APPEAL NO. 980254
FILED MARCH 25, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was begun on July 9, 1997 (the hearing officer's decision states June 12, 1997, while the audiotape states July 9, 1997), in (City 1), Texas, with (hearing officer) presiding as hearing officer. The record indicates that the hearing was recessed to allow the appellant (carrier) an opportunity to search the claims file and the case was reconvened on December 19, 1997, for closing remarks. Respondent (claimant) apparently was not present at the December 19th hearing and the hearing officer agreed to leave the record open for closing remarks and responses. The record does not contain any written closing remarks and the hearing officer closed the record on January 15, 1998. With respect to the five unresolved issues reported from the benefit review conference (BRC), the hearing officer determined that 1) Claimant did not sustain an injury in the course and scope of his employment on _____ (all dates are 1995, unless otherwise noted), that 2) claimant did not have disability, that 3) claimant had timely reported his claimed injury on November 27, 1995, that 4) claimant had not made an election of remedies when he filed to receive benefits under a group health policy and that 5) carrier did not timely contest compensability after receiving written notice of claimant's alleged injury and that carrier's contest is not based upon newly discovered evidence.

Carrier appeals the determinations on all five issues; however, clearly the key issue is timely contest of compensability. Carrier also contends that claimant made an election of remedies, that claimant failed to timely give notice of his injury to the employer, that claimant had not sustained a compensable injury (due to carrier's failure to timely contest compensability) and that, because claimant did not have a compensable injury, claimant cannot have disability. The file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

Briefly, the facts are that claimant was a heavy equipment mechanic. Claimant testified that on _____, as he was getting on a forklift, he accidently hit a lever, that he had to jerk sideways to avoid injuring a coworker and, in the process, fell out of the forklift, hitting the running board and then falling to the ground. Claimant testified that he told is supervisor, Mr. H, about the accident shortly after it occurred and that he "had a warm sensation" in the right side of his lower back. Mr. H, in a handwritten memo (unclear whose handwriting it was as there is another statement from another employee with similar printing), denied that claimant reported an injury to him at that time. Claimant said that he finished his shift on _____ and worked for several days thereafter. Claimant said he had back pain the following morning. At

some time (maybe around November 17th, according to Mr. H's statement), claimant went on vacation to the east coast. (There are some allegations this was to move his mother or mother-in-law to Texas). Claimant testified that he woke up on Thanksgiving (no date is given) with severe back pain radiating into his right thigh and leg. Claimant testified that he cut his visit short and returned to Texas to seek medical assistance. Apparently, on November 27th, claimant went to pick up his paycheck and, according to Mr. H's statement, Mr. H was told that "[Claimant] was suffering from some sort of back injury . . . and that he was inroute [sic] to visit a doctor, to have an MRI performed."

Claimant testified that he initially saw his family doctor, Dr. E, who recommended x-rays to diagnose his condition. An off-work slip is dated November 28th (but the signature is illegible). In an office note dated December 4th, Dr. E notes back pain as well as "weakness in his right face" and "some C7 numbness in his fingers." Claimant testified that at that time he didn't know the cause of his symptoms and therefore paid for the medical care through his group health insurance. Claimant was referred to Dr. S, who in a report dated December 7th comments that claimant "states that [he] recalls some exacerbation of his pain while operating forklift at work." Dr. S ordered an MRI. An MRI performed on December 11th shows a "prominent left postero-lateral and lateral L5-S1 disc protrusion" which touches a nerve root.

Claimant filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) dated March 14, 1996. The TWCC-41 shows it was received in the Texas Workers' Compensation Commission (Commission) (City 1) field office on March 15, 1996. In evidence as Claimant's Exhibit No. 9 is a Texas COMPASS (Comp. Automated Support System) note which shows "N7 letter created on 04/09/96" and "NF letter created on 04/09/96" and that the claim file was transferred "to (General, (City 1)) on 04/09/96." An Employer's First Report of Injury or Illness (TWCC-1) dated March 4, 1997, received by carrier on March 10, 1997, indicates a _____ date of injury, where "claimant alleges unknown injury to unknown body part to unknown cause" with a date reported as March 4, 1997. (We caution that Section 409.005(f) provides that the TWCC-1 may not be considered as an admission or evidence against the employer or carrier.) Carrier filed a Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) dated March 10, 1997, stating that carrier received its first written notice of injury that same date. The hearing officer, in her Statement of the Evidence, comments:

> Carrier said they first received written notice of the claimed injury on March 10, 1997, and disputed the injury on the same day. Commission records indicate that a request for a TWCC-1 was sent to carrier on April 9, 1996, but was not filed with the Commission until May 12, 1997, the date of the [BRC]. See Claimant's Exhibit No. 9. Carrier should have received the letter from the Commission requesting the TWCC-1 no later than April 14, 1996.

Apparently, based on that reasoning, the hearing officer made a factual determination that "Carrier first received written notice of the claimed injury on April 14, 1996." We reverse and remand on this issue.

Section 409.021(c) provides in part that if a carrier does not contest compensability of an injury on or before the 60h day after the date on which the carrier is notified of the injury, the carrier waives its right to contest compensability. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a) (Rule 124.1(a)) provides that written notice of injury will be by the TWCC-1 or any other written notification which fairly informs the carrier of the facts showing compensability. *See* Rule 124.1(d). In this case, Claimant's Exhibit No. 9 only shows that N7 and NF letters were created. There is no evidence if, or when, and/or to whom those letters might have been sent, much less evidence that carrier either received a TWCC-1 or other written notice showing compensability of a claim. Further, even if an N7 or NF letter was a request for a TWCC-1, one might logically reach a conclusion that such a letter was sent to the employer, rather than the carrier. In any event, we reverse the hearing officer's determination that the carrier received written notice of the claimed injury on April 14, 1996 (Finding of Fact No. 4), as being unsupported by the evidence or the hearing officer's explanation. We remand this issue to the hearing officer for specific determinations based on the existing record and/or explanation referring to specific evidence when and/or by what means carrier received written notice of the claimed injury and whether it timely contested compensability from that date.

Finding of Fact No. 9, that claimant did not sustain an injury in the course and scope of his employment on _____, has not been appealed (carrier appealed Conclusion of Law No. 6) and therefore has become final pursuant to Section 410.169.

The hearing officer's determination that claimant is not barred from pursuing his workers' compensation benefits because he received some group health benefits, under an election of remedies doctrine, is affirmed. The Appeals Panel has frequently noted that the election of remedies doctrine is not a favored one and its scope should not be extended. Texas Workers' Compensation Commission Appeal No. 93155, decided April 14, 1993; Texas Workers' Compensation Commission Appeal No. 970601, decided May 16, 1997; and Texas Workers' Compensation Commission Appeal No. 980024, decided February 13, 1998. We do however note that claimant's testimony that he reported a work-related injury to the employer on _____ and November 27th is somewhat at odds with his testimony that he used group health coverage because he did not know what was causing his back pain. However, it is the hearing officer, as the fact finder, who resolves inconsistencies and contradictions in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer, in Finding of Fact No. 8, determined that claimant first reported the claimed injury to the employer on November 27th,

apparently relying on Mr. H's written statement that he was told that claimant was alleging a work-related injury on that date (even though Mr. H may not have believed it). We find sufficient evidence to support the hearing officer's determination that claimant reported his alleged injury to the employer on November 27th and affirm the hearing officer's determination on that issue as not being against the great weight and preponderance of the evidence. Cain v. Bain 709 S.W.2d 175, 176 (Tex. 1986). Whether claimant had disability will depend on whether claimant sustained a compensable injury and, consequently, we also remand on that issue for determinations supported by the evidence.

In summary, the determination that claimant did not sustain an injury in the course and scope of employment on _____ (Finding of Fact No. 9) has become final pursuant to Section 410.169; we affirm the hearing officer's determinations that claimant has not made an election of remedies by seeking "medical care under his HMO" (Finding of Fact No. 8) and that claimant gave timely notice of his alleged injury to the employer on November 27th. On the threshold issue of timely contest of compensability after receipt of written notice, and the issue of disability, we remand to the hearing officer for further consideration and determinations as supported by the existing evidence of record and not inconsistent with this opinion.

Pending resolution of the remand, 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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge