

APPEAL NO. 950106
FILED MARCH 6, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 1, 1994, a hearing was held. Appellant (claimant) did not appear at this hearing, but his counsel did; a show cause hearing addressing claimant's absence was held on December 12, 1994. The hearing officer determined that carrier contested compensability within 60 days, that claimant was not injured in the course and scope of employment on _____, and that claimant has no disability. The hearing officer also determined that claimant did not have good cause for missing the hearing of December 1, 1994. Claimant asserts on appeal that the injury was compensable because carrier failed to state grounds for compensability within 60 days, that disability flows from the compensable injury, that carrier did not dispute compensability because it did not state an adequate basis for disputing, and that claimant did have good cause for his absence from the hearing. In addition, claimant takes issue with certain findings of fact and conclusions of law which also attack the finding of no compensable injury based on the evidence of injury. Carrier replies that the decision of the hearing officer should be affirmed.

DECISION

We affirm.

Claimant is a truck driver. On _____, he worked for (employer). He testified that after an accident on _____, involving another truck of employer he was following, claimant hurt his knee while his truck was being unloaded. He stated that he jumped down off the bed of the trailer, which was about 41 inches off the ground, landed on both feet on grass, and hurt his right knee. Claimant acknowledged that he still had a bullet in the upper part of his right knee. He denied reporting to anyone that he hurt his knee when braking at the time of the accident he witnessed on _____. He also denied that (Dr. H) accurately recorded his history when he noted that claimant fell off a trailer, landing on his knee in an unusual manner.

Claimant stated that he reported the injury on July 8, 1994, to (Mr. M). He saw his family doctor, (Dr. X) on July 23, 1994, when the pain continued to get worse. Dr. X took him off work. He was referred to another doctor and saw (Dr. M) who took him off work on July 25th. On August 3, 1994, he learned that he had lost his job. He was able to get another job in November and was working at the time of the December 1, 1994, hearing. He stated that the bullet had never slowed him down before _____. He says his injury of _____, has caused his patella to be above its normal location.

Mr. M testified that he is the terminal manager with employer. He had seen claimant wearing a brace on his knee several times prior to _____. He stated that

claimant told him on July 31, 1994, his problem with the knee was from "stomping" on the brakes. On July 31st, claimant had given Mr. M several medical statements he sought payment for. Mr. M stated that he did not let claimant go, but that claimant had simply taken all of his possessions on August 3rd without saying anything to anyone. Mr. M testified that claimant drove regularly from _____ to July 31st without time off for any problem.

(Mr. S) testified that he is the dispatcher for employer. On _____, he talked to claimant about the accident involving another of employer's trucks. Neither at that time, nor in his daily contact with claimant after _____, did claimant ever mention any injury to his knee. He too, states that when he first heard of a claimed injury on July 31st, claimant described it as occurring when he slammed on his brakes to avoid an accident.

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 401.165. In this case she was presented with conflicting evidence as to why claimant no longer worked for employer (two explanations--one attributed to claimant) and how the claimed injury occurred (three explanations--all of which, according to two other employees and one doctor, emanated from the claimant). The hearing officer could resolve these conflicts in such a way as to question the credibility of the claimant. In this regard, the hearing officer in her Discussion observes that the "claimant's testimony and medical records are internally inconsistent." In addition, the medical records do reveal a bullet in the knee, plus Mr. M testified that claimant had worn a brace at times in the past on the same knee. The MRI taken on September 15, 1994, showed the patella and its tendons to be normal and concluded that the knee was normal.

Texas Workers' Compensation Commission Appeal No. 92058, decided March 26, 1992, affirmed a hearing officer's decision that found no injury when similar complaints had been made prior to the fall in question. While there is no evidence of similar complaints, there is evidence of having used a brace on the same knee, coupled with no objective showing of damage to the knee. These points, together with the testimony of absence of any mention of injury in daily discussions with claimant, continued work from _____ to July 31st, and the inconsistencies attributed to claimant provide sufficient evidence to support the finding that claimant did not show an injury in the course and scope of employment.

With no compensable injury there can be no disability. See Section 401.011(16). In addition, Mr. M testified that claimant went to work for another employer the day after he left employer but only stayed with that firm for one day because of incarceration. Claimant acknowledged that he had also been working for "about a month," although he stated that his doctor had not released him to work.

The other issues on appeal concern carrier's dispute and whether claimant showed good cause for missing the hearing of December 1, 1994.

Claimant's main argument concerning the question of injury on appeal is that the carrier is liable because it did not adequately dispute compensability. At the beginning of the hearing on December 1, 1994, with claimant's counsel present, the hearing officer announced the issue as "did the carrier waive its right to contest the compensability of the claimant injury by not contesting compensability within 60 days of being notified of the injury;" she then set forth the burden of proof on this issue by saying, "the carrier has the burden of proof on the issue of whether the carrier timely contested compensability." No objection was made. At the hearing, claimant's counsel offered a TWCC-21 showing carrier received notice of the claim on August 11, 1994, with a stamped date of receipt at the Fort Worth field office of October 14, 1994.

After carrier introduced a copy of the same TWCC-21, showing the same date of notice to carrier of August 11, 1994, with a date stamp of September 12, 1994, at "Austin Central" of Texas Workers' Compensation Commission (Commission), claimant's counsel observed in closing:

The two facets of the case, the first deals with the carrier's delay in contesting the issue. And that appears, based upon the evidence introduced today, to have been timely, albeit, there's a heck of a lot of confusion why there were two of the things filed. So I will not speak on that any further and will switch to the second, which is essentially whether there was a timely notification of disability and injury, compensable injury.

Thereafter on December 12, 1994, at the hearing on good cause, the hearing officer told claimant, as he was about to testify on the merits, that there had been an issue of whether the carrier waived its right to contest compensability, "and we resolved that last week by agreement so there's only two issues left," which she indicated were whether claimant was injured in the course and scope of employment and whether claimant had disability. With claimant's counsel present, there was no objection either to the statement as to agreement resolving the issue about carrier contesting compensability or to the statement that only two issues remain, involving injury and disability.

With the record showing that the issue, as stated by the hearing officer, as litigated at the hearing by the parties, as conceded in closing argument, and as referred to by the hearing officer at the December 12th hearing, only involved the time of filing the TWCC-21, and with the record showing no objection to any characterization made as to that issue, the determination that carrier timely filed its dispute of compensability is sufficiently supported by the evidence.

At the December 1, 1994, hearing the hearing officer denied a request for continuance made by claimant's counsel. In its assertion of error, claimant does not say how he was harmed by the failure to grant a continuance. See Texas Workers' Compensation Commission Appeal No. 92539, decided November 25, 1992. While the hearing officer did not grant the motion for continuance, she did provide for a later show

cause hearing for the claimant to show why he was not present at the hearing. In addition, the claimant's counsel at the hearing of December 1, 1994, presented evidence on the issues; at the December 12, 1994, hearing, the hearing officer not only allowed the claimant to present evidence to show cause relative to his absence, but allowed him to testify on the merits. See Texas Workers' Compensation Commission Appeal No. 92005, decided February 20, 1992, which refused to dismiss a claim based on non-attendance at the hearing and allowed evidence to be presented; this opinion correctly pointed out that a failure to appear is sanctioned by a Class C administrative violation. See Section 410.156. Denial of the request for continuance was not an abuse of discretion.

Claimant testified that he was on the road in (City), (State), when contacted by his counsel the night before the hearing of December 1, 1994. He could not get back in time to attend. He was queried about the possibility that he could have appeared by telephone on December 1st, but did not directly answer, indicating that he was told the next hearing would be by telephone (claimant appeared by telephone on December 12th). Claimant agreed that the address he provided the Commission was correct and indicated that after December 1st, but prior to December 12th, he had picked up the notice of the first hearing.

Claimant did not testify that he had communicated with the Commission prior to departing on the current job, nor that he had contacted the Commission indicating that he could not be present.

Texas Workers' Compensation Commission Appeal No. 93605, decided August 26, 1993, acknowledged that the acts of a client's attorney were attributable to him in regard to matters of late filing of an appeal. In this case the notice of the hearing on December 1, 1994, was mailed to claimant's counsel in addition to claimant, and counsel was present at the hearing. Why the evidence only shows one communication, the day before the hearing, between claimant and counsel is unknown. However, any failure to communicate between claimant and counsel does not provide a basis for finding an abuse of discretion on the part of the hearing officer for not finding good cause. While finding no good cause for failure to attend the December 1st hearing, the hearing officer correctly allowed both the claimant and his counsel to present evidence on the merits.

The findings of fact and conclusions of law are sufficiently supported by the evidence. The decision and order are sufficiently supported by the findings of fact, the conclusions of law, and the evidence of record and are affirmed. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge