APPEAL NO. 960035
FILED MARCH 29, 1996

A contested case hearing (CCH) was held on December 11, 1995 to consider the disputed issues in claims by respondent _____ (claimant) against appellant Texas Workers' Compensation Insurance Fund (Carrier 1) bearing docket number _____ and against respondent Employers of Wausau (Carrier 2) bearing docket number _____. The essence of the dispute was whether claimant's low back problems experienced on _____, were attributable to the uncontested compensable low back injury she sustained on _____, when her employer had workers' compensation insurance coverage with Carrier 1, or whether her problems were attributable to a new injury sustained on _____- when her employer had coverage with Carrier 2. The hearing officer resolved the disputed issues in both claims in a consolidated Decision and Order. With respect to Carrier 1, the hearing officer concluded that claimant was injured in the course and scope of her employment on _____; that such injury is a producing cause of her current condition; that Carrier 1 is not required to raise the sole cause defense by any time constraints on this claim; that claimant had disability beginning June 9, 1995, and that her disability had not ended as of the date of the CCH; that claimant's average weekly wage (AWW) is $406.10; and that Carrier 1 "owes workers' compensation [benefits] on this claim." With respect to the disputed issues in the claim against Carrier 2, the hearing officer determined that claimant did not sustain a new compensable injury on _____; that she did not have disability from an injury of that date; and that her AWW is $406.10. Only Carrier 1 has appealed. Carrier 1 first asserts that the hearing office erred "in conducting ex parte communication with a representative of a party in this case." Carrier 1 also challenges on evidentiary sufficiency grounds the hearing officer's findings that the injury of _____, is a producing cause of claimant's current condition, that claimant had disability beginning June 9, 1995, and continuing, and that claimant did not sustain a new injury on _____. Claimant and Carrier 2 responded urging the absence of error and the sufficiency of the evidence to support the decision.

DECISION

Affirmed.

Claimant testified that on _____, she injured her low back at work, notified her employer, missed two days of work because of the injury, sought medical treatment from Dr. P (Dr. P) approximately three days later, and was released to return to light duty work with lifting and movement restrictions. She indicated that she had injured her back in two motor vehicle accidents three and five years earlier and had been treated by Dr. P. Dr. P's Initial Medical Report (TWCC-61) of claimant's _____, visit stated that claimant had "functionally recovered" from the prior back injury and had back pain "after vigorous physical activity at work." He diagnosed lumbosacral radiculitis. Carrier 1 acknowledged

having accepted liability for the _____injury. Claimant stated that because she was pregnant at the time, Dr. P could not obtain diagnostic tests nor prescribe medications, that she was provided with physical therapy to learn how to do stretching to alleviate the pain, and that she was told she would "just have to suffer." She worked until February 22, 1995, when she stopped in anticipation of the childbirth. Claimant also said she had to pay for her visits to Dr. P in October and December 1994, and that sometime before the delivery of her baby on February 28, 1995, she made repeated but unsuccessful efforts to contact Carrier 1 by telephone and by correspondence in an effort to obtain reimbursement for her doctor visits and for authorization for a stair step device.

Claimant indicated that she returned to her regular duties at work on May 23, 1995, when her family leave expired; that the pain from her low back injury, which had persisted since the injury and given her a few problems at home, got worse after she returned to work performing her regular duties; that she had trouble walking because of low back spasms and that she also had to obtain an ergonometrically suitable chair at work. She said she continued her efforts to contact Carrier 1 not only for reimbursement but for authorization to return to Dr. P because of her increasing back pain and that at some time after she resumed working, she was called by DG (Ms. G) who identified herself as the supervisor of Carrier 1's adjuster handling claimant's file, IV (Ms. V). Ms. G told claimant that Carrier 1 was trying to close her file and claimant said she strenuously resisted since she was still having trouble with her low back.

Claimant further testified that on _____, she experienced back pain at work that morning, that she took a Darvocet and a muscle relaxer and did some stretching but the pain continued. In her recorded interview by the Carrier 1 of July 20, 1995, she stated that her duties were largely clerical and that she had lifted a heavy box at work that morning but that her back "didn't go out then." Written statements of two coworkers indicated they did not observe claimant to be in distress from her back that morning. Claimant stated further that after returning from lunch, she retrieved a carry-out lunch from her car that she had purchased for a coworker and that as she left her car to return to her workplace, she had such severe back pain she fell to her knees. She said she crawled to the building where coworkers called an ambulance which took her to a hospital emergency room (ER). Claimant stated that in the ER she was given several injections for pain, was x-rayed, and was discharged for three days of bedrest. The June 9, 1995, ER record states that claimant took the Darvocet at 10:30 a.m. and that when she bent down to pick up the lunch from the floor of her car she could not straighten up due to back pain. The diagnosis was acute low back strain. Dr. P's Specific and Subsequent Medical Report (TWCC-64) for claimant's _____, visit reflected the injury date as _____ and the same diagnosis. He further reported that claimant was "temporarily totally disabled," that the date she could return to work was "unknown," and that she had a "pain exacerbation" for which she visited the ER. Claimant testified that she has not returned to work since June 9th because Dr. P had not yet released her to return to work.

Claimant said she contacted Ms. G and told her about the pain episode on _____ and that Ms. G insisted that she "had to file it as a new claim." Claimant said she protested contending that she had not sustained a new injury but rather "never got better from the first one" but Ms. G required her to file a new claim. She said she then filled out claim forms for both injury dates explaining that she had not completed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) for her _____ injury because she had not been provided with the form. There were no timely notice or timely claim disputed issues.

A July 18, 1995, MRI obtained by Dr. P revealed desiccation and a posterior herniation at L5-S1. Dr. P wrote Carrier 2 on July 26, 1995, stating that he had treated claimant after a 1992 back injury; that at that time her lumbar MRI showed "minimal findings and certainly no protrusion or herniation at L5-S1"; that she recovered "full function"; that he documented claimant's recent pain episode "as lumbar pain exacerbation related to original injury of _____; and that her recent MRI documents a change which he believes is "related to the back injury of _____." Dr. P wrote on September 13, 1995, that he felt the recent MRI documented a change in the structural pathology which was "reflective of the impact of a new injury of _____." On September 20, 1995, Dr. P reported that claimant was "eager to get back to work, even with her pain, if she could be assured that she could sit for prolonged periods of time." On October 30, 1995, Dr. P wrote Ms. V that claimant's _____ exacerbation "did not cause additional damage to her lumbar spine on what had resulted from her _____ injury."

At the outset of the CCH, Carrier 1 represented that it accepted liability for the _____, injury. The hearing officer then reviewed with the parties the disputed issues relating to each carrier from separate benefit review conferences and also mentioned that he had earlier advised Carrier 2 he would take up its "untimely" motions at the CCH. The hearing officer failed to identify the motions and mark them as hearing officer exhibits while stating they were "not in evidence, but is part of my hearing record." We gather that he was referring to Carrier 2's "Motion to Consolidate [CCHs] or, Alternatively, to Join Additional Parties" and its "Motion to Modify Disputed Issue for CCH or, Alternatively, Motion to Add Disputed Matter." Carrier 2 has not appealed the manner in which the hearing officer dealt with its motions and we need not further consider them. In the course of his discussion of the disputed issues, the parties' positions on those issues and the burdens of proof, as well as Carrier 2's motions, the hearing officer stated that he "spoke briefly with the ombudsman this morning that told me that she believed the evidence would show that there's really only one date of injury, and that is the time frame when [Carrier 1] was the Carrier." He then went on to state that if that were the case, Carrier 2's motions would be moot since there would not actually be a claim being pursued against Carrier 2. The hearing officer then asked the ombudsman if his assumption was correct "that there's really only going to be one claim against one carrier" and the ombudsman responded in the

affirmative. A short while later, the hearing officer questioned claimant under oath about having ongoing claims against both carriers and she indicated it occurred because Ms. G required her to file a new claim against Carrier 2 in spite of the fact that she had not sustained a new injury on _____.

After his questioning of claimant, the hearing officer made comments to the effect that given claimant's testimony that she did not sustain an injury on _____, it appeared that Carrier 2 would likely prevail on its disputed issues. He stated as follows: "So from what you've already told me this morning, all the issues in dispute from [Carrier 2] are going to be resolved in [Carrier 2's] favor unless, of course, the Carrier for the fund sustains his burden of proof on showing sole cause. Maybe there was some other injury complicated." Both carriers then declined the hearing officer's offer to put "something else . . . into the record at this point."

Section 410.167 provides that a party and a hearing officer may not communicate outside the CCH "unless the communication is in writing with copies provided to all parties or relates to procedural matters." *And see* Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.3(a) (Rule 142.3(a)). Rule 142.3(b) also excepts persons communicating with the hearing officer "in any manner regarding procedural issues." In responding to Carrier 1's appealed error concerning the ex parte communication, both parties point out that Carrier 1 did not object to it at the CCH. We, too, cannot discern any attempt by Carrier 1 at the CCH to preserve an error for appeal on this matter. Carrier 2 further contends that the brief communication with the ombudsman, which, as noted, was again had on the record, was not improper in that it concerned a matter of procedure. We are mindful that the hearing officer not only revealed his communication with the ombudsman on the record but repeated the communication with the ombudsman; that the content of the communication appeared to be an effort on the hearing officer's part to acquire some basic insight into the issues he had to deal with at the CCH given the two claims with different carriers and thus was in a sense procedural in nature; and that Carrier 1 raised no objection and even declined to state anything for the record before the hearing officer went on to hear opening statements and take the evidence. We also observe that Carrier 1 does not contend that it was in any way limited in the evidence it offered and the arguments it made. We do not find merit in this assertion of error.

As for the remaining appealed issues, suffice it to say that we are satisfied that the hearing officer's determination regarding the injury on _____, the lack of a new injury on _____, and the existence of disability through the hearing date find adequate support in the evidence. We disagree with Carrier 2 that Dr. P's expert medical opinion is wanting in specificity, particularly given his later letter of clarification. Dr. P's progress notes into the fall of 1995 support claimant's contention that her disability (as defined in Section 410.011(16)) continued. These were fact questions for the hearing officer who is the sole judge of the relevance, materiality, weight and credibility of the evidence. Section

410.165(a). We will not disturb the challenged findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge