

APPEAL NO. 000259

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 January 6, 2000. The hearing officer determined that the respondent's (claimant) compensable injury of the left knee on _____, does not extend to and include a left inguinal abscess/inflammatory lymph node and that the appellant (carrier) waived the right to contest compensability of the claimed injury by failing to do so within 60 days of being notified of the injury. The carrier appeals several findings of fact, urging that the carrier did not waive its right to contest compensability and the hearing officer's decision should be reversed. The claimant responds, stating that he agrees with most of the hearing officer's findings but disagrees with Finding of Fact No. 23 and Conclusion of Law No. 3. The claimant's response is timely as a response but is untimely as an appeal of the hearing officer's determination that the claimant's compensable knee injury of _____, does not extend to and include a left inguinal abscess/inflammatory lymph node. The hearing officer's determination that the claimant's compensable knee injury of _____, does not extend to and include a left inguinal abscess/inflammatory lymph node has become final. Section 410.169.

DECISION

Reversed and rendered.

The claimant sustained a compensable injury to his left knee on _____, and had arthroscopic surgery to his left knee in November 1998. In _____, the claimant sought medical treatment for a lump over his left groin area and was initially diagnosed with a hernia. The claimant filed a workers' compensation claim for a hernia injury, indicating a date of injury of _____. The carrier for the _____, injury was National Union Fire Insurance Company, and it disputed the compensability of a _____, hernia injury on _____.

On January 20, 1999, after the claimant had exploratory abdominal surgery, Dr. A, opined that the claimant's inflammatory process (lymphadenitis) was related to the claimant's left knee surgery. The claimant testified that he first learned that his abdominal abscess was related to his compensable injury when he received Dr. A's January 20, 1999, letter. According to the claimant, he relayed this information to the carrier in a telephone call, and his employer called the carrier and sent it a copy of Dr. A's January 20, 1999, letter. In evidence is a letter from the claimant's employer dated January 26, 1999, addressed to Mr. M, (claims company), referencing the carrier's claim number for the _____, date of injury. The letter states:

I am sending a letter from [company] stating to the effect that an infection and subsequent required medical treatment resulted from [the claimant's] knee surgery. [Dr. A] and/or [Dr. E] of that department are willing to attest to that.

The medical assistance received by [the claimant] was denied under a separate claim by [Mr. T] and per conversation with [Mr. T] earlier today; this letter is being sent for review and attachment to the above claim. Please inform me of any decisions regarding this matter.

The claimant testified that Dr. A's January 20, 1999, medical report was attached to the employer's letter and both were faxed to the carrier, although he was not present when the employer faxed the documents.

According to the claimant, the carrier was again provided written notice that he was claiming his abdominal abscess was caused by his compensable injury in a letter (letter #1) from Dr. G dated June 28, 1999. Dr. G's letter is addressed "To Whom It May Concern" and states in part, "[i]t is my opinion that the inflamed [sic] node is most likely related to seeding by the skin at the time of the arthroscopic procedure. Therefore this should be covered under workers' compensation." On that same day, Dr. G issued a Report of Medical Evaluation (TWCC-69) certifying the claimant at maximum medical improvement on June 28, 1999, with a 6% impairment rating, and another letter (letter #2) addressed to AIG Insurance, concerning the TWCC-69, which referred only to the claimant's left knee.

A carrier must contest compensability of an injury on or before the 60th day after it is notified of the injury or else it waives its right to contest compensability and is liable for payment of benefits. Section 409.021(c); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c) (Rule 124.6(c)). A notice of injury, for the purposes of starting the time period for contesting compensability, must be written and must fairly inform the carrier of the nature of the injury, the name of the injured employee, the identity of the employer, the approximate date of injury, and must state "facts showing compensability." Rule 124.1(a). The writing may be from any source. Rule 124.1(a)(3). A carrier must timely contest the compensability of additional injuries. Texas Workers' Compensation Commission Appeal No. 950183, decided March 22, 1995. Written reports that consider whether a condition is work related may constitute written notice of injury under Rule 124.1, whether or not a concrete diagnosis is made. Texas Workers' Compensation Commission Appeal No. 950522, decided May 11, 1995. 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.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The carrier appeals the following findings of fact:

FINDINGS OF FACT

10. On January 26, 1999, Employer sent a letter to [Mr. M] at [claims company] to the effect that Claimant's inguinal abscess resulted from medical treatment for the compensable knee injury and attached a copy of [Dr. A's] pathology report in support of this position.

* * * *

12. On July 2, 1999, Claimant called TWCC [Texas Workers' Compensation Commission (Commission)] in reference to the extent of his injury to include an infection to the groin area, was given the toll free phone number to the insurance carrier, and was advised to have his treating doctor fax to Carrier a copy of the medical report indicating the diagnosis and explaining how it was related to his compensable injury.

13. On July 8, 1999, Carrier's agent, [claims company] received [Dr. G's] June 28, 1999 medical report.

14. [Dr. G's] June 28, 1999 medical report complies with the requirements of Rule 124.1 for providing written notice to Carrier of the extension of Claimant's _____ compensable injury to include the left inguinal abscess.

15. Carrier's July 8, 1999 receipt of [Dr. G's] June 28, 1999 report began the 60-day dispute period.

* * * *

18. Carrier was required to dispute the extent of Claimant's compensable injury no later than September 6, 1999.

19. On September 21, 1999, Employer sent another letter to [claims company], referring to Claimant's claim number, and stressed his concern that no response had yet been received to the request for coverage of the abscess and supporting medical previously forwarded to Carrier.

* * * *

22. On November 12, 1999, Carrier disputed compensability of Claimant's inguinal abscess.

* * * *

24. Carrier failed to timely dispute compensability of the extent of Claimant's compensable injury to include the inguinal abscess.

We first address the carrier's argument that the hearing officer erred in determining that the carrier first disputed compensability of the claimant's inguinal abscess on November 12, 1999. The carrier argues that its dispute was memorialized in Commission Dispute Resolution Information System (DRIS) notes on both September 29, 1999, and October 8, 1999. A DRIS note on September 29, 1999, states "Dispute added on issue(s) - C07, I03 C14." A DRIS note on October 8, 1999, memorialized a Commission conversation with the claimant indicating that the claimant was informed that a dispute had been filed. The carrier cites Texas Workers' Compensation Commission Appeal No. 94292, decided April 26, 1994 (Judge Kilgore dissenting), for the proposition that the filing of a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) is not always necessary if a dispute is denoted elsewhere. 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 at a BRC [benefit review conference] 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) 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 of this case clearly do not come within the narrow holding of Appeal No. 94292, and we decline to find a contest of compensability in this case based on the September 29, 1999, and October 8, 1999, DRIS notes. See Texas Workers' Compensation Commission Appeal No. 992853, decided February 3, 2000. The carrier filed a TWCC-21 on November 12, 1999, and the evidence is sufficient to support the hearing officer's Finding of Fact No. 22.

We next address the carrier's argument that the hearing officer erred in determining that the carrier received written notice on July 8, 1999. Letter #1 is not addressed to the carrier and does not contain a date stamp showing receipt by the carrier. The claimant did

not present any evidence concerning whether Dr. G sent letter #1 to the carrier, or when letter #1 was received by the carrier. The mere allegation that letter #1 was received by the carrier on July 8, 1999, is insufficient to meet the claimant's burden of proof. The hearing officer may have confused letter #1 which is not date stamped, with letter #2. Letter #2 is date stamped showing receipt by the carrier on July 8, 1999, but such report refers only to the claimant's knee and does not sufficiently comply with Rule 124.1 as providing written notice of a left inguinal abscess/inflammatory lymph node. The employer's letter dated January 26, 1999, purportedly faxed by the claimant's employer to the carrier, contains no fax number, and no supporting evidence was offered to indicate that it was faxed to the carrier on January 26, 1999. Dr. T wrote a letter to the carrier on August 13, 1999, indicating that he was asked to issue an opinion as to whether the claimant's inguinal abscess and inflammation were related to his arthroscopic knee surgery, and that the claimant's condition was not related, however, the letter does not contain a date stamp showing receipt by the carrier. There is no evidence to support that the carrier received letter #1 on July 8, 1999, and there is no evidence to support that the carrier received written notice of the claimant's left inguinal abscess/ inflammatory lymph node on any other date prior to September 14, 1999 (60 days prior to November 12, 1999). We reverse the hearing officer's Findings of Fact Nos. 13, 14, 15, 18, and 24; Conclusion of Law No. 2; and that portion of the decision section which states that the carrier waived the right to contest compensability of the claimed injury by failing to do so within 60 days of being notified of the injury, as being against the great weight and preponderance of the evidence. We render a new decision that the carrier did not waive the right to contest compensability of the claimed left inguinal abscess/inflammatory lymph node by failing to do so within 60 days of being notified of the injury. The carrier is not liable for benefits relating to the claimant's left inguinal abscess/inflammatory lymph node.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge