

APPEAL NO. 951268
FILED SEPTEMBER 18, 1995

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 June 2, 1995. The issues at the CCH were: 1. whether the appellant's (claimant herein) _____, compensable injury extended to his neck and back; 2. whether the respondent (carrier herein) specifically contested the compensability of the claimant's alleged injury to his back and neck; 3. has the issue over the carrier's duty to dispute the compensability of the alleged neck and back injury already been determined by the ruling of the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 94326, decided May 2, 1994; 4. did the claimant have disability resulting from the _____, injury, and if so, for what period(s); and 5. what is the claimant's average weekly wage. The parties stipulated that the claimant's average weekly wage was \$270.81. The hearing officer found that the claimant's compensable injury did not extend to his neck and back, that the carrier did not specifically contest the compensability of the alleged neck and back injury, that the carrier's duty to dispute the compensability of the alleged neck and back injury already was determined in Appeal No. 94326 and that the claimant did not have disability resulting from the _____, injury. The hearing officer stated in her decision that the claimant's injury did not extend to his neck and back under the doctrine of collateral estoppel. The hearing officer ordered the carrier to pay medical benefits in accordance with her decision, the 1989 Act, and the Rules of the Texas Workers' Compensation Commission (Commission). The claimant appeals the decision of the hearing officer contending that his injury extended to his neck and back and that the claimant had disability. The carrier responds that the decision of the hearing officer should be affirmed. The carrier also objects to the continued presence of Mr. C in proceedings before the Commission, alleging that Mr. C, who filed claimant's appeal, is barred from assisting the claimant pursuant to Section 410.006.

DECISION

Affirmed in part and reversed and rendered in part.

The basic facts of this case are discussed in some detail in our decision in Appeal No. 94326, *supra*. Issues concerning medical treatment, specifically change of treating doctor are discussed in Texas Workers' Compensation Commission Appeal No. 950144, decided March 8, 1995. We incorporate our earlier discussions of the facts in these decisions by reference and will only briefly summarize them here.

The claimant alleged three injuries while working for the employer in 1993. This appeal, as well as the two other Appeals Panel decisions cited, deals with an injury the claimant alleges took place on _____, when he fell down stairs at work. The hearing officer in Appeal No. 94326, *supra*, found that the claimant staged this fall and was

not injured in the fall, but that the carrier failed to timely dispute the claim for injury.¹ The hearing officer also found no disability resulting from this injury. In regard to the questions of whether the accident was staged, whether the claimant was injured and whether the claimant had disability, there was conflicting evidence. The Appeals Panel found that the evidence contrary to the decision of the hearing officer did not constitute the great weight and preponderance of the evidence and therefore the Appeals Panel could not reverse the decision of the hearing officer based upon any error in making these findings of fact. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The Appeals Panel did reverse the decision of the hearing officer that the claimant did not have a compensable injury and rendered a decision that he did suffer a compensable injury because the carrier failed to timely dispute his claim of injury.

Here the same reasoning applies to the extent of injury. The hearing officer found that carrier failed to timely dispute the claimant's allegation of neck and back injury, and this finding is unappealed. Thus the carrier became legally liable for these injuries regardless of any factual finding that the claimant's injury did not extend to his neck and back. We will not overturn the hearing officer's factual finding that the claimant's injury did not extend to the neck and back because extent of injury is a factual matter within the province of the hearing officer and this finding is not contrary to the great weight and preponderance of the evidence. However, the carrier failed to timely dispute the claimant's allegation of neck and back injury. Thus as a matter of law the carrier became legally liable for the claimant's neck and back injury. We therefore reverse the decision of the hearing officer that the claimant's injury did not extend to his neck and back and render a decision that as matter of law the claimant's injury extended to his neck and back. This is not contrary to, but is consistent with, our decision in Appeal No. 94326, *supra*, which did not deal with issue of extent of injury.

This decision does not relieve the claimant of proving that any medical treatment for his injury is reasonable and necessary. Nor does it relieve the claimant from proving disability. Disability is a question of fact about which the hearing officer in the present case has ruled against the claimant. While there is conflicting evidence, we hold that there is sufficient evidence to support her decision.²

As to the assistance of Mr. C, we note that the carrier alleges that Mr. C is an employee of an attorney and not a relative of the claimant. If true, this would bar Mr. C from assisting the claimant under Section 410.006. However, there is no evidence in the record supporting this allegation, and without such, any ruling on this point would be mere speculation by us.

¹The carrier has 60 days after the date on which it is notified of the injury to contest the claim or it waives its right to do so. Section 409.021(c).

²The decision of the hearing officer in Appeal No. 94326 only determined the question of disability through the date of the CCH; in that case, and is *res judicata* on disability through that date. See Texas Workers' Compensation Commission Appeal No. 931049, decided December 31, 1993.

The decision of the hearing officer in regard to disability is affirmed. The decision of the hearing officer that the claimant's injury did not extend to his neck and back is reversed and new decision is rendered that the claimant's injury included his neck and back.

Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

Because of our decision in Texas Workers' Compensation Commission Appeal No. 94326, decided May 2, 1994, and the doctrine of *stare decisis*, I concur with the decision of Judge Kilgore. We are faced with a difficult issue, made more complex by the requirement of Chapter 410 of the 1989 Act that disputed issues be individually resolved and not compromised or traded as was done in compromise settlement agreements under the prior workers' compensation law. Judge Kilgore in Appeal No. 94326, *supra*, and in this case very ably presented one viewpoint on this complex issue. However, if we were deciding this issue for the first time, I would join with the well written dissenting opinion of Judge Potts in Appeal No. 94326, *supra*.

Tommy W. Lueders
Appeals Judge

DISSENTING IN PART AND CONCURRING IN PART:

I concur with that part of the majority opinion which affirms the hearing officer's decision that the claimant does not have disability.

I respectfully dissent from that part of the majority opinion which reverses the hearing officer's decision that the claimant does not have a compensable injury and which renders a decision that the claimant has a compensable injury. The reasons for my

disagreement with the majority's opinion on compensability in this case are set forth in my dissent in Texas Workers' Compensation Commission Appeal No. 94326, decided May 2, 1994. As I stated in that dissent, I cannot read Section 409.021 or Rule 124.6 to make a nonexistent injury into a compensable injury when a carrier fails to timely contest compensability.

Robert W. Potts
Appeals Judge