

APPEAL NO. 990836

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 March 22, 1999. The issues at the CCH, as reported out of the benefit review conference (BRC), were whether the respondent (claimant) sustained a compensable back injury¹ and whether the claimant had disability from January 19, 1999, to the date of the hearing. The hearing officer found that an injury was "alleged" on this date and that the claimant had disability from January 19, 1999, to March 22, 1999. The appellant (carrier) appeals these determinations, contending error in the failure of the hearing officer to address the issue of a compensable injury and that without a compensable injury there can be no disability. The claimant replies that the decision is correct and should be affirmed.

DECISION

Reversed and remanded.

The report of the BRC on January 19, 1999, commented that the claimant was not present. The only unresolved issues were: "Did the claimant sustain a compensable injury to his back on _____?" and "Did the claimant sustain disability from January 19, 1999 to date and continuing?" The hearing officer made the following findings of fact and conclusions of law pertinent to this appeal:

FINDINGS OF FACT

2. Claimant alleged an _____ injury to his back.

* * * *

4. Carrier accepted liability for Claimant's alleged _____ injury until contesting liability in May 1998.

CONCLUSIONS OF LAW

3. The hearing officer has no jurisdiction in this proceeding to make a determination whether the claim is fraudulent.

4. Because Claimant has shown by a preponderance of the evidence that his inability to obtain and retain employment at wages he earned

¹In his statement of the issues in the decision and order, the hearing officer added parenthetically to this issue the additional statement "(injury in the course and scope of employment with [employer])."

before _____ from January 19, 1999 to March 22, 1999 arose out of the treatment for the alleged _____ injury, he has disability and is entitled to TIBS [temporary income benefits] for such period.

The hearing officer explained his decision as follows:

The issue of whether Claimant had a compensable injury is not properly before the hearing officer. Claimant alleged an injury on _____. The Carrier did not dispute the injury within 60 days, and paid benefits including the cost of a spinal surgery in September 1997. The carrier disputed liability in May 1998 based on interviews of a third persons [sic] who allege that the claim was fraudulent. The Carrier's allegation of fraud, is a collateral attack on liability, and is not properly before the hearing officer in a benefit [CCH], as fraud issues are determined elsewhere.

We observe, initially, that these comments of the hearing officer appear, to a degree, to be based on evidence not admitted in the record of proceedings below. Secondly, the issue of compensability of an _____, injury was reported out of the BRC. No comments on the report of the BRC were submitted by either party. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(c) (Rule 142.7(c)). The issues of carrier waiver of compensability as provided in Section 409.021(c) or whether, based on newly discovered evidence, the carrier can reopen the question of compensability, see Section 409.021(d), are not subsumed in the issue of compensability. See Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991, where we stated that if the issue of carrier waiver of the right to dispute compensability is not raised at the BRC, "then the issue may not be considered at the [CCH] except by the consent of the parties or a determination of good cause." The report of the BRC does not reflect that the claimant asserted or took the position that the carrier waived its right to dispute compensability or that the carrier did not possess newly discovered evidence that would entitle it to reopen the issue of compensability. Of course, had the claimant been present at the BRC, the "real" issue may have been presented for resolution. At the CCH, the parties agreed that the issues were as stated in the report of the BRC. The claimant did not ask to add an issue of carrier waiver of its right to dispute compensability. The matter was nowhere addressed and there was no hint from the hearing officer that this issue should be added or that he may issue a decision and order on the basis of this unreported issue. Finally, the hearing officer's characterization of the compensability issue as an "allegation of fraud" and "collateral attack on liability" serves no useful purpose and is largely incorrect. Frequently, the parties' dispute of liability is over the question of whether the claimed injury actually happened as the claimant alleged. Simply because a carrier asserts an injury is not work related and a claimant asserts that it is does not turn the issue into a question of "fraud" for which resolution must be found outside the CCH process. We assume that the hearing officer's use of the phrase "collateral attack" means simply that he perceives this dispute over compensability to be based on the newly discovered evidence provisions of Section

409.021(d). In any event, simply to label this a "collateral attack" does not deprive the hearing officer of jurisdiction to resolve the reported issue of whether the claimant sustained a compensable injury on _____.

The hearing officer was required to resolve the issue of whether the claimant sustained a compensable injury on _____, based on the properly admitted evidence before him. No issue of carrier waiver or carrier's right to reopen the issue of compensability based on newly discovered evidence was before the hearing officer and no findings in these regards should be made. Because the hearing officer failed to make findings of fact and conclusions of law on the issue of a compensable injury, we reverse his decision and order and remand for express findings of fact and conclusions of law, based on the existing record, that the claimant did or did not sustain a compensable back injury on _____.

Section 401.011(16) defines disability as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Where, as here, there was no agreement or stipulation by the parties that the claimant sustained a compensable injury on _____, the finding of disability without the threshold finding of a compensable injury is fatally defective. For this reason, we also reverse the finding of disability and remand this issue. On remand, a finding of disability may only be made if there is also an express finding of a compensable injury.

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.

Alan C. Ernst
Appeals Judge

CONCUR:

Dorian E. Ramirez
Appeals Judge

CONCUR IN RESULT:

Stark O. Sanders, Jr.
Chief Appeals Judge