APPEAL NO. 950100
FILED FEBRUARY 28, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 19, 1994. The issues at the hearing were:

1. Whether the respondent/cross-appellant's (claimant herein) injury of _____, was a producing cause of or related to his knee problems, urinary incontinence and impotence.

2. Whether the claimant reached maximum medical improvement (MMI) and, if so, when.

3. What is the claimant's correct impairment rating (IR).

4. Whether claimant timely filed his claim for compensation, or had good cause for not timely filing his claim.

5. By agreement of the parties, whether the appellant/cross-respondent (carrier herein) properly contested compensability of the knee problems, incontinence and impotence.

The hearing officer determined that the compensable injury of _____, was a cause of the knee problems, but that the claimant failed to prove that his incontinence and impotence were part of this injury; that claimant reached MMI on July 27, 1994, with a nine percent IR in accordance with the report of a Texas Workers' Compensation Commission (Commission)-selected designated doctor; that claimant, without good cause, failed to timely file a claim with the Commission within one year of the date of his injury; and that the carrier did not contest compensability of the knee problems, incontinence or impotence.

The carrier appeals only the finding that it did not contest the compensability of this claim arguing that the claimant's failure to timely file a claim allowed it to reopen the issue of compensability. The claimant replied that the carrier delayed too long in reopening this issue. The claimant also appeals the determination of the hearing officer that his incontinence and impotence were not caused by his compensable injury of _____; that he did not timely file his claim; and that the report of the designated doctor is not contrary to the great weight of the other medical evidence because it only rated his back and not his other conditions. The carrier replies that the decision on these issues adverse to the claimant were supported by sufficient evidence and should be affirmed. The hearing officer's finding that the compensable injury included the knee has not been appealed and has now become final. Section 410.169. The compensability of the claimant's back injury of _____, was not an issue at the CCH.

DECISION

We affirm in part and reverse and remand in part.

It was not disputed that the claimant sustained a compensable back injury on _____, when he stepped on a grate which gave way. His right foot fell through the grate to the floor of a pit about 18 inches below. According to the claimant, the grate fell back against the claimant's right leg. He said he felt low back pain and swelling and by evening his right knee became swollen and painful and his ankle was sore. He claims that the extent of his compensable injury includes not only his back and knee, but also was a producing cause of his incontinence and impotence and he insists that he did not have these problems before his injury of _____.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether an injury has occurred as claimed and the extent of that injury are generally questions of fact. Injury may be proven by the testimony of the claimant alone and objective medical evidence is not required to establish that particular conduct resulted in the claimed injury, except in those cases where the subject is so technical in nature that a fact finder lacks the ability from common knowledge to find a causal basis. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. We believe that a causal connection between the claimant's fall, as he described, and subsequent incontinence and impotency is "not within the common knowledge of mankind and require(s) expert evidence." Texas Workers' Compensation Commission Appeal No. 93952, decided December 1, 1993, and cases cited therein.

The claimant said he received medical care from (Dr. ST), D.C., on the day of the accident. Dr. ST initially diagnosed muscle spasm, L4-5 subluxation and sprain/strain. In a letter of May 5, 1993, to the Commission, Dr. ST stated the claimant "is still suffering from an inability to feel . . . urination movement and inability to attain an erection." In a report of December 29, 1993, Dr. ST noted the claimant had "urgency of urination and decreased sensation of L1." Dr. ST referred the claimant to (Dr. A), a neurologist. On April 5, 1993, Dr. A noted complaints of incontinence and impotence since the injury and decreased sensitivity in the lower extremities, but provided no opinion on the cause of these problems. The claimant was also referred to (Dr. K), D.O., who placed the claimant in a work hardening program. In his examination of October 11, 1993, Dr. K diagnosed lumbosacral strain and noted his sensation was intact in the lower extremities. On November 5, 1993, Dr. K found the claimant's neurological examination "entirely within normal limits." No mention is made of incontinence or impotence problems.

On May 11, 1993, (Dr. D), examined the claimant and noted his complaints of incontinence and impotence and suggested he be seen by a urologist to determine if there was a neurologic connection between these problems and his low back. On June 21, 1994, Dr. D quotes the claimant as reporting that his urologist attributed "nerve injury" to the penis to his "blood sugar" levels.

(Dr. SK), a urologist, examined the claimant on December 7, 1993. The claimant reported his incontinency, but not the urgency, had subsided. Dr. SK diagnosed an organic impotence that may be caused neurologically or from diabetes. He offered no opinion as to whether the claimant's accident on _____, had a role in this.

(Dr. SI), the Commission-selected designated doctor, examined the claimant on September 8, 1993, and January 12, 1994. He found the claimant had not yet reached MMI, and noted occasional difficulty with bowel and bladder function. In a third examination on May 11, 1994, Dr. SI wrote that the claimant has no bladder difficulty, but did have problems "with obtaining and sustaining an erection." He concluded that this problem, based on his review of the claimant's medical records, was organic impotence, but gave no information on its causation. Finally, in his report of July 27, 1994, in which Dr. SI found MMI on July 27, 1994, and assigned a nine percent IR, he makes no comment on claimant's incontinence or impotency problems.

Based on this evidence, the hearing officer concluded that the claimant failed to establish that his incontinence and impotency were part of his compensable injury. To the contrary, he found that there was no medical evidence to show a neurological connection between his low back injury and either the incontinence or the impotence. On appeal, the claimant argues that organic impotence includes neurologic impotency and that a bulged disc at L3 establishes the neurological connection.

The hearing officer, as fact finder, was the sole judge of the relevance and materiality and of the weight and credibility of the evidence, including the medical evidence. Section 410.165. The hearing officer had the responsibility to resolve any conflicts and inconsistencies in the evidence and determine what facts had been established. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). The medical evidence in this case noted symptoms of incontinence and impotence, but no doctor attributed these problems to the claimant's fall on _____. None of the medical evidence compelled a conclusion in

favor of the claimant on the issue of the extent of his injuries. To the contrary, the hearing officer could have concluded that this evidence was unpersuasive on the question of causation. *See* Texas Workers' Compensation Commission Appeal No. 94975, decided September 2, 1994. For this reason, we believe the evidence was sufficient to support the decision of the hearing officer that the claimant failed to prove his incontinence and impotence were compensable and we decline to reverse this part of his decision on appeal.

The claimant also appeals the findings and conclusions of the hearing officer that he, without good cause, failed to timely file a claim for compensation with the Commission. Section 409.003 requires, in pertinent part, that an employee file a claim for compensation with the Commission not later than one year after the date of injury. Section 409.004 provides that failure to file such a claim relieves the employer and carrier of liability unless good cause exists for the failure to timely file a claim or the carrier does not contest the claim. The claimant did not argue at the CCH or on appeal that he had good cause for failing to timely file a claim, but that he filled out a Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) shortly after the Commission mailed him this form. He said he completed the form, gave it to his wife to mail and that she told him she mailed it "probably" on March 31, 1993, which was well within the statutory time limit. The claimant's wife did not testify. The copy of the TWCC-41 introduced by the claimant into evidence at the CCH was not stamped as received either by the carrier, employer or the Commission and was a copy of the copy of the original the claimant said he kept after he gave the original to his wife to mail. No copy of this document was produced from the Commission claims file in this case. The claimant also contended that he was not aware that the Commission had not received the form until the Benefit Review Conference convened on this claim on October 18, 1994.

The hearing officer made findings of fact that the claimant did not timely file his claim for compensation and did not have good cause for this failure. In his Statement of the Evidence, the hearing officer also wrote: "Although CLAIMANT alleged his wife mailed a Notice of Injury to CARRIER and to the Commission, she did not mail that notice and none has been received by the Commission." Whether and, if so when, a claim is filed is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94538, decided June 16, 1994. The claimant asserted that had he been advised earlier that his TWCC-41 had not been received he could have requested the U.S. Postal Service to search for it. He did not testify whether the claim was mailed by first class, registered or certified mail or with a return receipt requested. The hearing officer obviously found the claimant's testimony that his wife mailed the claim unpersuasive. Since the claimant admitted he filed a separate claim on another injury at about the same time, perhaps he and his wife confused the claims. In any case, under our standard of review, we will not reevaluate the claimant's credibility on this issue. We would only note that in those cases where there is a presumption of receipt of a document placed in the hands of the U.S. Postal Service, the presumption is rebuttable by proof of

non-receipt. *See* Cliff v. Huggins, 724 S.W.2d 778 (Tex. 1987). An examination of Commission files that fails to disclose the document claimed to have been mailed may constitute sufficient evidence of non-receipt to rebut the presumption. We further distinguish this case from our decision in Texas Workers' Compensation Commission Appeal No. 92279, decided August 6, 1992. In that case, the carrier contended it timely filed a dispute of compensability (TWCC-21), but none was in evidence in the Commission file. The hearing officer nonetheless found that TWCC-21 was in fact timely filed based on the carrier's presentation of a copy of the TWCC-21 date stamped as being received by the Commission. Other evidence was introduced about Commission procedures for indicating receipt of documents and that the date stamp appeared to be authentic. The Appeals Panel affirmed the finding of the hearing officer. In the case now appealed, there is no similar evidence verifying or tending to verify that the claimant in fact filed a claim for compensation, or that would otherwise render the decision of the hearing officer on this issue contrary to the great weight and preponderance of the evidence.

The carrier appeals the hearing officer's conclusion of law that it did not specifically contest the compensability of the incontinence and impotence and correctly points out that no findings of fact were made by the hearing officer in support of this conclusion. The pertinent Conclusions of Law Nos. 5 and 6 read in their its entirety as follows:

CONCLUSIONS OF LAW

5. CARRIER did not specifically contest the compensability of CLAIMANT'S knee problems, urinary incontinence and sexual impotence pursuant to Section 409.022 of the Texas Labor Code. [We consider the reference to Section 409.022 to be a typographical error, and that the hearing officer intended to refer to Section 409.021(c) and (d).]

6. CLAIMANT did not timely file a claim with the Commission within one year of the date of his injury and good cause did not exist for his failure to timely file such claim, but CARRIER did not contest the compensability of the claim. (Emphasis added.)

In Finding of Fact No. 20 the hearing officer states: "CARRIER did not, prior to the BRC on 10-18-94, contest the compensability of CLAIMANT'S knee problems, urinary incontinence and impotence and has never filed a TWCC-21 specifically contesting the compensability of those injuries." From this we assume there was a contest of compensability at least by October 18, 1994.

Sections 409.021(c) and (d) provide that a carrier which does not contest compensability of an injury by the 60th day after being notified of the injury waives its right to contest compensability absent a finding of new evidence that "could not reasonably have

been discovered earlier." As we stated in Texas Workers' Compensation Commission Appeal No. 941655, decided January 26, 1995, "[t]hese provisions provide alternate scenarios for contesting compensability such that the reliance on one necessarily precludes, or at least obviates, the need to rely on the other." With regard to a timely dispute of compensability, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6) also provides that if the carrier has begun payment of benefits (as was not disputed in this case), it must dispute the claim on or before the 60th day "after the carrier receives written notice of the injury. . . ." (Emphasis added.) This written notice can consist of the employer's first report of injury, notification by the Commission, or "any other written document, regardless of source, which fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability." Rule 124.1(a)(3). Whether a written notice "fairly" informs the carrier as described above is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93120, decided April 2, 1993.

We believe that whenever an issue involves timely filing of any notice or claim within a specified statutory period, findings of fact as to when the period began, and when the required notice was given, are essential. Unfortunately, in this case the hearing officer made no findings of fact about when the carrier first received written notice of the incontinence and impotence problems and what that notice was. We, therefore, remand the issue of whether the carrier contested compensability of the claimed incontinence and impotence injuries to the hearing officer to make specific findings of fact and conclusions of law as to when the carrier first received written notice of these claimed injuries in accordance with Rule 124.1 and, based on these findings of fact, whether the carrier contested the compensability of these injuries either within 60 days of the written notice or based on newly discovered evidence. *See* Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993, and Texas Workers' Compensation Commission Appeal No. 93120, decided April 2, 1993.

In its appeal, the carrier also urges that our decision in Texas Workers' Compensation Commission Appeal No. 94224, decided April 1, 1994, was wrongly decided. It construes this opinion to demand that carriers assert within 60 days of notice of an injury a defense that the claimant has not filed a claim for compensation within one year of the injury, an obvious impossibility, or waive that defense. This construction of our decision in Appeal No. 94224 fails to consider the necessary distinction between notice of an injury and notice of a claim. That decision reconciled various provisions of the 1989 Act by pointing out that the procedure for contesting compensability within 60 days, as set out in Section 409.021(c), also applied to disputes over liability for benefits based on failure to file a claim within one year of the injury as required by Sections 409.003 and 409.004. Thus, should a claimant fail to file a claim for benefits within one year of an injury, a carrier who wishes to dispute its liability on this basis must do so within 60 days of written notice of the untimely claim. Clearly, the decision cannot be read to demand a carrier contest on the basis of an untimely claim before the year for filing the claim has expired. *See* Texas Workers' Compensation Commission Appeal No. 94781, decided August 3, 1994.

Finally, the claimant appeals the findings and conclusions of the hearing officer that Dr. SI's certification of MMI and IR was entitled to presumptive weight.

Pursuant to Sections 408.122(b) and 408.125(e), the report of a designated doctor selected by the Commission has presumptive weight and the determination of MMI and IR shall be based on that report unless the great weight of the other medical evidence is to the contrary. "Great Weight" means more than an equal balancing or even a preponderance of the medical evidence, and whether the great weight of the other medical evidence is contrary to the report of the designated doctor is a factual determination to be made by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93459, decided July 15, 1993. In this case it was undisputed that Dr. SI, in assigning a nine percent IR, rated only the lower back. He did this because he examined the right knee and found no range of motion limitation. He, therefore, gave no rating to the knee. The only other doctor who provided a greater IR than Dr. SI was Dr. ST who gave the claimant a 25% IR. This rating consisted of 17% for lumbar range of motion deficit and 10% for pain and paresthesia based on "urgency of urination," decreased sensation of L1 and permanent residuals of sciatica. This latter 10% was not further apportioned.

Pursuant to Section 401.011(24), an IR is given only for permanent impairment resulting from a compensable injury. We have also held that in assigning an IR, a doctor should rate only the compensable injury. Texas Workers' Compensation Commission Appeal No. 931098, decided January 18, 1994. In this case, we are unwilling to conclude that the hearing officer erred in not considering Dr. ST's report to constitute the great weight of the other medical evidence. However, if pursuant to our remand on the issue of timely dispute of compensability, the hearing officer finds that the carrier failed to properly contest the compensability of the incontinence and impotence, these injuries become compensable as a matter of law, Texas Workers' Compensation Commission Appeal No. 93967, *supra*, and a rating will have to be provided. We thus affirm Dr. SI's nine percent rating insofar as it considered the claimant's back and knee injury, but leave open the issue of correct IR and associated date of MMI for the other two claimed injuries if deemed compensable.

We affirm those portions of the decision and order of the hearing officer which found the incontinence and impotence were not sustained in the course and scope of employment; which found that the claimant did not timely file a claim for compensation; and which found the claimant's date of MMI and IR for the back and knee injury. We reverse and remand that portion of the decision which found the carrier did not properly dispute compensability of the incontinence and impotence for further proceedings.

A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202.

See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Susan M. Kelley
Appeals Judge