

APPEAL NO. 991752

This appeal is brought 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 July 23, 1999. He (hearing officer) determined that the respondent (claimant) fell and injured his left knee in the course and scope of his employment on _____; that he had disability from March 30, 1999, through the date of the hearing; and that his average weekly wage is \$600.00. The appellant (carrier) requested review, contended that the hearing officer erred in considering the Employer's First Report of Injury or Illness (TWCC-1) and the benefit review conference (BRC) report in reaching his decision, urged that the determinations that the claimant sustained an injury in the course and scope of his employment and had disability are so against the great weight and preponderance of the evidence that they should be overturned, and requested that the Appeals Panel reverse those determinations and render a decision in its favor. A response from the claimant has not been received. The determination that the claimant's average weekly wage is \$600.00 has not been appealed and has become final under the provisions of Section 410.169.

DECISION

We reverse and remand.

In the statement of the evidence and discussion in his Decision and Order, the hearing officer commented on conflicting evidence and wrote:

The persuasive evidence, in fact, indicates that the Claimant injured his knee as a result of a fall occasioned by the collapse of his previously injured right leg. The true question is whether that fall occurred while the Claimant was on the job or not. If so, the injury would be compensable, as a new injury; although the former injury would be a "but for" cause, it could not be regarded as the sole cause, nor could the knee injury be regarded as a "natural progression" or "follow-on" of the prior injury under the Act and relevant case law. There is, as it happens, some credible evidence that a fall did occur on the jobsite: the Employer's First Report indicates that the Claimant reported a fall on the date of the alleged injury (before seeing [Dr. B]), and the Claimant named a specific co-worker who heard, but did not see, the fall. It appears from the [BRC] report that the Claimant's supervisor essentially acknowledged that an incident had occurred on the jobsite on the date alleged involving a fall by the Claimant.

Section 409.005 is entitled EMPLOYER REPORT OF INJURY; ADMINISTRATIVE VIOLATION and requires that an employer shall report to the employer's carrier if one of two specified occurrences takes place. Section 409.005(f) provides:

A report required under this section may not be considered to be an admission by or evidence against an employer or an insurance carrier in a proceeding before the commission or a court in which the facts set out in the report are contradicted by the employer or insurance carrier.

There are several Appeals Panel decisions concerning Section 409.005(f). For an example, see Texas Workers' Compensation Commission Appeal No. 961450, decided September 11, 1996. The TWCC-1 is dated March 23, 1999; indicates that the date of injury is _____; and states "employee was working on stilts and tripped on desk." The carrier had admitted into evidence an affidavit of Ms. R, a claims representative who handled the claimant's claim file in which she stated that she called the office of Dr. B, the doctor who was treating the claimant, and that she spoke with Ms. W in Dr. B's office. She swore that Ms. W told her that the claimant had an October 1996 injury to his right foot; that the claimant worked for another employer who had workers' compensation coverage with another carrier when he was injured in October 1996; that during the initial visit with Dr. B in March 1999, the claimant asserted that his present left knee complaints were related to his October 1996 right foot injury; that the claimant told Dr. B that his right foot gave way and he fell on his left knee; that at no time during that visit did the claimant indicate that his injury occurred as the result of his employment with the employer; that the request for treatment coverage was submitted to the carrier who had coverage for the October 1996 injury; that that carrier denied the request for treatment; and that the claimant changed his story and told Dr. B that his left knee complaints were related to an injury during his employment with employer in March 1999. On cross-examination, the claimant testified that Dr. B scheduled left knee surgery for March 22, 1999; that the carrier that had coverage for the October 1996 injury did not approve the recommended surgery on his left knee; and that he did not remember when he told Dr. B that he had fallen off stilts. At least the evidence in the affidavit of Ms. W contradicts the information in the TWCC-1 relied on by the hearing officer.

In Texas Workers' Compensation Commission Appeal No. 962479, decided January 17, 1997, the Appeals Panel stated that the hearing officer relied on a BRC report to make a finding of fact that is not otherwise supported by the evidence; cited Texas Workers' Compensation Commission Appeal No. 941698, decided February 2, 1995, holding that a BRC report is generally not evidence of facts stated in the report; and reversed and remanded for the hearing officer to resolve the disputed issue based on the evidence that was admitted at the CCH. In the BRC report dated May 13, 1999, the benefit review officer wrote:

The employer at the proceeding confirmed that fellow employees were present at the time of the fall, although the actual fall was not witnessed, the employer understood the fall occurred as reported.

In view of the hearing officer's having considered information in the TWCC-1 that was contradicted by evidence introduced by the carrier and his having considered information in the BRC report concerning the claimed injury in making a finding of fact that the claimant

fell and sustained an injury to his left knee in the course of his employment on _____, we reverse the decision of the hearing officer and remand for him to make findings of fact and conclusions of law to resolve the disputed issues based on evidence that is appropriate for him to consider.

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.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge