

APPEAL NO. 992149

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 11, 1999, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer determined that appellant (carrier) had not timely contested compensability "of the claimed psychiatric condition"; that a compensable \_\_\_\_\_, back injury "extends to and includes the Claimant's [respondent] current psychiatric problems"; and that claimant had disability (due to the "injury of \_\_\_\_\_") beginning on June 5, 1997, through March 13, 1998. (This is the period of disability listed in the disputed issue. Carrier had apparently paid temporary income benefits prior to June 5, 1997, and the parties confuse disability with maximum medical improvement (MMI). Claimant reached MMI by operation of law on March 13, 1998. See Section 401.011(30)(B).)

Carrier appeals certain of the findings and conclusions, contending that there was insufficient evidence of causation of "Claimant's psychiatric problems whatever those might be" by "medical evidence within reasonable medical probability" and that carrier had not had adequate notice of the psychiatric condition "which fairly informs" carrier of such a condition. Carrier contends that the evidence is insufficient to establish disability. Carrier requests that the hearing officer's decision be reversed and a decision rendered in its favor. The file does not contain a response from claimant.

DECISION

Affirmed in part and reversed and remanded in part.

Claimant was apparently employed as a dock worker/forklift operator for a motor freight line (employer). Claimant had apparently had a June 1995 back injury (not at issue here) and had returned to work sometime before \_\_\_\_\_. On \_\_\_\_\_, he was doing some heavy lifting when his "back went totally out again." Carrier has apparently accepted liability for a compensable low back injury of that date and the hearing officer made an unappealed finding of fact that claimant sustained a compensable injury to his low back doing repetitive lifting. Claimant's treating doctor for this injury was Dr. B, who, in a report dated February 8, 1999, said that he had claimant in an off-work capacity from April 4, 1996, through September 7, 1998, and, "[t]herefore he was unable to work during the dates in question 6/5/97 through 3/13/98." Claimant also testified that he was unable to work (obtain and retain employment) from \_\_\_\_\_, until he returned to work for another employer in September 1998. Medical evidence and claimant's testimony was that claimant had spinal surgery on April 15, 1998, performed by Dr. V.

At some point in 1996, Dr. B referred claimant to, Ph.D. Dr. Z, for a psychological evaluation. In a report dated October 22, 1996, Dr. Z recites a history of claimant's 1995

injury, three prior spinal surgeries, and personal history. Dr. Z notes that claimant is "becoming very depressed" about his inability to support his family. Dr. Z found claimant's "coping skills for physical symptoms are far below average," that he was "moderately depressed," "tense and agitated" and that claimant "definitely needs to have treatment for his emotional overlay." Dr. Z diagnosed claimant as having "Atypical Depression." Subsequently, Dr. B referred claimant to Dr. S for pain management. Dr. S, in a report dated November 7, 1996, reviewed claimant's orthopedic back problems and noted "increased stress, agitation and possibly depression. The patient seems to have a lot of symptoms of animosity." Dr. S's plan was to admit claimant into a pain management program and "Stress Psychology." There was no evidence if, or when, either or both of these reports were provided to carrier. In evidence is a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated November 6, 1997, reciting first written notice of injury was received on April 4, 1996, and giving notice that "Carrier disputes that the Claimant's current psychiatric problems are related to this claim" and that any income or medical benefits "are due for the psychiatric condition." Carrier does not deny receiving Dr. Z's and Dr. S's reports, and the hearing officer, in appealed Finding of Fact No. 8, only states those reports "gave fair notice to the Carrier that Claimant developed an emotional overlay and 'depression' as a result of the \_\_\_\_\_ compensable injury." There is no evidence nor finding by the hearing officer when carrier received these reports and, consequently, there is no evidence to support the hearing officer's conclusion that carrier had waived the right to contest compensability of the claimed psychiatric condition "by not contesting it within 60 days of being notified of it." Under Section 409.021(c), a carrier waives its right to contest compensability of a claimed injury if it does not contest within 60 days of the date it receives written notice of the claimed injury. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(3) (Rule 124.1(a)(3) provides that written notice can come from any document "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." We have consistently stated that it is the assertion of the facts showing compensability which triggers the duty to dispute and not the proof thereof. Texas Workers' Compensation Commission Appeal No. 980822, decided June 3, 1998; Texas Workers' Compensation Commission Appeal No. 962403, decided January 9, 1997; and Texas Workers' Compensation Commission Appeal No. 961618, decided October 3, 1996. An employee who asserts that a 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. Accordingly, we reverse the hearing officer's findings on this issue as not being supported by the evidence and remand the issue to the hearing officer for a determination, supported by evidence, of when carrier received Dr. Z's and/or Dr. S's report and whether carrier timely contested compensability within 60 days of that date.

Carrier also appeals the hearing officer's findings that the compensable low back injury of \_\_\_\_\_, extended to and includes claimant's "current psychiatric problems" on the basis that claimant's depression may have been caused by any of a number of nonwork-related factors and that there was no causal link within reasonable medical probability (or "certainty"). Carrier points out that the references to portions of Dr. Z's October 22, 1996, report and Dr. S's November 1996 report do not "establish causation within reasonable medical probability." Carrier references the August 10, 1999, report of, Ph.D. Dr. H, a clinical neuropsychologist, who was of the opinion that claimant "does not have a significant neurocognitive disorder that would account for his current status." Dr. H does note, however, that claimant "is now psychologically incapable of working because he cannot get over his rage about his maltreatment." Dr. H further notes that claimant's "narcissistic personality characteristics make him dangerous" and that claimant "talks about 'going postal.'" While we do not see anything in Dr. Z's report or Dr. S's report to establish causation, we do note that Dr. B, in a letter report dated March 5, 1999, comments on his (Dr. B's) concern regarding claimant's personality condition and that Dr. B has "requested that he [claimant] get psychological help for the compensable injury. . . ." We also note that Dr. B, in a progress note concerning claimant's compensable injury, refers claimant to a psychological center for counseling.

In Texas Workers' Compensation Commission Appeal No. 990257, decided March 24, 1999 (Unpublished), the Appeals Panel reviewed some cases where causality of a psychological condition was at issue and commented:

In Texas Workers' Compensation Commission Appeal No. 961449, decided September 9, 1996, we stated that "if a claimant's psychological condition is causally related to the compensable injury, it, too, is compensable," and "[t]he fact that there may be more than one cause of the claimant's psychological condition and that there are other stressors in this case beyond the claimant's chronic pain and multiple failed surgeries does not preclude a finding of compensability, provided that there is a causal connection between the compensable injury and the claimant's psychological problems." In Texas Workers' Compensation Commission Appeal No. 950749, decided June 21, 1995, the Appeals Panel stated "[a]lthough the claimant may not have experienced a psychological problem but for the fact that a back injury occurred in February 1991, and set in motion a protracted dispute resolution process, this is not alone a sufficient basis to conclude that an additional compensable injury has occurred." Appeal No. 950749 quoted the prior decision of Texas Workers' Compensation Commission Appeal No. 94591, decided June 22, 1994, which in turn quoted Texas Employers Ins. Ass'n v. Wilson, 522 S.W.2d 192, 195 (Tex. 1975), as follows:

[i]t therefore must be concluded that although the claimant may be disabled by reason of a neurosis traceable in part to

*circumstances* arising out of and immediately following his injury, there must be a finding that the neurosis was the result of the *injury*. [Emphasis in original.]

We concluded that "[i]f a claimant's psychological problems are traceable to the 'circumstances arising out of and immediately following the injury' as opposed to being the 'result of the injury,' they are not part of the compensable injury." Appeal No. 961449, *supra*.

The hearing officer does not indicate in his decision how he believed claimant met his burden of showing how the "current psychiatric problems" are a "result of the injury" as opposed to circumstances arising out of and immediately following the injury. The hearing officer only states, in Finding of Fact No. 16, that claimant met his burden of proof that established that his current psychiatric problems are the result of the compensable injury. Since we are remanding the case for the hearing officer to make additional findings regarding the timely contest of compensability issue, we likewise remand the case for the hearing officer to identify the "current psychiatric problems" claimant has and make specific findings, not inconsistent with this decision, how the identified condition was the result of the compensable injury, citing specific evidence that he believes establishes causality.

On the issue of disability, although the parties tended to confuse disability (as defined in Section 401.011(16)) with MMI (as defined in Section 401.011(30)), the hearing officer's decision on this issue is supported by the evidence, namely, claimant's testimony and Dr. B's February 8, 1999, report. Claimant's disability, in this case, is supported based on the compensable back injury alone. We do note carrier's contention, both at the CCH and on appeal, that the designated doctor's findings of positive Waddell's signs somehow precluded a finding of disability (the inability to obtain and retain employment at the preinjury wage; see Section 401.011(16)). At best, that was a factor for the hearing officer to consider and there is no indication that the hearing officer failed to give that factor the weight it deserved. Consequently, we affirm the hearing officer's decision that claimant had disability from June 5, 1997, through March 13, 1998 (and probably thereafter).

We remand the case for the hearing officer to make specific additional findings on the waiver and extent-of-injury issues, not inconsistent with our opinion herein.

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.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge