APPEAL NO. 952129
FILED JANUARY 31, 1996

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 November 13, 1995, in San Antonio, Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were whether the appellant (claimant), who is the claimant, continued to "suffer from the effects of the injury sustained on (date of injury), entitling him to workers' compensation benefits" and whether the claimant had disability from his compensable injury on (date of injury), and, if so, for what period.

The hearing officer, stating that it was undisputed that claimant had sustained "an injury" on (date of injury), opined that claimant had the burden to prove that his "current symptoms" related to that injury, that he had not done so, and that his inability to obtain and retain employment equivalent to his preinjury wage was not due to a compensable injury.

The claimant has appealed the hearing officer's decision. He asks that the Appeals Panel review the evidence in the record, and points out that his own doctors agree that his back strain resulted from his accident and only the company doctor opined that it did not. He further points to his testimony that the company doctor rendered that opinion without examining him. Claimant states that he had disability from June 26, 1995, the date he was taken off work, until October 17, 1995, the first day of work for another employer. The carrier responds briefly that the hearing officer is the sole judge of the evidence and that the hearing officer found the claimant not to be credible. The carrier also argues that the claimant's appeal is not timely.

DECISION

We reverse and remand.

The appeal is timely; the decision herein was distributed on November 29, 1995, to the parties, and the claimant is deemed, under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), to have received the decision by December 4, 1995. Claimant's appeal was filed on December 15, 1995, which is within fifteen days of the date of receipt. All dates in this decision are 1995 unless indicated otherwise.

As the carrier acknowledged in its opening statement, the events leading to the claimed injury are undisputed. The claimant had been employed for seven months by (employer), to work in the warehouse and load orders. Claimant said that on or about (date of injury), he was performing his usual job by standing on a pallet which was carried by a forklift in the warehouse, in preparation for loading the pallet with

merchandise. He said the pallet was elevated fifty feet in the air. Claimant said that neither he nor the driver saw an apparent ceiling overhang (described as a "wall" coming down from the ceiling). He was facing the shelves; the overhang was to his right, and struck him on the right side, bending him back over the forklift to the left side at waist level. Claimant said his face was scraped, his wrist was hurt, and he made contact at rib level with the forklift. Claimant said that he immediately reported the injury to his night supervisor and then worked the rest of his shift. Claimant said that after the accident he was scared and nervous because he could have fallen.

Claimant said that he was bruised and sore the next day but continued to work. He said that he thought his pain would go away. Claimant testified that the usual number of hours he worked was about 110 to 120 hours in a two-week period. However, between a week and two weeks after the accident, he began to experience increasing pain in his lower back, from the middle over to the left. Claimant said that he reported his pain, and breathing discomfort, to his night supervisor and asked whether he should see his own doctor or a company doctor. He said that he was told it didn't matter.

Claimant said that he continued to work until the pain got so bad he was unable to work. He made an appointment with his family doctor, Dr. S, and went to him on June 26th. To the extent that they are legible, Dr. S's records show that he treated claimant for lumbar strain and radiculopathy. The note of June 26th, while mostly illegible, does have the words "2 mo. ago on job" in its description of claimant's medical complaints. Dr. S ordered an MRI, which was essentially negative for herniated or bulging discs. Claimant said that Dr. S took him off work for four days, and the employer was co-operative. Claimant said that Dr. S thereafter ordered physical therapy for four to six weeks, and, when he took a slip to that effect to his supervisor, he was then told that he "couldn't do that" and he would have to see their company doctor.

Claimant testified he saw the doctor, whose name he could not recall and which is illegible in the single record in evidence, twice. The first time, he said only his reflexes were tested and he was not otherwise examined and touched. He said the doctor looked at his MRI. He testified that the doctor did not indicate he felt his problems were not work related. The doctor then ordered a short course of physical therapy. Claimant said he attended for three days and encountered so much pain he went back to report this to the company doctor. When he reported his problems during therapy, claimant said the doctor seemed to get upset and told him he was releasing him back to his family doctor, on a non work-related condition. He said that the record in evidence was written after his second visit.

A work status report in evidence from (healthcare provider) (Clinic), dated July 11, 1995, has brief identifying information about claimant and then the statement that claimant has low back pain not related to his accident of (date of injury), and that he is referred to see his regular doctor again for treatment of "non occupational" back pain.

The medical records indicate that a doctor to whom claimant was referred by Dr. S, who was Dr. R, on an Initial Medical Report (TWCC-61) dated July 24th, put claimant on bed rest for two to four weeks, and prescribed physical therapy. This report also notes a history of the forklift accident as the point of onset of pain. According to claimant, he followed this regimen and was released back to light-duty on September 7th. He said he went to the employer to resume working, but was told that no job had been kept open and he would have to reapply. Claimant said he reapplied but was not hired, and, because he needed to work, he sought and eventually obtained other employment, where he began working on October 16th. Claimant said that on September 7th, although released to light duty, he felt pretty good and that his condition was resolved by the time he went back to work.

On October 24th, Dr. S wrote a general letter stating that claimant sustained his low back pain and radiculopathy due to his job-related accident.

The carrier presented no witnesses but did put into evidence the employer's First Report of Injury or Illness (TWCC-1), completed by a person entitled insurance manager. This form stated that claimant had been struck in the chest and had no problems and symptoms until June 26th. The carrier argued this statement, as if it were evidence of the failure of claimant to complain, in its final argument. There was no evidence or assertion that there had been another incident or occurrence off the job that caused claimant's back pain.

The hearing officer, in his discussion of the evidence, stated that it was "undisputed that claimant was injured in an accident" on (date of injury). Noting that claimant did not seek medical treatment for over two months, he further notes that the back "conditions" treated by Dr. S and Dr. R "occur for any number of reasons." The hearing officer further noted that it was difficult because of the intervening time and no medical treatment, to causally relate claimant's symptoms to the (date of injury) accident. He stated that it was the claimant's burden of proof to show that "current symptoms are related to this on-the-job injury."

We believe that analysis of the claimant's injury went astray because of a poorly worded, and somewhat nonsensical, first issue-Does the claimant continue to suffer from the effects of the injury sustained on (date of injury), entitling him to workers' compensation benefits? The benefit review conference (BRC) was held on October 16th. The positions of the parties are stated as:

Claimant's position: The accident of (date of injury), resulted in a low back injury that persists currently.

Carrier's position: The claimant had an accident on (date of injury), but any injuries arising form [sic] this accident have since resolved.

Literally, the issue as stated assumes a compensable injury under Section 401.011(26) and does not pose a dispute as to whether claimant, at any time preceding the date of the BRC, was eligible for temporary income benefits (TIBS) or medical benefits. Moreover, the hearing officer's observation that claimant did not meet a burden of proving that his "current symptoms" related to his (date of injury) injury, or his conclusion of law that claimant did not "continue to suffer from affects" of that injury, are hardly surprising because the claimant did not, as of the date of the CCH, assert that he had "current symptoms." In our opinion, issues should be framed with reference to the pertinent statutory terms (injury, disability, maximum medical improvement (MMI)) and described as identifiable time frames; issues posed as requests for advisory opinions as to whether "symptoms" or "conditions" are present "currently" should be avoided.

The first issue reported from the BRC is plainly flawed. There was a separate second issue on disability, so the ambiguity of the first issue and the carrier's position cannot be resolved as an issue over whether the injury resulted in inability to obtain and retain employment. If it was the carrier's intent to dispute that claimant sustained a compensable injury at all on (date of injury), or that his admitted (but unspecified) injury on that date did not extend to the back, then this should have been expressly stated to enable the claimant to prepare his evidence, or raise available arguments under Section 409.021 as to the timing or substance of carrier's dispute. If the carrier's position that claimant's injuries had resolved was intended as an assertion that claimant had reached MMI, then a question would be raised as to whether the matter was ripe for decision in the absence of a designated doctor. Finally, a controversy over the reasonableness and necessity of claimant's medical treatment would be the province of the medical dispute resolution process. The burden of proof would not necessarily lie with the claimant on all of these issues.

Absent clear articulation of the first issue, we are unable to assess if the hearing officer has properly placed the burden of proof or applied the correct legal standards. While a claimant has the burden to prove that an injury in the course and scope of employment occurred, it does not necessarily follow that the claimant is required to separately prove that the symptoms he thereafter experiences to the injured area of the body, prior to reaching MMI, emanate solely from the work-related injury. The Appeals Panel has stated many times that the claimant's testimony alone is generally sufficient

to establish the fact of an injury. *Gee v. Liberty Mutual Fire Insurance Co.*, 765 S.W.2d 394 (Tex. 1989). The Appeals Panel has specifically declined to hold that expert medical opinion is required to prove a back strain. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. While the hearing officer also opines that the claimant's low back strain or "condition" could "occur for any number of reasons," the record is devoid of any evidence or even an assertion of such "other causes." Likewise, we do not endorse the concept that the "intervening time period" of slightly more than two months between claimant's accident and his first examination by a physician is of overriding significance given the description of the accident, the fact that the claimant continued to work, and his explanation for not going sooner.

Concerning the effect of the TWCC-1, Section 409.005(c) (the version of the statute in effect for claimant's date of injury) provided that the TWCC-1 may not be considered as an admission by, or evidence against, a carrier in a proceeding in which the facts set out in the report are contradicted by the carrier. We believe that this provision precludes the carrier in this case from picking out isolated portions of the report, where the occurrence or extent of an injury is disputed, to assert as "evidence" supporting the carrier's defense. Just as the TWCC-1 could not be used as an admission of an injury to claimant's chest, we do not believe that it may be taken as evidence of no injury to claimant's back.

As we believe that the wording of the first issue is ambiguous and flawed to such extent that evaluation of the hearing officer's decision and allocation of the burden of proof cannot be made, and because it appears that the hearing officer agrees that the claimant was "injured" on (date of injury), but ordered that there was no entitlement to benefits (which would include medical benefits), we reverse and remand the case to address these errors. Noting that the decision on disability was affected by the hearing officer's determination of the first issue, we likewise remand the case for reconsideration of this issue in light of resolution of the other matters. Although the carrier argued at the CCH that disability, if any, would end on the date that claimant was released for light duty, it appears to us that a reasonable interpretation of the "inability to obtain and retain employment" would allow for the fact that obtaining employment will not usually occur on the date the release was issued. We would also note that the Appeals Panel has held that a release to light duty does not equate to an end to disability. Texas Workers' Compensation Commission Appeal No. 950246, decided March 31, 1995.

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 Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judg