

APPEAL NO. 990920

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 5, 1999, a hearing was held. He determined that respondent/cross-appellant (claimant) compensable injury to his right wrist on _____, aggravated a preexisting mal-union of the radius. He also found that the appellant/cross-respondent (carrier) received written notice of an aggravation injury on December 8, 1998, and did not dispute such injury in 60 days. Finally, he determined that claimant did not have disability from August 4, 1998, through the date of this hearing. Carrier asserts the injury issue was a matter for the Medical Review Division to consider and therefore there was no jurisdiction to decide it; it states that the decision is against the great weight of the evidence; it also asserts that a November 11, 1998, medical report does not say the mal-union was caused by the _____, injury; and it contends that it does not have to dispute a diagnosis. Claimant asserts that he did have disability, saying he should not have been terminated and has not worked because of his injury.

DECISION

We affirm.

Claimant worked for (employer) on _____. On _____, he was moving furniture (sofa) when, he testified, the other mover's grip slipped; claimant said he grabbed the sofa, "extending his wrist"—that right wrist then became swollen. The next day he went to Dr. C at a minor emergency care center for medical care, complaining of pain and numbness. The limited notes indicate that an x-ray showed an "old injury, [illegible - possibly 'arthritic'] changes[,] strained right wrist."

Claimant, and the medical records, indicated that claimant had multiple injuries to the right wrist before _____. These injuries were said to include one in 1979 in which the ulnar nerve was cut; in 1985 he fractured the "wrist" (without saying whether it was the radius); he said he broke it again in a car accident but does not know the year; and then "smashed" his hand (perhaps the right hand) in a filing cabinet mishap in 1995 for which he received treatment into 1996. He says he is worse now. He had been working for this employer since January 1998 without problems until the _____, injury.

Upon the carrier's motion to dismiss the case as a Medical Review matter, the hearing officer ruled that he would consider the issue as one of extent of injury (whether the 1998 injury was a producing cause of the non-union of the right radius) while he added that he would not consider the question of whether surgery or other medical treatment is reasonable and necessary. The hearing officer then addressed the producing-cause issue in a finding of fact that said the _____, injury aggravated the preexisting mal-union of the radius "with severe positive ulnar nerve variant"; the finding of fact he made much more accurately reflects the evidence presented than did the "producing cause of the non-union" language found in the issue.

The carrier maintained that the claimant only had a strain of the right wrist. In its dispute, dated March 1, 1999, the carrier disputed "any injury except a sprain to the right wrist" (*compare* to Dr. C's diagnosis of a "strain"). The written notice of injury which may have prompted this dispute will be addressed along with the waiver issue hereafter. For now, the carrier's dispute can be compared to the factual situation set forth in Texas Workers' Compensation Commission Appeal No. 981133, decided July 15, 1998, which carrier relies upon. In that opinion, a focal point was that "the parties stipulated on the record that the claimant sustained a compensable low back injury on (Date of injury for Appeal No. 981133)." There was no limitation on that stipulation, such as "the compensable injury was limited to a strain." Almost four years later, the carrier in that case was asking whether the 1994 injury was a "producing cause of the L4-5 disc herniation," an issue which, when compared to the stipulation, was, in reality, an attempt to relitigate the compensable injury question since there was no evidence of other injury before or after the 1994 injury. In addition, in that case, studies (CT scan) were referenced that said there were bulging discs at L4-5 and L5-S1 in 1994 while a CT scan in 1997 was said to have "shown the same findings at L4-5 and perhaps an increased bulge or minor herniation of L5-S1." Appeal No. 981133 was determined to be a Medical Review matter under the circumstances of that case. The author judge, as the author judge of Appeal No. 981133, believes it impossible to state all the conditions under which a particular injury/treatment matter should be determined by the dispute resolution process and which should be determined by Medical Review under the 1989 Act. In comparing Appeal No. 981133 to the case now under review, more similarity would be present if the carrier herein simply accepted a "wrist injury" (as opposed to disputing "any injury except a sprain"). *Compare* to the carrier's acceptance of a "low back injury" in Appeal No. 981133 which expressed no limitation to its acceptance. However, although that type of acceptance of injury could possibly make the cases similar, there still is the question of several injuries in the case under review so that the "producing cause" issue sounds in "sole cause" whereas there was no "sole cause" undercurrent in Appeal No. 981133. The carrier's assertion that jurisdiction did not lie is not accepted, particularly with the hearing officer effectively pointing out that he would not consider what treatment, if any, was necessary and reasonable for claimant's condition.

Carrier's dispute of March 1, 1999, was found to have followed written notice provided by a medical record of November 11, 1998; that record was received by the Texas Workers' Compensation Commission (Commission) on December 8, 1998, and carrier does not assert that it received it later or did not receive it at all. That report was made by Dr. M. He stated the mal-union of the radius was prior to the compensable injury, but he also stated that in regard to "whether his new injury is aggravating the current situation, I think he has had an aggravation, but obviously he has had significant pre-existing conditions." In that same report, Dr. M identified the injury as one occurring in April 1998 while moving a sofa. There was no assertion that the information provided did not accurately identify the claimant or the date of injury. The comments made by Dr. M satisfactorily meet the requirement for stating "facts showing compensability." See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1 (Rule 124.1). The comments made by Dr.

M do not amount to a diagnosis which carrier says it does not have to dispute. The determination that the carrier did not timely dispute the compensability of the injury is sufficiently supported by the evidence.

The Commission appointed Dr. H to examine claimant to determine whether claimant sustained an aggravation of a preexisting injury. Dr. H recited the history of accidents beginning in 1979. He somewhat confused the situation by using the words, "this second injury," when the history shows that there were more than two injuries prior to 1990. Nevertheless, the meaning of this choice of words was a matter for the hearing officer, who is the sole judge of the weight and credibility of the evidence, to determine. See Section 410.165. Dr. H wrote, "[c]ertainly, this second injury is a further aggravation of preexisting injury which is not in disagreement by any physician, I believe." He added some statements about surgery which do not control this review, and then said, "the pain and degeneration of the wrist due to the second injury has further aggravated the procedure and is bringing this situation to a climax" This opinion, in addition to that of Dr. M on November 11, 1998, provides sufficient evidence to support the determination that claimant's _____, compensable injury aggravated his preexisting wrist condition, which was also expressed in words reflecting the issue by saying that the compensable injury of _____, is a producing cause of the claimant's current right arm condition.

Turning to the claimant's appeal regarding disability—claimant worked from April 22, 1998, through August 3, 1998, at restricted duty for the employer. The issue involving disability asked if there was disability beginning August 4, 1998. Claimant did not testify that his wrist was worse on August 4, 1998; he did not testify that he was unable to do the restricted office work that he was doing (filing, shredding, copying) while working after the date of injury. While the hearing officer commented in his Statement of Evidence about "insufficient" evidence of "reasonable efforts to find work" after August 3, 1998, which is not the test for disability for a claimant who is under a restricted release to work, he also stated that claimant worked until August 3, 1998, when he was terminated for failure to contact the employer. The latter observation, along with evidence that indicates claimant did not call in to employer as required for a period of a week, can result in a determination of no disability when coupled with the hearing officer's findings of fact that said claimant voluntarily left his job and was terminated and also said that claimant's "condition did not cause him to be unable to obtain and retain employment at wages equivalent to his pre-injury wage." See Texas Workers' Compensation Commission Appeal No. 91098, decided January 15, 1992, which also noted no absence from work because of the injury after restrictions had been imposed, but observed that the claimant got "fed up" and resigned; the conclusion was that the injury did not keep that claimant from working, but that quitting his job did. See *also* Texas Workers' Compensation Commission Appeal No. 961797, decided October 24, 1996, which stated that disability ceased when that claimant was terminated (for cause) for unexcused absences.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

I concur in the determination of the jurisdiction issue because I believe that the "true nature of the dispute," Texas Workers' Compensation Commission Appeal No. 981220, decided July 15, 1998, is an extent-of-injury question; that is, the claimant is contending that on _____, he compensably aggravated the preexisting mal-union. What precisely this aggravation was is problematic, but it is of limited significance in light of the dispute waiver finding.

Alan C. Ernst
Appeals Judge