

APPEAL NO. 992070

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 August 17, 1999. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury on _____, whether the claimant reported an injury to the employer on or before the 30th day after the injury, and whether the claimant had disability.

The hearing officer determined that the claimant did not sustain a compensable injury on _____, that the claimant did not timely report her claimed low back injury to the employer, that the claimant did not have good cause for failing to report her low back injury, and that the claimant did not have disability from January 29, 1999, through the date of the CCH. The claimant appeals, urging that the hearing officer improperly based his entire decision on claimant's injury being _____, rather than _____, and that the hearing officer's decision goes against the preponderance of the evidence and should be reversed.

The respondent (carrier) replies that the evidence is sufficient to support the hearing officer's decision, that the hearing officer made his decision based upon his belief that the claimant did not present credible evidence to support her position, and did not merely base his decision on a determination regarding whether the claimant's injury occurred on _____, or _____.

DECISION

Reversed and remanded.

At the beginning of the CCH, the claimant's attorney requested that the issue as identified in the benefit review officer's (BRO) report "[d]id the claimant sustain a compensable injury on _____" be amended to reflect "on or about _____," or, in the alternative, "on _____." The carrier objected to the request on the basis that an interrogatory had been propounded to the claimant in which she had stated that the BRO report accurately listed all issues she was presently disputing, and had objected to the question of whether the BRO report accurately described her position on the disputed issues. Representing the claimant at the CCH was Mr. R, an attorney substituting for Mr. H, claimant's attorney of record, who had appeared at the benefit review conference (BRC) on July 1, 1999. Mr. R stated that he became involved in the claimant's case the day before the CCH. The claimant testified that she told Mr. H in April or May 1999, that the date of injury was _____, the date she got her prescription filled, and that Mr. H brought up the discrepancy in the date of injury at the BRC. The carrier did not dispute that the issue was raised at the BRC. After considering the parties' arguments, the hearing officer found no good cause and denied the claimant's request to either add a disputed issue or amend the disputed issue. The hearing officer based his ruling on the claimant's failure to respond to the BRO report in writing or otherwise, and the claimant's answers to interrogatories. The hearing officer advised the parties that he would hear only the issue of

a claimed injury of _____. The hearing officer resolved that issue, and the others as identified by the BRO.

In Texas Workers' Compensation Commission Appeals Panel No. 970851, decided July 2, 1997, the Appeals Panel stated:

The Appeals Panel has observed that the resolution of disputed issues is not governed by the strict rules of pleading as practiced at common law or in the district courts of the state of Texas. See Texas Workers' Compensation Commission Appeal No. 951848, decided December 18, 1994 [sic, should be 1995], and cases discussed therein. Thus, some leeway, consistent with express provisions of the 1989 Act and implementing rules, is to be given to the parties to resolve substantive issues as expeditiously as possible provided that due process principles of fundamental fairness are observed in the joining of issues at each stage of the adjudicatory process. We have also stressed that the inclusion of a date of injury is "essential" to resolving the compensability of an injury. Texas Workers' Compensation Commission Appeal No. 94713, decided July 12, 1994. Consistent with these principles, we have not required that the date of injury found by a hearing officer be the same as the date alleged by the claimant when the evidence indicates otherwise. Texas Workers' Compensation Commission Appeal No. 941029, decided September 16, 1994. Nor must a claimant in all cases "pinpoint" a date of injury. See Texas Workers' Compensation Commission Appeal No. 960997, July 10, 1996. This is particularly true in claimed repetitive trauma injury cases where the date of injury is always somewhat of a moving target. See Texas Workers' Compensation Commission Appeal No. 94894, decided August 25, 1994. It is also true in cases of discrete trauma injuries. See Texas Workers' Compensation Commission Appeal No. 941398, decided December 1, 1994, where the Appeals Panel affirmed a finding of a hearing officer that the date of a discrete injury was _____, not _____ as initially claimed. Similarly, in Texas Workers' Compensation Commission Appeal No. 91123, decided February 7, 1992, the Appeals Panel wrote that the 1989 Act "does not require that an issue as to time of injury be restricted to the date on the notice of injury when examined in the adjudication process." This is not to say that a claimant may be so vague about a date of injury or otherwise so confuse the question that the carrier is not given a fair opportunity to defend the claim or that a party should be allowed to benefit from such confusion or intentional obfuscation by making no attempt to clarify the matter either at a BRC or in response to a report of a BRC.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) generally addresses the disputes which are to be considered by a hearing officer. Absent the unanimous consent of the parties, an additional dispute may be raised by a represented party in writing provided, among other things, that it is "sent to the commission [Texas Workers' Compensation

Commission] no later than 15 days before the [CCH]." If these conditions are met, a hearing officer may consider the additional issue "only on a determination of good cause." Rule 142.7(e). In this case, though it may have been helpful if the claimant had either responded to the BRO report, or requested an additional dispute, the claimant was not foreclosed from litigating the issue of whether she sustained a compensable injury on _____. The BRO report identified the correct issue, whether the claimant sustained a compensable injury, it just did not indicate the specific date that the claimant alleged at the CCH. In so stating, we note that the parties are disputing an injury which arose out of an identified set of circumstances, lifting a heavy box in the furniture department.

Review of the record indicates that throughout the CCH, the claimant was repeatedly questioned about the date of injury, and about the events of _____. The claimant testified that she went to the (Clinic) on the same day that she was injured, and that because the Clinic's records indicate that she went to the Clinic on _____, the date of injury is _____. We recognize that a hearing officer may decide an issue actually litigated at the CCH, even if it is not among the issues in dispute. Texas Workers' Compensation Commission Appeal No. 962596, decided March 27, 1997. While the hearing officer declined to add or amend the issue of compensability to include the date _____, the parties actually litigated whether the claimant sustained a compensable injury on _____, and the hearing officer should have resolved the issue accordingly.

Consistent with our previous decisions and refusal to adopt strict rules of pleading in the adjudication of disputes, and the parties' litigation of the issue of whether the claimant sustained a compensable injury on _____, we reverse the hearing officer's decision and order and remand for the hearing officer to determine whether the claimant sustained a compensable injury on _____. We also reverse and remand the issues of notice to the employer and disability.

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 Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge