APPEAL NUMBER 94994

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On June 22, 1994, a contested case hearing was held in (City 1), Texas, with (hearing officer) presiding. The issues were whether the cross-appellant, who is the claimant herein, sustained a compensable injury to her neck, right hand, and wrist when she injured her lumbar spine in a fall on (date of injury) , while employed by (employer); whether the carrier disputed compensability of her neck injury within 60 days after being notified about it, and, if not, whether the carrier's dispute of compensability was based upon newly discovered evidence which could not reasonably have been discovered earlier; and whether the claimant reached maximum medical improvement (MMI) and, if so, on what date.

The hearing officer determined that claimant had not sustained a compensable injury to her cervical spine, right hand, and wrist on (date of injury) , when she injured her lumbar spine. The hearing officer further found that the carrier received written notice of injury to the neck on May 17, 1993, through a report of the treating doctor, and did not dispute compensability of the neck within 60 days. The hearing officer determined that the claimant had not reached MMI for the reason that she disputed her treating doctor's report finding MMI, but a designated doctor had not been appointed, and the issue was therefore not ripe for determination.

The carrier has appealed the hearing officer's findings and conclusions that the claimant notified the carrier's adjuster of her disagreement with MMI and that therefore there was a dispute over MMI which was not ripe for resolution, arguing that the hearing officer has erred "as a matter of law" because MMI became final after 90 days. The carrier further asserts error "as a matter of law" in his conclusion that the carrier waived its right to contest compensability of the neck injury. Finally, the carrier states that the hearing officer erred "as a matter of law" in ordering it to pay workers' compensation benefits, stating that a finding of "no compensable" injury precludes it from paying benefits. The carrier argues that it is "irrelevant" whether it contested compensability and that a waiver does not convert a noncompensable injury into a compensable one, since this is really a "coverage" issue. The claimant asks that the decision be upheld in these regards. The claimant appeals the hearing officer's determination that claimant did not sustain a neck, arm and wrist injury in the course and scope of her employment, to which the carrier responds that such should be upheld.

DECISION

We affirm the hearing officer's decision, but reform his conclusion of law that claimant did not sustain a "compensable" neck injury to conform to his findings of fact on the waiver issue, noting that, as a matter of law, the neck injury became "compensable" because the carrier waived its right to assert otherwise.

The claimant had been employed by the employer for two to three weeks when she slipped and fell on a wet floor while putting a silverware rack into place above a sink. She

stated that she hurt her back, and medical records show she was diagnosed with a herniated disc at L5-S1. Claimant's contention also was that she hurt her neck at the same time and her right arm and wrist. Although seen at first in the emergency room, she did not treat with a doctor until she saw Dr. C two months after her injury. (Claimant admitted that she wrote in the word "neck" at the end of a line after the words "increasing pain in" on a copy of the emergency room record that she forwarded to the carrier, but maintained she did so with no intent to deceive the carrier.) Claimant testified that she asked Dr. C several times about her neck and headaches, but that he did nothing for them and only treated her lumbar spine. The record indicated that the first time neck pain is mentioned was in a medical report of Dr. C dated April 26, 1993. There is a subsequent report that makes reference to neck pain, dated May 12, 1993, in which the doctor questions whether it was related to the on-the-job incident, and it is stamped "received May 17, 1993 (City 2) West".[1] There is no Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dispute form in the record, although sometime in late July 1993, the carrier filed a medical payment dispute form which disputed the neck injury only.[2] Claimant was diagnosed with a cervical herniated disc by her second treating doctor Dr. P and she had surgery. She also indicated she had a carpal tunnel surgery as well on her right arm.

Claimant explained her earlier failure to list her neck on her claim for compensation or a report of injury completed for the carrier was based upon her assumption that her neck and back were the same. A doctor for the carrier who reviewed only claimant's medical records opined that she did not injure her cervical spine when she fell.

Effective September 28, 1992, Dr. C released claimant back to work, and completed a Report of Medical Evaluation (TWCC-69) showing the date of MMI as this same date. The text of the report noted that claimant had a slightly bulging lumbar disc. However, Dr. C made no assessment of impairment at all; the percentage impairment portion of the form is blank. According to notes of the adjuster that are in the record, this was documented ("nothing is shown under percentage of whole body impairment") by the adjuster and she attempted to call Dr. C's office to clarify. No clarification is recorded on her records in evidence. The adjuster's notes document that the claimant called on October 9, 1992, to indicate disagreement with Dr. C's return to work, and that the adjuster advised her to call the Texas Workers' Compensation Commission to dispute MMI. The note on that date also documents that the adjuster advised claimant they were still investigating whether there was any permanent impairment, and that the adjuster wrote to

[1] While there is nothing in the record to indicate whose received date-stamp this is, the carrier has not appealed the hearing officer's fact finding that the May 12, 1993, doctor's report is sufficient "written notice" of the neck injury and that it was received by the carrier on May 17, 1993.

[2] Again, there is no appeal by the carrier on the basis that a timely dispute was made by filing this document, and carrier's argument in its brief assumes that it did not timely dispute the neck injury because it was not required to do so.

Dr. C seeking clarification of whether claimant had impairment. No reply from Dr. C, if any, is included in the record.

WAIVER OF DISPUTE TO COMPENSABILITY, AND THE EFFECT ON WHETHER BENEFITS MAY BE PAID FOR AN INJURY

The carrier's appeal of the order to pay benefits necessarily calls into review the hearing officer's Conclusion of Law No. 2, that claimant has not sustained a compensable neck injury, along with his Conclusion of Law No. 3, that the carrier waived the right to contest compensability of the neck injury.

It is worth noting that in preliminary conversations with the hearing officer, the claimant's attorney advanced the argument that a "compensable injury" could arise not only by virtue of a finding that an injury occurred in the course and scope of employment, but also by virtue of the failure of a carrier to timely dispute compensability. This is essentially what the Appeals Panel has previously noted in other decisions in which a waiver by a carrier was found. *See* Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993. We noted in that appeal that waiver of the contest of compensability was essentially a confession of compensability, so that review of the hearing officer's other finding on injury was thus moot. If a defense is waived, there is essentially no compensability "issue" to decide. Further, even where a hearing officer undertakes to decide such issues separate from the waiver issue, the effect of a finding of waiver is to hold, as a matter of law, that the alleged injury is compensable. Texas Workers' Compensation Commission Appeal No. 94326, decided May 2, 1994.

We agree that this is the case here. Once the carrier received notice that the compensable injury extended to another part of claimant's body, and another injury was alleged, it was required to dispute compensability. Texas Workers' Compensation Commission Appeal No. 93491, decided August 2, 1993; Texas Workers' Compensation Commission Appeal No. 94798, decided July 26, 1994. Where no issue is joined because of the carrier's waiver of a dispute to compensability, we believe that the effect is that the asserted and undisputed injury becomes "compensable." Carrier's contention that Section 409.021 somehow only applies to compensable injuries, and not all claimed injuries, would strip Section 409.021(c) of all meaning. It is self-evident that there must be something to "waive" for the statute to have impact, and that would be the right to prove that an injury is, in fact, one for which a carrier may not be liable. A carrier who would apply Section 409.021 to only contest injuries opined to be "compensable" would arguably be in the posture of bad faith and certainly in violation of some compliance sections of the 1989 Act. *See* Section 415.002(a)(4), (7), & (14). The very purpose of the contest described in Section 409.021(c) is to prescribe how the carrier must assert that an alleged injury is <u>not</u> compensable. Once an injury is compensable by virtue of waiver of contest, the only way a carrier may reassert a defense is through reopening the issue if there is a finding of evidence that could not reasonably have been discovered earlier. Section 409.021(d). There was no demonstration of such "new evidence" in the case at hand.

As part of its appeal, the carrier has forwarded a copy of a judgment from a (City 3) District Court which it argues suspends this agency's interpretation of Section 409.021. No applicable authority is cited in support of this proposition. Leaving aside that the hearing officer's attention was not directed to this judgment, and it is not otherwise part of the record, the apparent summary judgment does not recite any basis for a finding against the claimant, nor is the Commission joined as a party. The decision is without effect, therefore, beyond its factual context, and certainly the Commission is not bound by such a general judgment of a district court, through stare decisis, in its interpretation of the Section 409.021.

Because the carrier failed to timely join issue on the ground that the neck injury did not occur in the course and scope of employment, the hearing officer's findings of fact on that issue are somewhat academic and do not effect the ultimate compensability of the neck injury. While the hearing officer's conclusions seem somewhat inconsistent, it is clear that he held that compensation was payable for the neck injury, and so ordered. Consequently, we reform the hearing officer's Conclusion of Law No. 2 by deleting the word "compensable" before the word "injury" in the first line of that conclusion. We reform Conclusion of Law No. 3 to make express the implied conclusion inherent in his decision, by adding the following sentence at the end: "The claimant's neck injury is therefore a compensable injury."

WHETHER THE ISSUE OF MMI WAS RIPE FOR DISPUTE

The carrier's appeal on the issue of MMI is that claimant's MMI status became final because she did not dispute it within 90 days, as required by Rule 130.5(e). To some extent, through his finding that claimant did timely dispute her MMI to the adjuster, the hearing officer has also assumed that the 90 day would apply to this situation.

As we have held, however, Rule 130.5(e) does not operate to independently finalize a status of MMI independent of a final impairment rating. A certification of MMI can only become final if the impairment rating has. Texas Workers' Compensation Commission Appeal No. 93391, decided July 5, 1993. In this case, there was no impairment rating, a fact noted by the adjuster as a point of concern. The record contains no response, if any, of Dr. C to the adjuster's inquiry as to whether claimant had an impairment rating Dr. C could assess. We are unwilling to conclude that Dr. C intended a "zero" rating by leaving the percentage portion of the TWCC-69 form blank. He may well have simply decided to defer assessing an impairment until the passage of six months, having noted that the claimant had a bulging lumbar disc. MMI was disputed by the time of the benefit review conference. The hearing officer's determination that a decision on MMI was premature is sufficiently supported by the record.

CROSS-APPEAL: WHETHER THE HEARING OFFICER ERRED IN FINDING THAT CLAIMANT'S NECK INJURY DID NOT OCCUR IN THE COURSE AND SCOPE OF EMPLOYMENT

There has been no appeal of the hearing officer's findings that claimant's wrist and right arm injuries did not occur within the course and scope of employment, nor were such injuries included as part of the issue on waiver of compensability. The claimant appeals only the hearing officer's determination that claimant's neck injury did not occur in the course and scope of employment. We note that such determinations have generally been regarded by this Appeals Panel as factual determinations for the hearing officer. However, as we noted in our discussion on the waiver issue, his factual findings on this matter are somewhat academic, as the neck injury is ultimately compensable.

Subject to reformation of the hearing officer's conclusions of law to incorporate his implied findings and conclusions, and noting our comments on the cross-appeal, we affirm the decision and order of the hearing officer, finding the same are both supported factually, and are correct as a matter of law.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge