

APPEAL NO. 950214

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 19, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. With respect to the two issues before her, the hearing officer determined that appellant (carrier) waived its right to contest the compensability of the compression fractures in respondent's (claimant) spine by failing to do so within 60 days of the date it had written notice thereof and that the compression fractures in claimant's spine are a result of the compensable injury of (date of injury). In its appeal, carrier argues error in each determination. Claimant's response urges affirmance on the basis of the sufficiency of the evidence to support the hearing officer's decision and order.

DECISION

We affirm in part and reverse and render in part.

Claimant testified that on (date of injury), he was employed as a service advisor by (employer) and had been so employed for six years. On (date of injury), claimant testified that he was sitting in a chair and bent over to pick up a piece of paper that had fallen on the floor. He stated that as he twisted to pick up the paper he felt intense pain in his back. Later that evening, claimant went to the emergency room and was diagnosed with back strain. Claimant testified that he took a couple of days off from work and then attempted to return, but did not last more than half a day because of the pain in his back. Thus, claimant sought treatment with (Dr. W), to whom he had been referred by the employer. In an Initial Medical Report (TWCC-61) dated July 27, 1993, Dr. W diagnosed a back strain and reported that "x-rays of the dorsal spine and the chest were negative." Apparently after claimant did not respond to conservative treatment, Dr. W referred him to (Dr. K). In a narrative report corresponding to his initial appointment with claimant, Dr. K concurs in the diagnosis of back strain and sends claimant for physical therapy. In a Specific and Subsequent Medical Report (TWCC-64) dated September 14, 1993, Dr. K report that claimant has returned "because of severe increase of pain for which absolutely nothing helps." At the September 14th appointment, Dr. K took additional x-rays of claimant's back, which revealed compression fractures in the thoracic and lumbar spine. Accordingly, he added a diagnosis of dorsal and lumbar spine compression fractures to the diagnosis of back sprain/strain. That report is date stamped as having been received by the carrier on September 27, 1993.

In response to the diagnosis of the compression fracture, Dr. W prescribed a lift chair for claimant, which was submitted to the carrier for preauthorization of payment. On September 28, 1993, the adjuster who was handling claimant's claim for the carrier, (Ms. G), submitted that request to Health Benefit Management (HBM) for utilization review. On September 29, 1993, HBM recommended non-authorization of payment for the lift chair, stating:

It is the opinion of the reviewing consultant that, "The compression fracture of T8 is not due to a work accident, but rather to severe osteoporosis. The osteoporosis is secondary to prolonged use of steroids for psoriasis which is not a work related condition."

At some point thereafter, carrier filed a Notice of Medical Payment Dispute (TWCC-62) dated November 4, 1993, with the Texas Workers' Compensation Commission (Commission) Medical Review Division, which provided that the "charge [was] unrelated to compensable injury, previously non-authorized by HBM."

On the issue of whether claimant's compression fractures were causally related to the compensable injury, three doctors have provided an opinion. In a report dated February 14, 1994, (Dr. A), to whom claimant was sent by the carrier, stated:

In my opinion he has back pain and bilateral thoracic radicular pain related to the T8 compression fracture. On the basis of the plain films and the MRI scan, it appears that the pathologic fracture is most likely the result of osteoporosis/osteopenia.

* * * * *

I do believe that his present symptoms of back and chest pain were directly incurred in the manner the patient describes, and specifically from twisting while trying to retrieve an object from the floor.

In response to Dr. A's report, carrier filed a TWCC-21 dated April 12, 1994, which does not reflect the date it was received by the Commission, stating:

The compression fractures of T8, L1, L2, and L3 are not due to a work accident, but rather to severe osteoporosis. The osteoporosis is secondary to prolonged use of steroids for psoriasis which is not a work related condition. The pathological fractures of T8, L1, L2 & L3 did not occur from an injury in the course and scope of claimant's employment, therefore, they are not compensable.

On the issue of causation, Dr. K stated in a July 26, 1994, report:

I again express my belief that the compression fractures are in no relationship to the patient's stated accident on (date of injury) for the following reasons:

1. In the initial x-ray evaluation the patient did not have any evidence of compression fracture.

2. Even at a much later date, several months following after when the patient was taken off work status he continued to have additional compression fractures. There [sic] are entirely related to the patient's severe osteoporosis. The patient's incident or accident of (date of injury) is purely incidental for these problems.

3. From a status of Workman's Compensation evaluation the patient is felt to have sustained a minor sprain of the dorsolumbar region which at this time must be considered to be resolved. The additional much more severe problem as described above and unrelated to the accident persists and are also still symptomatic.

In his report of August 26, 1994, Dr. W stated:

As previously discussed regarding [claimant], if you assume that all [he] sustained was a muscle strain at [employer], then he has no disability. However, if you assume that this was the beginning of all of his compression fractures, which were the result of his injury plus osteoporosis, which was the result of long term steroid use, then he is 100% disabled at this time, and I do not believe that he will reach maximum medical improvement for the next 12 to 24 months.

Initially, we turn to carrier's argument that the hearing officer erred in finding that it had waived its right to contest the compensability of the compression fractures by failing to do so within 60 days of the date it received written notice of the injury pursuant to Section 409.021(c). Carrier argues that it did not have written notice that the compression fractures were alleged to be part of the compensable injury until Dr. A's report of February 14, 1994, opining that the fractures were related to the compensable injury. Thus, carrier maintains that its TWCC-21 of April 12, 1994, constituted a timely contest of compensability. The hearing officer found that carrier had its first written notice of the compression fractures in September 1993. That corresponds to Dr. K's September 14, 1993, TWCC-64 adding a diagnosis of compression fractures, which carrier received on September 27th. In Texas Workers' Compensation Commission Appeal No. 94884, decided August 22, 1994, we stated that Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 124.1 (Rule 124.1) provides that written notice includes the carrier's earliest receipt of either the first report of injury, notification provided by the Commission or "any other written 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." In addition, we have specifically noted that the "question of when the [carrier] first received written notice of injury was a fact question for the hearing officer to resolve." Texas Workers' Compensation Commission Appeal No. 941096, decided September 27, 1994. The hearing officer is the sole judge of the relevance, materiality, weight and credibility of the evidence. Section 410.165. When the September 14, 1993,

TWCC-64, identifying the claimant, the employer, the date of injury and the diagnosis is considered in conjunction with a late September 1993 bill for the lift chair submitted by claimant for preauthorization, we believe that the hearing officer's determination that carrier first had written notice in September 1993, that claimant's compression fractures were alleged to be part of the compensable injury is supported by sufficient evidence. We cannot agree with carrier's argument that it was not until Dr. A issued his causation opinion that carrier had written notice sufficient to trigger the running of the 60-day period for contesting compensability. When a TWCC-64 identifying the diagnosis, the claimant, the date of injury, and the employer is received by a carrier along with a bill for authorization of payment for medical treatment or services related to that diagnosed condition, the 60-day period of Section 409.021(c) is triggered and carrier is required to either dispute compensability at that time or risk waiver. Carrier did not do so in this instance until April 1994, a date well beyond the 60-day period. Thus, there is sufficient evidence to support the hearing officer's determination that carrier waived its right to contest compensability herein.

Carrier also argues in its appeal that its filing of a TWCC-62 with the Medical Review Division is sufficient to satisfy the requirement of Section 409.021(c). As carrier notes, we specifically considered and rejected that argument in Texas Workers' Compensation Commission Appeal No. 94404, decided May 20, 1994. Carrier argues that the case was incorrectly decided, asserting that it is being punished for filing the incorrect form. Carrier's argument misses the mark. As we noted in Appeal No. 94404 and again in Appeal No. 941096, *supra*, it is not that carrier is using the wrong form. Rather, the carrier is utilizing the incorrect forum to assert a contest of compensability. Where issues of compensability arise, the 1989 Act provides for resolution of such disputes through the dispute resolution process of the Division of Hearings. Rule 124.6(d) specifically contemplates a two-fold requirement where a carrier challenges the payment of a particular bill and also contends that no medical benefits are due because the injury is not compensable, the filing of both a TWCC-62 and a TWCC-21. The medical dispute resolution process is used to determine if payment for a medical service should be made, and if so, how much should be paid. Thus, by filing its TWCC-62 with Medical Review, the carrier sought resolution of an issue of reasonable and necessary medical service but did not timely contest the compensability of the compression fractures. See Appeal Nos. 94404 and 941096, *supra*.

Next we turn to the issue of whether the compression fractures are causally related to the compensable injury. It is well settled that under the 1989 Act, the claimant has the burden of proving that he sustained a compensable injury and the extent of that injury. Texas Workers' Compensation Commission Appeal No. 94232, decided April 11, 1994. Whether claimant suffered a compensable injury is a fact question to be resolved by the hearing officer. As an appellate body, we do not reverse the hearing officer's factual determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In determining that claimant's compression fractures are the result of his (date of injury), compensable injury, the hearing officer made the following challenged findings of fact and conclusion of law:

FINDINGS OF FACT

4. Claimant sustained a work related injury to his lower back on (date of injury) while bending at work.
5. During the course for treatment for Claimant's original injury, a lower back strain, his pain became increasingly worse and he did not respond to the typically prescribed treatment plan.
6. Claimant had the condition of osteoporosis due to prolonged use of steroids for psoriasis. This condition made him more susceptible to a compression fracture.
7. Claimant sustained a compression fracture following the injury of (date of injury) which was evident within two months of the original injury in September 1993.

CONCLUSION OF LAW

3. Claimant's compression fractures are a result of the compensable injury sustained on or about (date of injury).

As previously noted, Dr. A stated that the compression fractures were "most likely" the result of osteoporosis in his February 14, 1994, report. Dr. K more definitively stated that "the compression fractures are in no relationship to the patient's stated accident on (date of injury)" In the discussion section of her decision, the hearing officer emphasizes Dr. W's report of August 26, 1994, which provides in relevant part:

[I]f you assume that all [claimant] sustained was a muscle strain at [employer], then he has no disability. However, if you assume that [the compensable injury] was the beginning of all of his compression fractures, which were the result of his injury plus osteoporosis, which was the result of long term steroid use, then he is 100% disabled at this time

We cannot agree with the hearing officer's characterization of Dr. W's report as providing a causal connection between the compensable injury and the compression fractures. On its face, the report specifically withholds providing such an opinion by alternatively stating his opinion on claimant's disability if the fractures are or are not a part of the compensable injury. On this state of the evidence, we believe that a determination that there is a causal connection between the compensable injury and claimant's compression fractures would be so against the great weight of the evidence as to be clearly wrong or manifestly unjust.

However, the hearing officer did not make that factual finding. Instead, as noted above, the hearing officer found that "Claimant sustained a compression fracture following the injury" and did not make a corresponding finding of a causal connection between the injury and the later developing fracture. Thus, her conclusion that the fracture is "a result of the compensable injury" is not supported by a factual finding and, likewise cannot stand for that reason. Our review of the record indicates that the determination that the compression fractures are a result of the compensable injury is not supported by a factual finding in this case. However, even if such a finding were included in the decision, it would be so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, we reverse the determination that claimant's compression fractures were a result of the compensable injury and render a new decision that the fractures are not part of the compensable injury in this case.

We reverse the hearing officer's injury determination and render a new decision that the compensable injury in this case does not include the compression fractures. However, in light of our affirmance of the hearing officer's determination that carrier waived its right to contest the compensability of the compression fractures herein, we affirm the order that carrier is liable for medical and income benefits, as if they were part of the compensable injury.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge