

APPEAL NO. 980670
FILED MAY 18, 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 held on February 25, 1998, with a hearing officer. The issues at the CCH were whether the appellant/cross-respondent (carrier herein) waived the right to contest the compensability of the claimed injury by not contesting compensability within 60 days of being notified of the injury and whether the compensable injury included the cervical spine, thoracic spine lumbosacral spine, crush injury to right foot, right elbow sprain, right wrist sprain, right shoulder sprain, right knee injury, right hip injury, right ankle injury (with possible resulting ankylosis), left ankle injury, cerebral concussion, and contusion to the face, including the mandible. The hearing officer found that the respondent/cross-appellant (claimant herein) injured his left wrist, right wrist, right ankle and right foot during the compensable injury. The hearing officer found that the carrier only timely disputed the claimant's cervical and back injuries. The hearing officer concluded that the claimant's injuries included the right foot (crush injury), right elbow, right wrist, right shoulder, right knee, right hip, left knee, right ankle, left ankle, cerebral concussion, left wrist, and contusions to his face, including mandible.

The claimant files a request for review challenging a number of the hearing officer's findings and arguing that his injury included an injury to his cervical spine and back. The carrier responds that the claimant's request for review is untimely. Records of the Texas Workers' Compensation Commission (Commission) show that the decision of the hearing officer was mailed to the claimant on March 18, 1998. The claimant recites that he received the decision on March 23, 1998. We note this is the same day we would have deemed receipt under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 102.5(h) (Rule 102.5(h)). The claimant mailed his request for review to the Commission postmarked April 21, 1998, and the Commission received it on April 23, 1998. Thus, since he did not mail his request for review to the Commission within 15 days of the date he received the decision of the hearing officer and it was not received within 20 days of this date, the claimant's request for review is untimely. See Section 410.202(a); Rule 143.3(c). We do not have jurisdiction to consider the claimant's request for review and we will not discuss it further.

The carrier also filed a request for review challenging some of the hearing officer's Findings of Fact and Conclusions of Law and asserting two grounds of error. First, the carrier argues that it did not receive notice of additional injuries (those in addition to the right foot and left wrist) on July 2, 1997. Second, the carrier contends that its Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) filed on August 25, 1997, was adequate to dispute all of the claimant's additional injuries. The claimant responds that the carrier's use of a "catch-all" phrase did not

dispute his specific additional injuries and questions whether the carrier's TWCC-21 was actually filed on August 25, 1997.

DECISION

Reversed and remanded.

The hearing officer sets out the evidence, particularly the medical evidence, in some detail and we will not repeat his discussion of the evidence here. We adopt the hearing officer's rendition of the evidence and will only summarize the evidence directly germane to the narrow issues before us. The parties stipulated that the claimant sustained a compensable injury on _____, which included a crush injury to claimant's right foot and a left wrist injury. There was evidence that injury took place when the claimant, who was working as a gutter installer, fell off a roof nine to ten feet to the ground onto concrete. The emergency room report mentions that the claimant fell from a roof landing mainly on his right foot and that he had pain in his right heel and both wrists. The medical evidence indicates that the claimant underwent surgery on his right foot. The claimant changed treating doctors to (Dr. S), who in a July 2, 1997, report concerning the claimant, mentions additional areas of the claimant's body that were injured in his compensable accident. The carrier put into evidence a TWCC-21 dated August 22, 1997, and stamped with the Commission's date-stamp on August 25, 1997. In this TWCC-21 the carrier stated its dispute as follows:

[C]arrier accepts a Fracture of (R) foot and sprain of (L) wrist injury only. The carrier disputes any other diagnosis or extent of injury as not related to the accepted compensable injury. Carrier has no medical evidence to support a cervical or back injury as related to the original injury one year ago.

It was undisputed that this was the only TWCC-21 filed by the carrier.

The carrier challenges the hearing officer's following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

2. July 2, 1997, was the date the Carrier first received written notice of Claimant's additional injuries sustained from a fall of _____.

* * * *

4. Carrier's TWCC-21 filed on August 25, 1997, accepted the right foot and left wrists [sic] injuries of Claimant, but only disputed the cervical and back injuries of the Claimant.

5. Claimant's fall from a roof on _____, while he was performing job duties as a gutter installer, resulted in Claimant injuring his left wrist, right wrist, right ankle, and right foot.

CONCLUSIONS OF LAW

3. Carrier waived the right to contest the compensability of Claimant's injuries to his right elbow, right wrist, left wrist, right shoulder, right knee, right hip, left knee, right ankle, left ankle, cerebral concussion, and facial contusions, including mandible, by not contesting compensability within 60 days of being notified of the injuries.
4. Claimant's compensable injuries include the right foot (crush injury), right elbow, right wrist, right shoulder, right knee, right hip, left knee, right ankle, left ankle, cerebral concussion, left wrist, and contusions to his face, including mandible.

Section 409.021 provides as follows, in relevant part:

- (a) An insurance carrier shall initiate compensation under this subtitle promptly. Not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall:
 - (1) begin the payment of benefits as required by this subtitle; or
 - (2) notify the commission and the employee in writing of its refusal to pay and advise the employee of:
 - (A) the right to request a benefit review conference; and
 - (B) the means to obtain additional information from the commission.
- (b) An insurance carrier shall notify the commission in writing of the initiation of income or death benefit payments in the manner prescribed by commission rules.
- (c) If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of the

insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period.

- (d) An insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

Section 409.022 provides as follows:

- (a) An insurance carrier's notice of refusal to pay benefits under Section 409.021 must specify the grounds for the refusal.
- (b) The grounds for the refusal specified in the notice constitute the only basis for the insurance carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date.
- (c) An insurance carrier commits a violation if the insurance carrier does not have reasonable grounds for a refusal to pay benefits, as determined by the commission. A violation under this subsection is a Class B administrative violation.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 124.6(a)(9) (Rule 124.6(a)(9)) states that a carrier which refuses to begin paying temporary income benefits shall notify the Commission and the claimant, on a TWCC-21, of its refusal and that such notice shall contain, among other things:

a full and complete statement of the grounds for the carrier's refusal to begin payment of benefits. A statement that simply states a conclusion such as "liability is in question," "compensability in dispute," "no medical evidence received to support disability," or "under investigation" is insufficient grounds for the information required by this rule.

Determinations of when the carrier received adequate notice and whether the carrier adequately disputed within a reasonable time involve making factual determinations based upon the evidence and reasonable inferences from the evidence. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas

Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, 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 for factual sufficiency of the evidence, we should 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, 635 (Tex. 1986).

We are troubled that the hearing officer, in his discussion, describes the TWCC-21 as a dispute of "all" other injuries and attributes his decision to (uncited) Appeals Panel decisions that he says require the carrier to specify the body parts it disputes. However, we believe that the proper standard is whether a "fair reading" of the TWCC-21 indicates a dispute to compensability. In this case, whether the carrier specifically named two injuries it accepted, and said it disputed all injuries beyond this, a "fair reading" of the TWCC-21 in issue leads inevitably to the conclusion that it disputed all additional injuries beyond the right foot and left wrist. We also note that the attorney for the carrier represented to the hearing officer that the carrier received notice of the additional injuries by August 21, 1997. We also note that it was undisputed that the TWCC-21 was filed by the carrier on August 25, 1997; consequently, it was timely, or at least within 60 days of notice.

Because the hearing officer's determination that most claimant's injuries were based on his finding of "waiver," the decision and order of the hearing officer are reversed and the case is remanded for a new decision on the issue of the extent of the compensable injury. Texas Workers' Compensation Commission Appeal No. 94977, decided September 6, 1994.

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:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge