer's determinations on the fact of claimant's injuries are fully supported by the record, and, in any case, were not substantively appealed by the carrier. Further, we note that the (subsequent date of injury) injury was litigated fully and essentially by consent.

It is possible that the explanation for the change in date of injury to _____ came during an off-the-record preliminary conference referred to by the hearing officer at the beginning of the hearing. However, the (subsequent date of injury) injury remained a principal part of claimant's presentation of the evidence and no objection was made thereto by the carrier. The hearing officer asked the carrier for its position on the (subsequent date of injury) injury and the carrier responded that 1) the accident did not occur and 2) that it was an ordinary disease of life. The (subsequent date of injury) injury, and facts underlying this injury, were fully litigated at the hearing. (Beyond doubt, claimant gave timely notice to his employer of this injury.)

We disagree that the case was decided as a repetitive trauma by the hearing officer, as opposed to a combination of two specific injuries. (A repetitive trauma analysis would likely have resulted in a finding of timely notice.) We have before stated that the hearing officer is not bound to the date selected by the parties at the BRC where the issue involves whether or not a compensable injury occurred. Texas Workers' Compensation Commission Appeal No. 93183, decided April 22, 1993. Testimony in this case, and argument, alluded to the fact that there may have been several BRCs prior to the hearing. Given that the (subsequent date of injury) injury was fully litigated, and the claim form was put into evidence, we cannot agree with carrier's argument that claimant abandoned his (subsequent date of injury) claim nor is there evidence that it "successfully defended" this claim in another proceeding. We therefore cannot agree that the hearing officer erred to the extent that he also found injury on (subsequent date of injury).

For these reasons, we affirm the hearing officer's decision, although we find that his factual determinations and record are supportive of the "actual knowledge" exception, rather than good cause exception, to the notice requirement.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge