APPEAL NO. 962112

This appeal is brought 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 August 13, 1996, in (city), Texas, with (hearing officer) presiding as hearing officer. He determined that the appellant (carrier herein) did not "specifically" contest the compensability of the claimed injury; that the respondent (claimant herein) did not sustain a compensable injury on (date of injury) that without good cause the claimant failed to timely report the claimant's injury to the employer; and that the claimant did not have disability. The carrier was held not liable for benefits. The carrier appeals the determinations that it did not specifically contest the compensability of the claimed injury as incorrect as a matter of law and that the hearing officer improperly added this as a disputed issue at the CCH. The appeals file contains no response from the claimant. The other determinations, all adverse to the claimant, have not been appealed and have become final. Section 410.169.

DECISION

Affirmed.

The report of the benefit review conference (BRC) that preceded the CCH lists as an issue: "Did the carrier specifically contest compensability on the issue of sustaining an injury in the course and scope of employment pursuant to [Section 409.022 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6)]?" The carrier submitted a timely response (*see* Rule 142.7(c)) to the BRC report which stated in pertinent part:

> The issue of whether "carrier specifically contest(ed) compensability" under Rule 124.6 and [Section] 409.022 was not raised by the Claimant and Claimant had no "position" on the issue not raised. Carrier objects to the Benefit Review Officer's [BRO] raising of an "issue" sua sponte and which was not subject to prior dispute by the parties. If the [Texas Workers' Compensation Commission (Commission)] is supposed to be pro-active in this arena, the Carrier should have been informed the TWCC [Texas Workers' Compensation Commission] thought the [Payment of Compensation or Notice of Refused or Disputed Claim] TWCC-21 was insufficient basis for not beginning benefits, as related by the TWCC-21.

When the hearing officer announced that the matter of the contest of compensability was an issue to be decided at the CCH, the carrier's attorney objected, again on the basis that this had not been an issue considered at the BRC. In making this assertion, the attorney emphasized that he was not present at the BRC, but the attorney who prepared the response was, and he stood by the position that this was not raised as an issue or discussed at the BRC. The claimant's attorney stated that she was present at the BRC and this matter was discussed. Specifically, she said "[n]ear the conclusion of the [BRC], when we were discussing what the issues would be, that was an issue that the Hearing Officer [sic] had raised at that time." The hearing officer, noting that the BRO was not available to question, did not find good cause to "remove" this issue from his consideration.

Presumably and without saying so, he accepted the claimant's attorney's account of what happened at the BRC. He did not address the carrier's other contention, confirmed by the claimant's attorney, that this issue emanated from the BRO and that in the process the BRO became an advocate for the claimant.

We are concerned about how the question of the contest of compensability became an issue in this case. First, we observe that the BRO functions in the capacity of a mediator. *See* Section 410.022. As such, the BRO must be impartial. Secondly, this claimant was represented by an attorney who can be presumed able to adequately represent the interests of the claimant. Thus, leaving aside questions of impartiality, we question why a BRO would take on the added task of creating more issues rather than concentrating on resolving the issues developed by the parties. *Compare* Texas Workers' Compensation Commission Appeal No. 91113, decided January 27, 1992. Third, we believe that when a party responds to a BRC report, that response should be timely accommodated as appropriate. Here, the BRO could have provided vital information on the question of what issues were raised by the parties. The hearing officer recognized this, but out of expediency declined to make inquires of the BRO or even to go beyond the statements of the claimant's attorney. In making these comments, we acknowledge that a hearing officer may modify an issue to clarify or better reflect the actual matter in dispute. Texas Workers' Compensation Commission Appeal No. 93067, decided march 11, 1993. *See also* Texas Workers' Compensation Commission Appeal No. 92268, decided August 6, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 92071, decided April 10, 1992. In any event, the carrier did not request that the BRO provide evidence on this point, nor did it ask that the claimant's attorney be put under oath as a witness, nor did it attempt in any way to cross-examine or probe more carefully the attorney's account of what happened at the BRC. Under these circumstances, we are unwilling to conclude that the BRO became an advocate for the other party or that the carrier properly preserved a record of this claimed error. Thus, we find no reversible error in adding this issue.

The carrier also appeals the substantive resolution of this issue as incorrect as a matter of law. Briefly, Section 409.022 provides that a carrier's notice of refusal to pay benefits (TWCC-21) must specify the grounds for the refusal. Rule 124.6(a)(9) provides that conclusory statements such as "liability is in question," "compensability in dispute," "no medical evidence received to support disability," or "under investigation" lack sufficient specificity as grounds for refusing to pay benefits. The Appeals Panel has further held that "magic words are not necessary to contest compensability of an injury" and that we will "look to a fair reading of the reasoning listed to determine if the notice of refusal or denial is sufficient." Texas Workers' Compensation Commission Appeal No. 93326, decided June 10, 1993. The reasons given are to be read as a whole to determine whether they are adequate to contest compensability. Texas Workers' Compensation Commission Appeal No. 93533, August 6, 1993.

The reasons given in the TWCC-21 for disputing compensability consisted of the following:

THE CLMT MADE AN ELECTION OF REMEDIES AS ALL MEDICAL HAS BEEN FILED UNDER HIS PERSONAL INS. **NO MEDICAL TO SUPPORT ANY WORK RELATED INJURY**. INJURY NOT REPORTED WITH IN 30 DAYS TO HIS EMPLOYER. [Emphasis added.]

The question is whether this language, particularly as highlighted, was adequate to contest compensability. In support of its position that this TWCC-21 was sufficient to contest compensability, the carrier cites a series of cases.[1] In these case, the specific language included "not work-related" or lack of medical evidence in the context of other language attributing the injury to something other than the workplace. In the case we now consider, the highlighted language is essentially similar to the language of "no medical evidence received to support disability" which Rule 142.6(a)(9) deems inadequate. It conveys the message only that the carrier's investigation of compensability was incomplete or inconclusive. It is not an assertion of no work-related injury nor does its context support a broader interpretation. *See* Texas Workers' Compensation Commission Appeal No. 93326, decided June 10, 1993. In Texas Workers' Compensation Commission Appeal No. 94977, decided September 6, 1994, Judge (judge) discussed numerous cases dealing with the sufficiency of a carrier's dispute of compensability. In that case the statement on the TWCC-21 was in terms not only of awaiting further medical evidence, but also of other considerations which raised the question or at least implied that the claimed injury was not in the course and scope of employment.

Having reviewed the record in light of existing Appeals Panel decisions, we conclude that the carrier's TWCC-21 did not adequately contest the compensability of the claimed injury on the basis that it was not in the course and scope of employment. Rather, when considered in the context of the entire statement, the language only asserted a lack of sufficient medical evidence on which to make a decision to deny benefits for this reason. Thus, we find no error in the hearing officer's determination of this issue and would note only that the claimed injury was found not compensable for another reason.

[1]These include Texas Workers' Compensation Commission Appeal No. 93302, decided June 2, 1993; Texas Workers' Compensation Commission Appeal No. 92145, decided May 27, 1992; Texas Workers' Compensation Commission Appeal No. 94977, decided September 6, 1994; and Texas Workers' Compensation Commission Appeal No. 950380, decided April 26, 1995.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge