APPEAL NO. 001044

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 April 7, 2000.

The issues reported from the benefit review conference (BRC) were whether the appellant (claimant) sustained a back and right knee injury on _____, in addition to his right foot and ankle injury; whether the respondent (carrier) contested compensability on or before the 60th day after being notified of the injury (or, if not, whether the carrier's contest was based upon newly discovered evidence that could not have reasonably been discovered earlier); and whether the claimant had disability from his injury for a period from September 14, 1998, until August 31, 1999.

The hearing officer determined that the claimant did not sustain a compensable injury to his right knee and back in addition to the injury to his right foot and ankle on _____; that the carrier contested compensability on or before the 60th day after being notified of the injury; and that the claimant has not had disability.

The claimant appealed and argued that the hearing officer's weighing of the evidence was flawed and that he ignored the great weight and preponderance of the evidence. The claimant argues facts underlying his contention that the right to dispute compensability was waived by the carrier. Finally, the claimant argues that he was unable to work beginning September 14, 1998. The carrier responded that the decision should be affirmed.

DECISION

We affirm the hearing officer's decision.

The claimant worked for (employer), and said he injured his right foot, ankle, knee, and lower back when he stepped on a nail at work on _____, and fell, twisting his body. The claimant was treated by the on-site medical division of the employer, by a doctor and with therapy, at least through October 1996, although he contended more treatment after that time, for which records apparently do not exist or have not been produced. The claimant continued to work throughout this time, first on light duty, and then full duty beginning in October 1996. There is a short therapy slip showing that a Dr. S with the employer's on-site medical office ordered six therapy sessions beginning August 28, 1996. The clinic note in evidence from August 28, 1996, or October 25, 1996 (both dates are on the document), showed that the claimant complained about lumbar pain, with a gradual onset since stepping on the nail. The puncture wound was observed to be healed.

The claimant said that in August 1997 the employer advised that he see a doctor. He asked for the name of a co-employee's doctor, and, based upon this, began treatment with Dr. M on August 25, 1997. Dr. M's records thereafter show that he treated the claimant for knee and back problems. The claimant said that Dr. M, early on, was unable to treat his knee or back because of denial by the carrier. When or how the denial occurred was unclear from the claimant's testimony. The claimant said that at some unspecified time after he began treating with Dr. M, he requested his on-site medical records from the employer and was told they had sent "everything" to the carrier. The only note he was ever able to get from the employer was a record dated either August 28, 1996, or October 25, 1996.

The claimant said he was unable to work from September 14, 1998, through August 31, 1999, due to his injury, and said that the employer would not accommodate him on a light-duty job.

On March 25, 1999, Dr. M certified that the claimant reached maximum medical improvement (MMI) on September 13, 1998, with a zero percent impairment rating. The first record of any Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) filed by the claimant in evidence is a claim form that is undated but was date-stamped by the carrier on March 29, 1999.

THE THRESHOLD "WAIVER" ISSUE

Analysis of this case was muddied at the outset because although the injury issue was phrased as an "extent of injury" matter, the waiver issue was cast broadly as to whether the carrier waived the right to dispute compensability of "the injury." No stipulations were made that the claimant had sustained a compensable injury to any degree, but the some of the testimony, the BRC report, and the argument of counsel allude to the fact that the carrier may have accepted compensability at some point for the claimant's foot and ankle.

It was the claimant's burden, having raised the argument of waiver, to prove that the elements of waiver existed. That is, the claimant was required to show that the carrier received not verbal but written notice of injury, as defined in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1 (Rule 124.1) and failed to react to that injury as provided by Section 409.021 or applicable rules.

Most of the CCH was directed at the first and third issues of injury and disability. That comparatively scant regard was paid to the waiver issue during presentation of the evidence was clear when the hearing officer, during the claimant's closing argument, noted that no Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) forms were in evidence. At this point, two TWCC-21s were offered into evidence. While neither was date-stamped by the Texas Workers' Compensation Commission, no objection was made to their admission.

The handwritten September 19, 1997, TWCC-21, submitted by the carrier showed that the injury was described as "foot/ankle" and that first written notice of injury was received on August 30, 1996; the carrier disputed any benefits arising out of "right knee problems." This dispute also says that the injury was limited to a puncture wound, and no other injury resulted.

The typewritten TWCC-21 submitted by the claimant is dated May 11, 1999, describes the nature of the injury as right foot; and states that written notice of injury was first furnished on August 30, 1996, by Ms. G, therapist. (Her involvement in the claim remains beyond the record otherwise.) This TWCC-21 also joined issue as to expressly enumerated body regions, including the back.

In our opinion, the September 19, 1997, TWCC-21 may be fairly read as disputing any aspect of the injury beyond a puncture to the foot. The hearing officer's discussion shows that this TWCC-21 was considered to be the operative document as to the "waiver" issue. What the May 11, 1999, TWCC-21 did or did not dispute is therefore somewhat irrelevant.

As the hearing officer noted, there was no document proven to be a written notice of injury more than 60 days before the September 19, 1997, TWCC-21, such that the hearing officer could conclude that this was not a timely move on the carrier's part to join the issue in accordance with Section 409.021. While the recitation of a date of written notice to the carrier on a TWCC-21 is some evidence of receipt of such notice, it is not conclusive evidence. At best, it indicates that the carrier was notified about a foot and ankle injury.

In this case, it is apparent that the employer treated the injury "in house" for a considerable period of time and there is no indication that the carrier was called upon to pay either medical or indemnity benefits before the claimant was treated by Dr. M. There is no indication in the record that the September 1997 TWCC-21 represented a belated response or deferred investigation of the claim once the carrier was officially notified in writing.

We affirm the hearing officer's decision that the carrier did not waive the right to contest compensability of the injury.

INJURY AND DISABILITY ISSUES

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. This is equally true of

medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer could have believed that injuries as extensive as claimant later claimed would not have enabled him to work nearly a year, and that it was more likely than not that the incident in question did not give rise to later manifested or claimed back and knee problems.

Temporary income benefits (TIBs) are due when an injured worker has not reached MMI and has disability. Section 408.101(a). Section 401.011(16) defines "disability" as: "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." With no threshold finding that there was a compensable injury (or that claimant's back and knee were part of the compensable injury), there could be no disability. The hearing officer could likewise have disbelieved that the contended injuries were extensive enough to prevent any employment. And regardless of the disability findings, TIBs are not due after MMI has been reached even if there is an inability to work. Section 408.101(a).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). That is not the case here, and we affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge