

APPEAL NO. 991413

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 June 10, 1999. The issues at the CCH were whether the compensable back injury sustained on _____, is a producing cause of the disc fissure at L2-3 and the disc protrusions or herniations at L4-5 and L5-S1, and whether the appellant (carrier) waived its right to contest the compensability of the disc fissure at L2-3 and the disc protrusions or herniations at L4-5 and L5-S1, by not contesting compensability timely. The hearing officer determined that the compensable injury sustained on _____, is a producing cause of the disc fissure at L2-3 and the disc protrusions or herniations at L4-5 and L5-S1, and that the carrier waived its right to contest the compensability of the disc fissure at L2-3 and the disc protrusions or herniations at L4-5 and L5-S1, by not contesting compensability timely. The carrier appeals, urging that the hearing officer's decision is against the great weight and preponderance of the evidence, that the finding that the carrier's dispute was not timely is incorrect as a matter of law, and that the hearing officer failed to properly apply the burden of proof on the issue of whether the compensable injury sustained on _____, is a producing cause of the disc fissure at L2-3 and the disc protrusions or herniations at L4-5 and L5-S1. The respondent (claimant) replies that the hearing officer's decision is correct, is supported by the evidence, and should be affirmed.

DECISION

Affirmed in part, reversed and rendered in part.

The claimant sustained a compensable injury on _____. A prior Decision and Order dated November 12, 1991, determined that the compensable injury included the claimant's back. The claimant was off work from the date of injury until he returned to work on September 3, 1991. The claimant testified that he received treatment for his back pain from Dr. D from 1991 through 1994, Dr. M in 1991, Dr. D's partner in 1996, and at an emergency room (ER) in 1997. According to the claimant, his treatment consisted of anti-inflammatory medication and manipulative therapy for his back pain. The claimant testified that his back pain would flare up occasionally and that on May 26, 1998, when at home, he bent over a sink to brush his teeth and sneezed, causing his back to lock up. The claimant asserts that his current back condition is related to the 1991 compensable injury.

The medical records indicate that the claimant had a lumbar x-ray and received treatment for lumbosacral nerve root irritation in 1991. Dr. M's records indicate that the claimant received treatment at their facility through August 29, 1991. No medical evidence was presented from late 1991 until May 26, 1998, with the exception of an ER visit on September 5, 1997. On May 26, 1998, the claimant sought medical treatment at (medical center) and was diagnosed with an acute lumbar herniated disc. The history indicates:

This 43-year old white male got out of bed to get ready for work. He started sneezing, and on his third sneeze he had the sudden onset of low back pain, nonradiating He has had a prior back injury four years ago with a diagnosis of back strain This resolved well with routine medications.

A June 10, 1998, MRI revealed a disc protrusion of the L4-5 disc with a flattening of the thecal sac, a disc protrusion of the L5-S1 disc with a small annular fissure, and a fissure in the L2-3 disc space. In a report dated December 1, 1998, Dr. F states that the claimant's back problems all stem from his _____, injury, and recommends a discogram to identify whether the claimant is a fusion candidate. Dr. J states that the claimant was experiencing lower back discomfort prior to his accident, that the claimant aggravated his lower back, and that significant increases in disc pathology are not noted to have occurred.

The carrier had two doctors review the medical records, Dr. H and Dr. O. Both doctors state that there are no records to indicate any ongoing problems from 1991 to approximately 1998; that the claimant's _____, injury is not the basis for his 1998 symptoms or findings; and that if this was a continuation of the 1991 injury, the claimant would have had ongoing back problems that showed the progression over the intervening years. The carrier presented the testimony of Mr. KW and Mr. TW to support its position. Mr. TW, the health and safety supervisor, testified that he received no reports or bills from Dr. D indicating that the claimant was receiving any medical treatment between October 1991 and May 1998, and that during this period, the claimant did not complain of any back problems. Mr. KW, the human resources manager, testified that the claimant applied for short-term disability in May 1998, after reporting that while brushing his teeth, he sneezed and his back locked up. Mr. KW testified that the claimant indicated that his back condition was not work related.

The claimant had the burden to prove that the compensable injury sustained on _____, is a producing cause of the disc fissure at L2-3 and the disc protrusions or herniations at L4-5 and L5-S1. Despite the carrier's contention that the hearing officer transferred the burden of proof to the carrier to prove that there was no injury and disability, the record reflects the hearing officer correctly assigned the burden of proof to the claimant. While the hearing officer did not discuss the claimant's evidence and how he met his burden of proof in the Statement of the Evidence, we cannot conclude that the burden of proof was misplaced and we do not find error.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer determined that the compensable injury sustained on _____, is a producing cause of the disc fissure at L2-3 and the disc protrusions or herniations at L4-5 and L5-S1. The only medical evidence which causally relates the claimant's back condition to the compensable injury is Dr. F's opinion, which states:

It is my medial [sic] opinion that [claimant's] back problems all stem from his work-related injury seven years ago. In fact, I am 100% sure this is the case.

Given the absence of medical treatment between September 1991 and May 1998, and the onset of back pain after a specific incident on May 26, 1998, this is a case where the causal relationship between the injury and the current condition requires expert medical evidence which establishes the connection as a matter of reasonable medical probability, as opposed to a possibility, speculation, or guess. See Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Texas Workers' Compensation Commission Appeal No. 981253, decided July 27, 1998. Dr. F's opinion does not contain any supporting rationale and does not rise to the level of reasonable medical probability. We find the hearing officer's determination so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we reverse Finding of Fact No. 3 and Conclusion of Law No. 3 and render a decision that the compensable injury sustained on _____, is not a producing cause of the disc fissure at L2-3 and the disc protrusions or herniations at L4-5 and L5-S1.

A carrier is required to dispute the compensability of an injury not later than 60 days after receipt of notice of injury, or it will waive its right to do so. Section 409.021(c). However, a carrier may reopen inquiry into compensability if there is a finding of evidence that could not reasonably have been discovered earlier. Section 409.021(d). The Appeals Panel has held that where the issue involves whether a more severe condition has evolved from an injury whose compensability was conceded or waived, the "reopening" statute applies. Texas Workers' Compensation Commission Appeal No. 962415, decided January 9, 1997; Texas Workers' Compensation Commission Appeal No. 94943, decided August 31, 1994. An employee who argues that a document is written notice of the compensability of a particular injury and that receipt of the document makes the carrier's contest of compensability untimely, has the burden of proving when the notice was received. Texas Workers' Compensation Commission Appeal No. 941398, decided December 1, 1994; Texas Workers' Compensation Commission Appeal No. 990307, decided March 24, 1999.

Not appealed were the hearing officer's findings that the carrier had written notice of the claimant's lumbar complaint on November 24, 1998, and that the carrier did not file its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) until February 3, 1999, on the 71st day after receiving written notice of the claimant's lumbar complaint. The uncontroverted evidence indicates that the carrier raised an oral dispute at the November 24, 1998, benefit review conference (BRC). The carrier asserts that a dispute may be effectively raised orally at a BRC, if the conference is within 60 days of the date of the carrier's first written notice. The carrier asserts Texas Workers' Compensation Commission Appeal No. 94292, decided April 26, 1994, is indistinguishable from this case. In Appeal No. 94292, the Appeals Panel wrote:

In the instant case, we feel that we would be elevating form over substance were we to hold that the carrier failed to timely contest compensability when it had in fact notified both the claimant and the Commission [Texas Workers' Compensation Commission] at a BRC held within 60 days of its receipt of written notice of the injury that it was contesting compensability of the injury, had given reasons for contesting compensability at the BRC, both the contest of compensability and the reasons therefor were reduced to writing by the BRO [benefit review officer] within the 60-day period, and the parties proceeded to a [CCH] based on the carrier's contest of compensability. We note that under Rule 141.5(c) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 141.5(c)] the BRO is required to identify and describe the disputed issues and elicit each party's statement of position, and under Rule 141.7(c) the BRO is required to make a written report of the BRC We believe that this case represents an unusual situation and our holding should not be construed to go beyond the specific facts of this case.

The facts before us do not match those in Appeal No. 94292, and we do not modify the requirements for contesting compensability. In this case, there was no written report from the November 24, 1998, BRC setting forth the carrier's position for contesting the compensability of the claimant's back condition and the parties did not proceed to a CCH at that time. We believe this case is factually similar to Texas Workers' Compensation Commission Appeal No. 961475, decided September 13, 1996, wherein the Appeals Panel affirmed the hearing officer's determination that the carrier waived its right to contest compensability where the carrier made an oral contest at the BRC and there was not a written request from the carrier for a BRC, nor a written report from the BRO setting forth the carrier's position for contesting the compensability of the claimed injury. The hearing officer did not err in determining that the carrier waived its right to contest the compensability of the disc fissure at L2-3 and the disc protrusions or herniations at L4-5 and L5-S1, by not contesting compensability timely. Although we believe that this case should have been litigated under Section 409.021(d), based on newly discovered evidence, which requires the contest to be made with due diligence in a reasonable time, not a 60-day period, its application would not result in a different outcome. We find sufficient evidence to support the hearing officer's decision that the carrier waived its right to contest the compensability of the disc fissure at L2-3 and the disc protrusions or herniations at L4-5 and L5-S1, by not contesting compensability timely.

We reverse and render a new decision that the compensable injury sustained on _____, is not a producing cause of the disc fissure at L2-3 and the disc protrusions or herniations at L4-5 and L5-S1. We affirm the hearing officer's decision that the carrier waived its right to contest the compensability of the disc fissure at L2-3 and the disc protrusions or herniations at L4-5 and L5-S1, by not contesting compensability timely. The carrier is liable for benefits related to the claimant's disc fissure at L2-3 and the disc protrusions or herniations at L4-5 and L5-S1.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge