APPEAL NO. 990919

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 April 1, 1999. The hearing officer determined that the respondent's (claimant) compensable injury included a left shoulder rotator cuff tear and that the appellant (self-insured) waived the right to contest the compensability of the claimed rotator cuff tear by not contesting it within 60 days of notice of the claimed injury. The self-insured appeals these determinations, contending that the Hearings Division had no jurisdiction in this case and that the decision is otherwise against the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The claimant worked as a laborer for the self-insured. He claimed a compensable left shoulder injury on _____, as a result of pulling on a carpet. He sought medical treatment from Dr. O, who in an Initial Medical Report (TWCC-61) of February 11, 1997, diagnosed a shoulder sprain/strain. The self-insured did not dispute the compensability of this injury presumably because it believed the injury was limited to a sprain/strain and would shortly resolve in the normal course of events.[1] The claimant returned to regular duties or was at least accommodated by the self-insured consistent with his physical limitations.

The claimant testified that he continued working and still experienced more or less continual left shoulder pain. He returned to Dr. O on July 21, 1998. In a report of this date, Dr. O indicated that the left shoulder sprain had resolved and that his x-ray on February 11, 1997, revealed arthritis. The carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on July 30, 1998, disputing "current medical treatment to the left shoulder as it is not directly related to the compensable injury, did not occur in the course and scope of the claimant's employment and is an ordinary disease of life (arthritis)." Dr. O referred the claimant to Dr. G, who requested an MRI and diagnosed left shoulder impingement and rotator cuff tendinitis, that is, a tear. Dr. O also referred the claimant to Dr. A, who, in a letter of September 11, 1998, also diagnosed impingement and partial rotator cuff tear of the left shoulder. Dr. O agreed with these diagnoses.

Computer notes generated by the self-insured's adjuster and printed on March 23, 1999, state that on October 23, 1998, the adjuster "received medical from [Drs. O, A and G] indicating clmt's current condition is directly related to this injury [of _____]." According to an unappealed finding of the hearing officer, the self-insured prepared a second TWCC-21 on December 3, 1998, and filed it with the Texas Workers' Compensation Commission

[1] The parties stipulated at the CCH that the claimant sustained a compensable left shoulder sprain/strain injury on _____.

(Commission) on February 2, 1999. In this TWCC-21, the self-insured again disputed "all current and future medical treatment to the left shoulder as it is not directly related to the compensable injury, did not occur in the course and scope of the claimant's employment, appears to be an ordinary disease/condition of life (arthritis & degenerative spur) and it also appears the claimant's current symptoms are the result of an intervening injury (rotator cuff tear, shoulder impingement, ligamentous sprain & bone contusion/bruise)."

We address the jurisdictional question first. The self-insured argues no jurisdiction in the Hearings Division because this case involves a claimed injury to the same body part (left shoulder) and that the "question is whether the claimant's current medical treatment is reasonable and necessary as it relates to the compensable injury of _____." It relies on our decision in Texas Workers' Compensation Commission Appeal No. 981133, decided July 15, 1998, in support of its position. In that case, the issue was whether the compensable lumbar injury at L4-5 was a "producing cause" of the "current lower back condition, L4-5 disc herniation." There we noted that there were no income benefits in issue and the issue was one of medical benefits to be determined by the Medical Review Division. This determination was consistent with other cases where the issue was framed in terms of "producing cause," *see* Texas Workers' Compensation Commission Appeal No. 990076, decided February 25, 1999, or "continue to suffer effects" of the compensable injury where the diagnosis remained essentially unchanged. Texas Workers' Compensation Commission Appeal No. 981220, decided July 15, 1998. As we noted in Appeal No. 981133, *supra*, these were not extent-of-injury cases. In the case we now consider, contrary to the suggestion of the self-insured, the issue was not framed in terms of "producing cause" of the current condition or the current condition as the "result of" the compensable injury. The position of the claimant, as reflected in the report of the benefit review conference (BRC), was that he tore his rotator cuff on _____, when he pulled on the carpet and felt pain. Thus, we believe this is in fact an extent-of-injury case as expressly framed in the BRC report and the authority cited by the self-insured in support of its jurisdictional argument does not apply.[2] In reaching this conclusion, we stress, as we did in Appeal No. 981220, *supra*, that it may be appropriate to look beyond the literal wording of an issue to determine the "true nature of the dispute." Nonetheless, such analysis must always begin with that wording of the issue and rely on the wording absent some reason not to. Here, we perceive no reason to go beyond the wording of the dispute, but are compelled to conclude that this is an "extent of injury" issue over which the dispute resolution process of the Hearings Division has jurisdiction.

On the substantive issue of whether the claimant tore his rotator cuff on _____, when he pulled on the carpet, the evidence was in conflict. Dr. O was of the opinion that the rotator cuff tear "occurred on the job." Dr. G agreed, though in his notes he reflects complaints of shoulder pain from January 1997 and from May 1998. The claimant testified that he first experienced the pain on the date of his injury and denies telling any doctor that the pain only occurred shortly before his return to Dr. O in July 1998. Dr. T, a carrier-selected doctor, examined the claimant on November 5, 1998, and concluded that the initial

[2]We note that there is no indication in the BRC report that the self-insured objected to the phrasing of the issue. Nor did the self-insured comment on the BRC report to assist the Commission in correctly framing the issue.

injury was only a strain, which resolved, and he doubted, based on other medical records suggesting a recurrence of pain in 1998, that the original injury included the tear. Still, he speculated that a small tear could have been present at the time of the injury and only became symptomatic later. Whether the claimant suffered a rotator cuff tear on _____, was a question of fact for the hearing officer to decide. She considered the evidence and concluded that the claimant met his burden of proof on this issue and established that his compensable injury extended to and included the tear. Self-insured stresses Dr. T's opinion and the work history of the claimant after the _____ incident, for a year and one-half, as supporting a finding that the claimant did not tear the rotator cuff on _____. The hearing officer was the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we conclude that the evidence was sufficient to support the finding that the compensable injury in this case extended to the left shoulder rotator cuff tear and affirm that determination.

In light of our affirmance of the extent-of-injury determination, the issue of the self-insured's failure to timely dispute compensability becomes less significant. In any case, we have observed that when a carrier accepts the compensability of what it perceives is a fairly minor injury and later the injury is diagnosed as much more serious than originally thought, the proper vehicle for disputing the compensability of the more serious condition is the so-called "re-opening" provision of Section 409.021(d) based on newly discovered evidence. *See* Texas Workers' Compensation Commission Appeal No. 962415, decided January 9, 1997; Texas Workers' Compensation Commission Appeal No. 94943, decided August 31, 1994. The time limit to dispute based on newly discovered evidence is not necessarily 60 days, but is some reasonable time, which, in any given case, may be more or less than 60 days. *See* Texas Workers' Compensation Commission Appeal No. 950050, decided March 1, 1995. In this case, the hearing officer appears to have resolved the carrier-waiver issue, not on the basis of newly discovered evidence, but on the basis of some written notice triggering a new 60-day dispute period under Section 409.021(c). Nonetheless, we will affirm a determination of a hearing officer on any theory of law reasonably supported by the evidence. Here, there is an unappealed finding that the self-insured received notice of the claimed rotator cuff tear on October 23, 1998.[3] A dispute was not filed until February 2, 1999, even though the TWCC-21 was completed on December 3, 1998. We do not consider the delay in filing the dispute reasonable based on newly discovered evidence on October 23, 1998. For this reason, we affirm the determination that the self-insured waived the right to contest the compensability of the claimed left rotator cuff tear injury.

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

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[3]This finding was apparently based on the adjuster's notes, which, according to the copy in evidence, were generated on March 23, 1999. If these constituted written notice for purposes of Section 409.021(c), a serious question of when the 60-day period began in this case would present itself. The question was not raised at the CCH or on appeal and, for this reason, we do not address it.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge