

APPEAL NO. 000965

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). A contested case hearing was held on April 12, 2000. The hearing officer concluded that the respondent/cross-appellant (claimant) did not sustain an injury to his low back in addition to his head and right wrist on _____; and that appellant/cross-respondent (carrier) did not waive its right to contest compensability of the claimed injury by not contesting within 60 days of being notified because claimant did not sustain an injury to his lower back and the carrier has no duty to file a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) to dispute compensability of an injury that did not exist. The carrier, in an appeal conditioned upon claimant's filing an appeal, disputes Finding of Fact No. 5 stating that the carrier "did not file a TWCC-21 with the Commission [Texas Workers' Compensation Commission] to dispute the claimed lower back injury of _____ [sic], described in the TWCC-53 [Employee's Request to Change Treating Doctors]." Claimant's request for review challenges the aforesaid legal conclusions as well as two factual findings on evidentiary sufficiency grounds. The carrier filed a response to claimant's appeal. The file does not contain a response from claimant to the carrier's appeal.

DECISION

Reversed and a new decision rendered that claimant did sustain a compensable low back injury on _____, and that the carrier has waived its right to contest the compensability of that injury.

THE INJURY ISSUE

The parties stipulated that claimant sustained a compensable injury on _____. Claimant testified that while at work on that date, he fell five to ten feet from a ladder, landed on concrete, and broke his wrist, cut his head, and injured his back. He said he was taken to the emergency room (ER) at a hospital where his head laceration was treated and surgery was performed on his wrist by Dr. MW. Claimant also stated that his back hurt even more than his wrist; that he complained of his back pain at the hospital; and that back x-rays were taken. He also said he complained of his back to Dr. MW, who was treating his wrist, and to the physical therapist. Claimant further stated that he was later referred to Dr. TW for an impairment rating (IR) and that he also told Dr. TW about his back pain. Dr. TW's July 30, 1999, report assigns an 11% percent IR for claimant's wrist only. Claimant said that a counselor at the Texas Rehabilitation Commission told him he should obtain treatment for his back; that early in September 1999, he commenced treatment for his back with Dr. V, a chiropractor; that sometime in September 1999 Dr. V discontinued treating his back; and that Dr. V has since resumed the treatment.

Claimant appeals findings that he did not sustain an injury to his lower back in the course and scope of employment on _____, and that he does not have an injury to his lower back. In support of these findings the hearing officer mentions in her recitation of the evidence that at the ER claimant also had complaints of lower back pain; that intake

records reflect tenderness in the low back and the impression of a myofascial lumbar strain; that lumbar spine x-rays were negative; and that claimant was discharged with a diagnosis of a right distal radius fracture but no back strain. The hearing officer goes on to note that although claimant continued to treat with Dr. MW, the progress notes do not reflect any complaints of old back pain; that physical therapy progress notes from March 24 through June 1999 do not reflect any complaints of back pain; that claimant was evaluated for work hardening on June 18, 1999, and the evaluation report did not reflect that claimant reported a back injury; that no complaints of back pain were noted in the work hardening progress notes; that a functional capacity evaluation (FCE) indicated no problems with walking , standing, sitting, climbing, trunk bending, squatting, kneeling, stooping or crouching; and that claimant was examined by Dr. TW on July 30, 1999, upon referral from Dr. MW and that clamant did not report a back injury to Dr. TW. The hearing officer then states that the Commission, apparently without any investigation, approved claimant's request to change treating doctors to Dr. V on August 30, 1999; that Dr. V then began documenting problems with claimant's cervical, thoracic, and lumbar spinal regions; and that Dr. V's records "are not credible." Dr. V's February 10, 2000, report states that claimant has never had treatment for his upper back; that he continues to have severe symptoms; and that the diagnosis is displacement and closed dislocation of thoracic and lumbar intervertebral discs. The hearing officer goes on to state that Dr. V referred claimant to Dr. M, whose records, likewise, "are not credible." The October 11, 1999, report of Dr. M, also a chiropractor, states that claimant told whoever filled out his accident report, because he could not write, that he had back complaints; that no one provided him with any back treatment before Dr. V; and that the diagnosis is resolving fractured right wrist and thoracolumbar sprain/strain injury, unresolved with probable lumbar spine disc herniation. The hearing officer further states that the report of Dr. S basically reflects claimant's subjective complaints of back pain and that claimant's reporting having a hard time doing anything is contrary to the results of the FCE of June 18, 1999.

The hearing officer further states that complaints of back pain were noted by the attending physician (at the ER) but "they were documented as a myofascial strain and Claimant was discharged without a diagnosis of a back strain"; and that claimant was followed closely by Dr. MW for the next eight months, was examined by Dr. TW and various physical therapists, and underwent an FCE on June 18, 1999, that indicated no back problem; and that "[c]laimant's evidence was insufficient to prove by a preponderance of the evidence that he sustained an injury to his low back in the course and scope of employment on _____, or at an time prior to September 2, 1999."

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The 1989 Act defines injury to mean in pertinent part "damage or harm to the physical structure of the body." Section 401.011(26). We conclude that the hearing officer's findings that claimant did not sustain an injury to his lower back in the course and scope of employment on _____, and that he does not have an injury to his lower back are against the great weight of the evidence. The hospital emergency triage assessment record of _____, reflects that claimant arrived by ambulance, was placed on a back board with his cervical spine immobilized, and that he was discharged to surgery with a diagnosis of right distal radius fracture. On another page of the hospital records, a pain drawing has markings in the area of claimant's lumbar spine; has circled under "Back," the words "CVA [costovertebral angle] tenderness"; and has circled under "clinical impression" the words "myofascial strain." On still another page of the hospital records under the words "Cause of Fall" is written "slipped on ladder and hurt back & right forearm," and under the words "Pain/Discomfort" is circled "back" and "lower." Two other pages of the hospital records, one of which mentions that bleeding from the head laceration was controlled, refer to claimant's complaint of back pain and another sheet reflects that both forearm and lumbar spine x-rays were taken. While the Appeals Panel has held that mere pain alone, without more, is not an injury, we have not held that a myofascial strain is not an injury, notwithstanding the duration of its symptoms.

We reverse Findings of Fact Nos. 2 and 3 and Conclusion of Law No. 4 and render a new decision that claimant did sustain an injury to his low back in addition to his head and right wrist on _____.

THE WAIVER ISSUE

Not challenged is the finding that the carrier received written notice of a claimed back injury on September 2, 1999, when it received a copy of claimant's TWCC-53 dated August 27, 1999. On this form, claimant requested to change treating doctors from Dr. MW to Dr. V for the reason that when claimant was injured, he was not treated for his back but only for his right wrist. The carrier has appealed the finding that the carrier did not file a TWCC-21 with the Commission to dispute the claimed lower back injury of _____, (sic) described in the TWCC-53. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c) (Rule 124.6(c)) instructs, in part, that if a carrier disputes compensability after payment of benefits has begun, the carrier shall file a notice of refused or disputed claim on or before the 60th day after the carrier received written notice of the injury. We find the evidence sufficient to support this finding. At the outset of the hearing, the hearing officer queried the carrier's representative about the fact that the TWCC-21 introduced by the carrier as an exhibit bore no date stamp or other indicia of the date of its receipt by the Commission; that is, the date it was filed. The carrier acknowledged that the exhibit did not bear evidence of the date it was received by the Commission and further acknowledged that the carrier did not have such a copy of the TWCC-21 in its possession. The carrier urged that the date the Commission received the TWCC-21 was not a disputed issue and that it could be inferred by the September 17, 1999, date on the TWCC-21 and by evidence that Dr. V ceased treating claimant for a while around that time.

Claimant disputes Conclusion of Law No. 4 stating that the carrier did not waive the right to contest compensability of the claimed injury by not contesting compensability within 60 days of being notified of the injury because claimant did not sustain an injury to his low back and carrier has no duty to file a TWCC-21 to dispute compensability of an injury that did not exist. See Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.)

Because we have rendered a new decision that claimant did sustain a low back injury on _____, we reverse Conclusion of Law No. 4, there being no basis to apply Williamson, and render a new decision that the carrier has waived its right to contest the compensability of claimant's low back injury.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Alan C. Ernst
Appeals Judge