APPEAL NO. 111246
FILED OCTOBER 28, 2011

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 July 13, 2011. With regard to the two issues before him, the hearing officer determined that: (1) the appellant/cross-respondent (claimant) did not sustain a compensable injury on (date of injury), and (2) the claimant did not have disability resulting from an injury of (date of injury), from December 15, 2010, through the date of this hearing. The claimant appealed the hearing officer's determinations on compensability and disability, contending that he had sustained an "injury" with resulting disability. The respondent/cross-appellant (carrier) responded to the claimant's appeal, urging affirmance of the hearing officer's determinations on compensability and disability. However, the carrier cross-appealed, contending that the claimant was not in the course and scope of employment at the time of the alleged work injury. The appeal file does not contain a response by the claimant to the carrier's cross-appeal.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

COMPENSABLE INJURY

Section 401.011(26) defines "injury" in pertinent part to mean "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." An injury includes the aggravation of a pre-existing condition or injury. Cooper v. St. Paul Fire & Marine Ins. Co., 985 S.W.2d 614 (Tex. App.—Amarillo 1999, no pet.); Peterson v. Continental Cas. Co., 997 S.W.2d 893 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Section 401.011(10) defines "[c]ompensable injury" to mean "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle [the 1989 Act]."

It was undisputed that the claimant, an electrician, fell at work on (date of injury), while returning from a break with his crew. In the Background Information section of his decision, the hearing officer states that "[t]he preponderance of the evidence establishes that [the claimant's] fall occurred 10-20 feet past the gate, on the walkway. [The claimant] fell while walking between the walkway form boards and the chain link fence."

At the CCH, the parties litigated two separate concepts under the issue of compensability: (1) whether the claimant sustained an "injury" resulting from the alleged work incident, and (2) whether the alleged injury arose out of and in the "course and scope of employment." In his decision, the hearing officer determined that the claimant was in the course and scope of his employment on (date of injury); however, he determined that the claimant did not sustain an injury as defined in Section 401.011(26).

Course and Scope of Employment

That portion of the hearing officer's determination that the claimant was in the course and scope of his employment on (date of injury), is supported by sufficient evidence and is affirmed.

Injury

It was undisputed that the claimant had a pre-existing left knee condition prior to the (date of injury), fall at work. Regarding the left knee, there was conflicting medical evidence regarding whether there was recent trauma or aggravation of pre-existing conditions that resulted in the undisputed swelling that was immediately observed in the left knee after the claimant's fall at work. In his Background Information section, the hearing officer found that the pain in the left knee resulting from the fall at work was not an injury by itself as defined under Section 401.011(26) and also stated that "[w]hether the swelling was anything more than existed before the fall is a matter of conjecture."

The evidence established that immediately after the fall, the claimant had swelling in the left knee and limped when he was helped to the general contractor's trailer after the fall. The claimant did not obtain medical care on the date of his fall, but did go to (CMC) on December 15, 2010. At the time of the claimant's initial medical examination at CMC on December 15, 2010, the claimant indicated not only was his left knee injured at work on (date of injury), but also his right hip. The claimant also complained about back pain, "night pain," and joint swelling. We note the hearing officer noted in his decision that the claimant did not complain about his back until January 18, 2011, to (Dr. F) which is contrary to the December 15, 2011, CMC medical record. The CMC medical reports on that date document that the claimant walked with the use of a cane and had light effusion in the left knee and "TTP quad tendon laterally." The treating doctor at CMC diagnosed a left knee contusion with effusion and left knee "OA" [osteoarthritis]. The treatment plan included a prescription of celebrex and an instruction to stay off the claimant's feet for 3 days, then a follow-up with his personal primary physician.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is

so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

It is clear from the hearing officer's comments that he was persuaded that the claimed incident at work occurred but based his determination of no compensable injury on his belief that the medical records did not document an injury. The evidence established that the claimant sustained an injury resulting from the fall, at the least, in the form of a left knee contusion. A contusion is an injury as defined under Section 401.011(26). *See* Appeals Panel Decision 060776, decided June 19, 2006. That portion of the hearing officer's determination that on (date of injury), the claimant did not sustain damage or harm to the physical structure of his body is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

Since we have reversed the hearing officer's finding that the claimant did not sustain damage or harm to the physical structure of his body and affirmed that the claimant was in the course and scope of employment on (date of injury), we reverse the hearing officer's determination that the claimant did not sustain a compensable injury on (date of injury). We render a new decision that the claimant did sustain a compensable injury on (date of injury).

DISABILITY

Section 401.011(16) defines "[d]isability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage." In determining disability, it is necessary for the hearing officer to determine what the form of the compensable injury is, at the least, even with no extent-of-injury dispute before the hearing officer, in order to address the disability issue.

The medical evidence indicates that beginning in January of 2011, the claimant was diagnosed with lumbar strain/sprain, hip sprain/strain, knee strain/sprain, left knee internal derangement and was treated by Dr. F. The medical evidence also indicates that on February 1, 2011, (Dr. G) diagnosed the claimant with a lumbar strain, left knee strain, and right hip sprain, recommending physical therapy and MRIs of the left knee and right hip. A letter of medical causation dated February 22, 2011, relating these sprain/strain diagnoses to the mechanism of injury (fall) by Dr. G is in evidence. (Dr. E) in a medical report dated April 19, 2011, diagnosed the claimant with lumbago with clinical instability at L5-S1 left-sided radiculopathy. There are Work Status Reports (DWC-73) in evidence placing the claimant off work for periods of time as well as the claimant's testimony that he is unable to obtain and retain employment at his pre-injury wage from December 15, 2010, through the date of the CCH because of the claimed injuries he sustained from his fall at work.

Because it is apparent the hearing officer is basing his disability determination on no injury and because we have reversed the hearing officer's determination on compensability, we likewise reverse the hearing officer's determination that the claimant did not have disability resulting from an injury of (date of injury), from December 15, 2010, through the date of this hearing. We remand the disability issue to the hearing officer for consideration of all the evidence and for further proceedings consistent with this decision.

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 Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **TWIN CITY FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3232.

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge