

APPEAL NO. 990460

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 16, 1999, a contested case hearing (CCH) was held. The issues unresolved from the benefit review conference (BRC) and recited were:

1. Is [respondent] Claimant's compensable injury a producing cause of the herniated disc at the C3-C4 level, and the bulging discs at the C5-C6 and C6-C7 levels of the cervical spine?
2. Did [appellant] Carrier waive its right to contest the compensability of the claimed cervical injury to the C3-C4, C5-C6, and C6-C7 levels by not contesting compensability within 60 days of being notified of the injury or by not sufficiently disputing compensability?

The hearing officer found that the parties "did not agree on the nature of the disputed issues," that the issues had not been fully mediated at the BRC and that the case was not ripe for adjudication. The hearing officer returned the case for the matter to be set at the next available BRC docket.

Carrier appealed, contending that the hearing officer's decision was "clearly wrong and manifestly unjust to [carrier]." Carrier argues that it was represented at the BRC by an adjuster, that the BRC report contained the parties' position on the disputed issues, that claimant had not filed a response to the BRC report, and that the hearing officer improperly suggested to claimant "that he was in error concerning the first disputed issue." Carrier objected to restating the issue and took the position that claimant "waived any additional disputes or its [sic, her] right to modify the disputed issues as raised." Carrier contends the hearing officer "does not have the power to order that a [BRC] be held on an issue in dispute." Carrier requests that we reverse the hearing officer's decision and that we remand the case back to the hearing officer for a hearing on the disputed issues as raised. The file does not contain a response from the claimant.

DECISION

Affirmed.

First, we note that the standard of review under which we consider this case is an abuse of discretion by the hearing officer, not a preponderance of the evidence. Texas Workers' Compensation Commission Appeal No. 951225, decided September 11, 1995. Next, we note that nowhere in the hearing officer's decision, carrier's appeal or the BRC report is the "compensable injury" defined. Based on claimant's opening statement (which is not evidence), we presume it to be a bilateral carpal tunnel syndrome (BCTS) injury.

At the CCH, the issues as reported out of the BRC were stated and agreed to by the parties, exhibits were admitted and, during claimant's opening statement, it became clear that the claimant believed the issue to be whether a repetitive trauma injury to the wrists extended to a cervical injury as defined in the issues. The carrier's position seemed to be that claimant was alleging that the compensable BCTS was causing the claimed cervical injuries. The hearing officer attempted to get the parties to agree so that both parties would be presenting evidence and arguing the same issue. When the hearing officer was unable to do so, the hearing officer referred the matter back to a BRC, over carrier's objection, for the issues to be defined.

The medical records in evidence indicate claimant was a seamstress and gradually developed "onset of pain over the right elbow, forearm and wrist" in 1997. Claimant was diagnosed with "right epicondylitis" and a left wrist ganglion cyst in May 1997. By June or July 1997, claimant was diagnosed as also having BCTS. In an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) dated July 1, 1997, claimant listed the parts of her body injured as "hands, wrist & arms, neck" being "strained." No Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) dated within 60 days of July 1, 1997, is in evidence. Claimant's ganglion cyst was excised and a carpal tunnel syndrome (CTS) release was performed on August 8, 1997, by Dr. M. Claimant began treating with Dr. P in November 1997. In reports dated November 4 and 18, 1997, Dr. P continued to diagnose CTS. In a Specific and Subsequent Medical Report (TWCC-64) dated December 16, 1997, Dr. P noted, "[claimant] continues with pain to the cervical spine to the hand. Limitation of motion in the neck with spastic muscles." A cervical MRI was recommended but disapproved by carrier. In a TWCC-21 dated December 4, 1997, carrier denied liability for two days lost time as not being related to the compensable injury. Claimant filed an amended TWCC-41 dated January 9, 1998, alleging a repetitive BCTS injury. In a TWCC-21 dated January 14, 1998, carrier disputed "recent cervical complaints as these are unrelated to her employment and her workers' compensation claim." An MRI (apparently performed at claimant's own expense or through her group health coverage) of the cervical spine performed on December 30, 1997 (transcribed on January 5, 1998), showed central posterior disc herniation at C3-C4 and bulging discs at C5-C6 and C6-C7.

A BRC was conducted on November 12, 1998, with the issues as previously listed. The benefit review officer (BRO) recommended that claimant's "compensable injury is not a producing cause of her cervical herniation at the C3-C4 level," defined injury and commented that it is claimant's burden "to prove her cervical injury is resulting from her original compensable injury." The BRO further recommended a finding that carrier "waived its right to dispute the Claimant's claimed cervical injury" and that carrier's dispute of "recent cervical complaints" was not sufficiently specific. Carrier filed a response to the BRC report disputing the BRO's recommendations.

As previously noted, claimant interpreted the disputed issue as being that she had to show the circumstances of the repetitive trauma injury as causing the cervical injury. Although not entirely clear, the carrier seems to interpret the BRC report to mean that

claimant must show the "compensable injury" (the BCTS) was a producing cause of the cervical injury. Carrier says it "was prepared to proceed on the disputed issues as raised and delineated at the BRC level" and that the hearing officer erred in attempting to clarify or restate the issue. Carrier contends that claimant, by stipulating to the issues from the BRC, "waived any additional disputes or its right to modify the disputed issues as raised and delineated."

The Appeals Panel, from time to time, has commented that issues should be clarified to define what the actual dispute is. See Texas Workers' Compensation Commission Appeal No. 970314, decided April 4, 1997, as an example. Merely plowing ahead with a misstated, or in this case misinterpreted, issue does not benefit the orderly resolution of disputed issues. We note that the hearing officer did not seek to add or exclude an issue, but only attempted to get the parties to litigate, or at least interpret, the stated issue the same way. Rather than proceed with the CCH, with each party trying the case on different theories, and after failing to obtain an agreement on what the stated issue really meant, the hearing officer referred the matter back to a BRC so that the issues could be defined or interpreted. In applying an abuse of discretion standard, we look to see if the fact finder acted without reference to any guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). In this case, we hold that the hearing officer did not abuse her discretion in attempting to get agreement from the parties on how the agreed upon disputed issues should be interpreted, and failing to do so, referred the case back for mediation at a BRC for agreement what the disputed issue means. We would also add that it would be helpful if the "compensable injury" is defined.

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge