

APPEAL NO. 991587

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 28, 1999. The issues at the CCH were whether the compensable injury is a producing cause of the respondent's (claimant) chronic low back pain and degenerative disc disease, and whether the appellant (self-insured) waived its right to contest compensability of the claimant's chronic low back pain and degenerative disc disease by not disputing this portion of the injury within 60 days. The hearing officer determined that the Division of Hearings of the Texas Workers' Compensation Commission (Commission) does not have subject matter jurisdiction to resolve this dispute, and dismissed the case for lack of subject matter jurisdiction. The self-insured appeals, urging that the compensability of the claimant's condition must be determined before any determination can be made as to whether the claimant is entitled to medical benefits, and that the Division of Hearings does have jurisdiction over the issues, and requests that the hearing officer's decision be reversed and remanded. The appeals file does not contain a response from the claimant.

DECISION

Reversed and remanded.

The parties stipulated that the claimant sustained a compensable lower back injury on (injury 2). In Texas Workers' Compensation Commission Appeal No. 962633, decided February 12, 1997 (Unpublished), the Appeals Panel affirmed a previous hearing officer's decision that the claimant sustained a compensable low back injury on injury 2. The claimant testified that as a result of the injury, he has been unable to work since March 1996, and his condition has steadily deteriorated to the point that he cannot bend, sit for more than five minutes, or lift anything greater than 10 pounds. According to the claimant, he sustained a prior back injury in August 1988 while working as a journeyman electrician, which resulted in a microdiscectomy for a herniated disc at L5-S1. The claimant testified that he retrained as a radiology technician and went to work for employer in August 1991; that he sought no medical treatment for his back after the surgery until his injury on injury 2, other than obtain some anti-inflammatory medication; and that he occasionally had back pain if he overexerted himself.

On March 8, 1999, Dr. D filed a Recommendation for Spinal Surgery (TWCC-63), recommending a lumbar fusion with instrumentation. Dr. D's diagnoses were lumbar herniation, low back pain and leg pain. The self-insured's second opinion doctor agreed with the recommendation for spinal surgery, and the self-insured was determined liable for the costs of spinal surgery. According to the claimant, the self-insured did not appeal such determination within 10 days. The claimant testified he was scheduled for spinal surgery on June 29, 1999.

On March 30, 1999, the self-insured filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) stating:

[Self-insured] disputes Spinal Surgery recommendation as being reasonable and necessary treatment as related to the compensable injury according to the designated doctor [Dr. Di] report of 10-14-98. In Dr. Di's report it is his opinion that the diagnostic studies indicating evidence of chronic radicular changes with no significant acute radicular changes would be consistent with injuries of at least six months or greater, but with claimant's prior history of numerous previous lumbar injuries with disc disruption, it is most likely related to claimant's previous injury and not to his current injury. This is consistent with peer review dated 12-8-98 by [Dr. P].

A benefit review conference (BRC) was held on May 13, 1999. The benefit review officer wrote in the BRC report that with regard to the issue of whether the compensable injury is a producing cause of the claimant's chronic low back pain and degenerative disc disease, the self-insured's position was that the claimant's chronic low back pain and degenerative disc disease is related to the claimant's previous injury and not the injury of injury 2, and that the need for spinal surgery does not arise from the compensable injury, but is completely related to his preexisting condition.

At the CCH, the parties discussed whether these issues should properly be decided by the Division of Hearings, or the Division of Medical Review of the Commission. The claimant asserted that the Division of Hearings had jurisdiction over the issues since a TWCC-21 had been filed by the self-insured. The self-insured asserted that the compensable injury of injury 2, is not a producing cause of the conditions for which the claimant requires spinal surgery, and agrees that the Division of Hearings has jurisdiction. The hearing officer states in the Statement of the Evidence "[t]he [self-insured's] attorney made it very clear that the [self-insured] was disputing their liability for spinal surgery," and based on Texas Workers' Compensation Commission Appeal No. 981133, decided July 15, 1998, the hearing officer determined that the Division of Hearings does not have subject matter jurisdiction to resolve this dispute.

The Appeals Panel has stated that the issue of whether or not treatment is reasonable and necessary for the claimant's compensable injury in the past or in the future is not within the jurisdiction of the hearing officer. The determination of what "health care is reasonably required by the nature of the injury" is a matter for the Medical Review Division of the Commission. Section 413.031(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.305 (Rule 133.305). The determination of "benefit disputes" are adjudicated by the Commission's Hearings Division. Rule 140.1. A "benefit dispute" is one "regarding compensability or eligibility for, or the amount of, income or death benefits." *Id.* A carrier is liable for lifetime medical benefits reasonably required by the nature of a compensable injury. Section 408.021(a); Texas Workers' Compensation Commission Appeal No. 92649, decided January 6, 1993.

Appeal No. 981133, *supra*, was determined to be a Division of Medical Review matter under the circumstances of that case. In that case, the parties stipulated on the record that the claimant sustained a compensable low back injury on Injury 1 and almost four years later, the carrier was questioning whether the injury 1 injury was a "producing cause" of the "low back condition, an L4-5 disc herniation." The instant case is distinguishable from Appeal No. 981133 because in this case, the self-insured is asserting that claimant's back pain and degenerative disc disease are the result of a previous injury and not the result of his work-related injury. See Texas Workers' Compensation Commission Appeal No. 991335, decided August 6, 1999, and Texas Workers' Compensation Commission Appeal No. 990920, decided June 16, 1999 (Unpublished).

In another recent decision, Texas Workers' Compensation Commission Appeal No. 991263, decided July 29, 1999 (Unpublished), the Appeals Panel considered a hearing officer's decision that the Division of Hearings did not have jurisdiction to resolve the issues of whether the compensable injury was a producing cause of the claimant's lumbar radiculopathy and whether the carrier timely contested compensability of the claimant's lumbar radiculopathy, although the hearing officer made findings in favor of the claimant on both issues. In that case, the Appeals Panel determined that the hearing officer did have jurisdiction to determine the identified issues before her, but did not have jurisdiction over the issue of what treatment is reasonable and necessary. The Appeals Panel stated that the Division of Hearings must determine what conditions are compensable before the Division of Medical Review can determine what treatment is reasonable and necessary.

We do not agree with the hearing officer's determination that the issue was a dispute over liability for spinal surgery. However, even if it were, such a dispute is one in which the Division of Hearings has jurisdiction. Rule 133.206(k). While it is evident that the self-insured does not want to pay the costs of spinal surgery, the underlying condition which necessitates surgery, identified by the self-insured as chronic low back pain and degenerative disc disease, is in dispute. This issue is one for the Division of Hearings to resolve, as well as the issue of whether the self-insured waived its right to contest compensability of the chronic low back pain and degenerative disc disease. Once a claimant has made out a *prima facie* case that the current condition is a result of the original compensable injury, the burden to prove that a preexisting condition or unrelated injury was the sole cause of the current condition falls on the carrier. Texas Workers' Compensation Commission Appeal No. 971727, decided October 17, 1997. We note that it is the claimant's burden to prove an injury or condition, not symptoms, and that the self-insured is required to dispute injuries, not symptoms. Texas Workers' Compensation Commission Appeal No. 961919, decided November 13, 1996 (Unpublished).

We disagree with the hearing officer's finding that the Division of Hearings does not have subject matter jurisdiction to resolve the issues before him. We reverse the hearing officer's Findings of Fact Nos. 5 and 6, and Conclusion of Law No. 1, and remand the case for such further development of the evidence as deemed necessary by the hearing officer, and for findings of fact, conclusions of law, and a decision and order to resolve the disputed issues of whether the compensable injury is a producing cause of the claimant's chronic

low back pain and degenerative disc disease, and whether the self-insured waived its right to contest compensability of the claimant's chronic low back pain and degenerative disc disease by not disputing this portion of the injury within 60 days. 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 Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge