APPEAL NO. 990996

Following a contested case hearing held on April 5, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant's (claimant) compensable left knee injury of _____, is not a producing cause of the fractured right fourth and fifth metatarsal bones in his right foot and that the respondent (self-insured) did not waive its right to contest the compensability of the claimed injury by not contesting it within 60 days of being notified of the injury. Claimant has appealed both determinations on evidentiary sufficiency grounds. The self-insured contends that the evidence is sufficient to support the challenged determinations.

DECISION

Affirmed.

We note at the outset that, in the hearing officer's decision and order, each party's exhibits are misidentified as those of the other.

Claimant testified that on _____, while fighting an apartment house fire, his left knee was injured; that his injured knee was subsequently surgically repaired (January 1995) and he was given a desk job in the alarm room; and that Dr. W, the designated doctor, assigned him a 14% impairment rating for that injury which he contested, going to a benefit review conference (BRC), in that other doctors had assigned higher ratings. Dr. S wrote on March 4, 1998, that he has been treating claimant conservatively for a patellofemoral syndrome; that claimant has been using an exercise bicycle and taking anti-inflammatory medicine; that he last saw claimant on January 15, 1998, and then recommended an aggressive weight loss program; and that he recommends that claimant be continued at light duty. Claimant stated that he had a civil service hearing, apparently in June 1998, concerning allegations of insubordination; that his employment was terminated because of his disability and he received his last paycheck in December 1998; and that the self-insured was "playing games" with him. Claimant further testified that on June 6, 1998, while walking on level ground at his house, his left knee gave way and he rolled on his right foot trying to avoid falling and fractured the fourth and fifth metatarsal bones. He said he sought treatment from a hospital emergency room and there presented his "private" insurance card and that two days later, he followed up with Dr. C and also gave that office his insurance card but advised Ms. C of that office that he intended to file a workers' compensation claim. A June 8, 1998, note made by Ms. C states that she called the self-insured about coverage and was told that claimant could file a claim but that it would be denied. A January 15, 1999, letter from the self-insured's adjusting company reflects that claimant has health insurance coverage through the self-insured.

Claimant further stated that he told Mr. H, who works in the self-insured's risk management office, about his injury and about filing workers' compensation paperwork and was told by Mr. H that he did not think the injury would be covered. Claimant testified that

he completed and signed two Employer's First Report of Injury or Illness (TWCC-1) forms, dating one "6-6-98" and the other "6-8-98" without explanation for the two forms and different dates. Neither form contains any other signature. Both forms state that claimant injured his right foot on June 6, 1998, on the driveway at his residence when his left knee buckled and he turned on his right foot to avoid falling, breaking the fourth and fifth metatarsals. The June 6, 1998, form bears the self-insured's fire department's date stamp of October 13, 1998, while the June 8th form does not bear a date received stamp. Asked directly, claimant testified that he relies on the TWCC-1 form as providing written notice that his June 6, 1998, right foot injury resulted from his _____, knee injury, making the point that the self-insured knew his injured knee was unstable. In evidence is an October 19, 1998, letter from Ms. S, an adjuster, to claimant stating that his report of a broken foot has been received and that it cannot be accepted as a new claim for an on-the-job injury in that it occurred at his home, not on the job.

Mr. H testified that he encountered claimant in June or July 1998 at a civil service hearing concerning allegations of claimant's insubordination and again at work when claimant was on crutches, that claimant told him he had fallen at home and was going to file a claim, and that he responded that it would be reviewed. Mr. H further testified that his investigation revealed that no person at the self-insured's fire department had the TWCC-1 with the October 13, 1998, date stamp on it before that date and that when he received that form, he believed claimant was reporting an injury which occurred at home and, thus, not compensable. He indicated that the self-insured notified its adjusting company of the TWCC-1 and was advised that the injury at home was not compensable. He also said that a search was conducted of the self-insured's files and no document was found advising the self-insured that claimant related his June 6, 1998, injury at home to his _____, compensable right knee injury until the self-insured received a December 11, 1998, letter from claimant's attorney. Mr. H further stated that he did not learn until the BRC that claimant was contending that his June 6, 1998, right foot injury was a follow-on injury from his _____, knee injury.

In evidence is claimant's Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) bearing his signature and the date "12-7-98." This form states the date of injury to the right foot as June 6, 1998, and the location of the injury as claimant's residence. Attached to this form is a statement which says that claimant's left knee was injured on _____, in a structure fire, that his left knee buckled on December 3, 1997, and he fell in a bathroom and was off work two to three weeks; that on June 6, 1998, his left knee buckled and he fell, breaking his right foot; and that he gave notice of his injury to Mr. H "through appropriate channels."

Also in evidence is the self-insured's Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21), dated December 18, 1998, stating that the self-insured denies any compensability in that claimant was at home, was not furthering the business of the employer, and was in no way on the job at the time of this injury. Claimant did not contend that this document was insufficient to constitute a contest of the compensability of his foot injury but, rather, that it was not timely filed because his TWCC-1

form or forms constituted earlier written notice of his injury given the context of the self-insured's knowledge that his injured knee was unstable. In evidence is another TWCC-21 dated February 9, 1999, which further disputes the foot injury.

Also in evidence is the March 14, 1997, report of Dr. B who operated on claimant's left knee. Dr. B states that claimant is still on light duty; that he has been wearing a knee support; that he has been fairly active in after-work activities; that his light- duty restrictions are changed to increase the lifting restriction to 100 pounds permanently; that he should still have some limitations on standing, stooping, bending, walking, and squatting; and that he will be fitted with a patella stabilizing knee support and be seen in the future as necessary.

Also in evidence is an August 25, 1998, report of Dr. M, who operated on claimant's right foot in March 1999, which states in the history portion that "[t]wo months ago [claimant] lost his balance secondary to instability of his left knee due to prior accident and surgery, and he fell onto his right foot in an inversion type way and caused a fracture of his 4th and 5th toes." Dr. M's October 22, 1998, record of a follow-up visit for his right foot states, among other things, that claimant "is going to find out if he can get Workman's Compensation."

The hearing officer found that claimant sustained a compensable injury to his left knee on _____; that on June 6, 1998, claimant was at home walking on level ground when his left knee gave out, causing him to fracture his fourth and fifth metatarsals; that the June 6, 1998, injury did not naturally flow from the _____, compensable injury; that claimant provided the self-insured with written notice of the claimed injury on October 13, 1998, which indicated a June 6, 1998, date of injury; that the October 13, 1998, notice of injury was insufficient as it did not identify the correct date of injury; that claimant first provided the self-insured with sufficient notice of injury on December 7, 1998; and that the self-insured disputed the claim on December 18, 1998. Based on these findings, the hearing officer concluded that the self-insured did not waive the right to contest compensability of the claimed injury by not contesting within 60 days of being notified of the injury and that the compensable injury is not a producing cause of claimant's fractured fourth and fifth metatarsals.

These appealed issues presented questions of fact for the hearing officer to resolve and it is the hearing officer who is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and who, as the trier of fact, resolves the conflicts and inconsistencies 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 Appeals Panel, an appellate reviewing tribunal, will not disturb the factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Section 409.021 provides that a carrier must contest the compensability of an injury on or before the 60th day after it is notified of the injury. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1 (Rule 124.1) provides, in part, that written notice of injury, as used in the 1989 Act, consists of the carrier's earliest receipt of either the employer's first report of injury, notification by the Texas Workers' Compensation Commission, or "any other notification regardless of source, which fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability." Claimant had the burden to establish the date the self-insured received a written notice which fairly informed the self-insured of facts showing the compensability of the claimed work-related injury of June 6, 1998. Texas Workers' Compensation Commission Appeal No. 962512, decided January 27, 1997. The hearing officer could reasonably conclude that neither the TWCC-1 form, which claimant expressly stated he relied on, nor any other writing received by the self-insured before the December 7, 1998, TWCC-41 with the attached statement, fairly informed the self-insured of facts showing the compensability of the right foot injury sustained at home on June 6, 1998.

As for the finding that claimant's right foot injury did not flow naturally from his left knee injury, the hearing officer's decision aptly cites and quotes from our decision in Texas Workers' Compensation Commission Appeal No. 951402, decided October 5, 1995. In that decision, we stated that we have considered and found noncompensable injuries resulting from an unstable or buckling knee, and that we have not endorsed a blanket concept that brings within the ambit of the compensable injury every consequence that arguably may not have occurred "but for" the compensable injury. The 1989 Act defines injury to mean "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26).

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge