APPEAL NO. 992012

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 23, 1999. With respect to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable injury to his right knee on (1st date of injury); that the respondent/cross-appellant, (carrier B) provided workers' compensation insurance for the claimant's employer on the date of his injury and that the appellant/cross-respondent, (carrier A) did not; and that the Texas Workers' Compensation Commission (Commission) does not have jurisdiction to decide whether carrier B should reimburse carrier A for the benefits it paid to the claimant for the (1st date of injury), injury. In its appeal, carrier A argues that the hearing officer erred in determining that she did not have jurisdiction to order carrier B to reimburse carrier A for the benefits it paid to the claimant under this claim. Carrier B did not respond to carrier A's appeal. However, carrier B filed a cross-appeal, alleging that the hearing officer erred in finding that the claimant sustained a compensable injury, noting that he had the burden of proof on the injury issue and contending that the burden could not be satisfied in this case because the claimant did not appear at the hearing. Carrier B further argues that the hearing officer erred in finding that carrier A's failure to timely dispute claimant's injury resulted in carrier A's legal responsibility for the claim, citing Texas Workers' Compensation Commission Appeal No. 950042, decided February 23, 1995, and that she erred in determining that the Commission did not have jurisdiction over the reimbursement issue. Finally, carrier B pointed to several clerical errors in the hearing officer's decision. In its response to carrier B's appeal, carrier A initially asserts that the appeal was untimely filed. Alternatively, carrier A urges affirmance of the determination that it was not legally responsible for paying the claim, agrees that the hearing officer erred in finding that she did not have jurisdiction over the reimbursement issue, and further agrees that the hearing officer "abused her discretion" in finding that the claimant sustained a compensable injury because he had the burden of proof on that issue and did not appear at the hearing. The appeals file does not contain a response to either appeal from the claimant.

DECISION

Affirmed.

Initially, we will address carrier A's assertion that carrier B's cross-appeal is untimely. Commission records reveal that when the hearing officer's decision was distributed to the parties, a copy was not placed in carrier B's Austin representative's box and that the hearing officer's decision was not sent to the carrier until September 15, 1999. Accordingly, carrier B's appeal, which is date-stamped as having been received by the Commission on September 30, 1999, was timely filed. Section 410.202 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3).

In its cross-appeal, carrier B noted that in Finding of Fact No. 1(c), the hearing officer incorrectly stated that carrier A's policy ended at 12:01 a.m. on July 24, 1998, when it actually ended on (1st date of injury). Carrier B's point is well-taken and as such Finding of Fact No. 1(c) will be modified, as follows:

> (3) Carrier A's policy ended at 12:01 a.m. on (1st date of injury); Carrier B's policy began at 12:01 a.m. on (1st date of injury).

Carrier B also correctly notes that the hearing officer attributed its evidence to carrier A and carrier A's evidence to carrier B. Thus, the decision and order is modified to properly reflect that two exhibits were offered and admitted on behalf of carrier B and that 11 exhibits were offered and admitted on behalf of carrier A.

Carrier B argues that the hearing officer's determination that the claimant sustained a compensable injury is against the great weight, arguing that the claimant had the burden to prove a compensable injury and that that burden could not have been satisfied in this instance because the claimant did not appear at the hearing. On appeal, carrier A states that it agrees with carrier B's assertion. We are somewhat puzzled by carrier A's argument in that regard in that carrier A's request for reimbursement from carrier B is necessarily dependent upon the existence of a compensable injury on a date when carrier B provided coverage. In the absence of a compensable injury, carrier B would not be liable for workers' compensation benefits and correspondingly no potential for reimbursement would exist.

The parties stipulated that the claimant alleged he was injured at 11:30 a.m. on (1st date of injury), a period when carrier B, rather than carrier A, provided workers' compensation coverage for the claimant's employer. At the hearing, carrier A submitted evidence in an attempt to demonstrate that the claimant sustained a compensable injury. Specifically, it offered an Initial Medical Report (TWCC-61) from Dr. A, with an accompanying narrative report, giving a history of the claimant's moving furniture from a delivery truck, stepping off the truck, and feeling a "pop" in his right knee, followed by severe pain. Dr. A diagnosed an "acute cartilage tear" in the claimant's right knee and "underlying osteochondritis dissecans." Carrier A also offered a (2nd date of injury), report from Dr. T, who served as its required medical examination doctor. Dr. T likewise noted a history that the claimant was injured in (1st date of injury), while working as a furniture delivery person. Dr. T reported that the claimant stepped off of the truck, "heard a snapping sound when he came down onto his knee," and was "unable to walk and had an immediate onset of pain." Dr. T opined that the claimant reached maximum medical improvement (MMI) for his compensable injury on (2nd date of injury), with an impairment rating (IR) of eight percent. Finally, carrier A offered a Report of Medical Evaluation (TWCC-69) and an accompanying narrative report from Dr. M, the Commission-selected designated doctor. Dr. M certified that the claimant reached MMI on (2nd date of injury), with an IR of eight percent for diagnosis-related impairment in the right knee. Dr. M's narrative states that the claimant was injured when he stepped out of the delivery truck,

heard a "snap" in his knee and was not able to walk. In her discussion, the hearing officer stated that the "medical records placed into evidence support that the Claimant injured his right knee while working for the Employer . . . ." We cannot agree that the hearing officer was precluded from finding a compensable injury in this instance because the claimant did not appear at the hearing. The medical evidence admitted in this case provides sufficient evidentiary support for the hearing officer's determination that the claimant sustained a compensable injury on (1st date of injury), when he stepped from a truck and felt a "pop" or "snap" in his right knee. Our review of the record does not reveal that the hearing officer's injury determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse her determination that the claimant sustained a compensable injury on (1st date of injury), on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Next, we consider carrier B's assertion that the hearing officer erred in finding that carrier A's "failure to dispute the Claimant's injury on the basis that it provided no workers' compensation coverage to the Employer at the time of the injury does not result in legal responsibility for Carrier A . . . ." Carrier B cited Appeal No. 950042, *supra*, in support of its argument; however, as the hearing officer noted, in Houston Gen. Ins. Co. v. Association Cas. Ins. Co., 977 S.W.2d 634 (Tex. App.-Tyler 1998, no writ), the Tyler Court of Appeals held that workers' compensation coverage may not be extended by waiver or estoppel. In so holding, the Houston General court overruled Appeal No. 950024, which had affirmed a hearing officer's determination that the carrier had waived its right to contest coverage by not disputing the claim within 60 days of having received notice of the injury under Section 409.021(c). Carrier B's continued reliance on Appeal No. 950024 is misplaced and we find no merit in its assertion that the hearing officer erred in determining that carrier A's failure to contest the claimant's claim did not extend its coverage to the claimant's injury, which occurred after its policy expired.

Finally, we consider the hearing officer's determination that she did not have jurisdiction to decide whether carrier B should reimburse carrier A for the benefits it paid to the claimant in this instance. Carrier A cites Texas Workers' Compensation Commission Appeal No. 961448, decided September 9, 1996, and Texas Workers' Compensation Commission Appeal No. 941124, decided October 6, 1994, in support of its argument that the hearing officer had jurisdiction over the reimbursement issue. Generally, the powers of an administrative agency are derived entirely from legislative enactment. The agency has the powers that are expressly conferred by statute together with those necessarily implied from powers and duties expressly given or imposed. Texas Workers' Compensation Commission Appeal No. 93642, decided September 10, 1993. Sections 410.032 and 410.033 are the provisions that were in effect for the time period relevant to this case which address the issue of reimbursement of overpaid benefits.[1] Sections 410.032(a) and (b)

[1] Section 410.209 entitled "Reimbursement for Overpayment," which is effective for interlocutory orders or a decision regarding a claim for benefits issued on or after September 1, 1999, is inapplicable in this case.

provide that where a benefit review officer (BRO) issues an interlocutory order to pay benefits and that order is reversed or modified at a contested case hearing or at arbitration, the subsequent injury fund "shall reimburse" a carrier for any overpayments made under that order. Section 410.033(a) states that where there is a dispute between carriers as to which carrier is liable for compensation, the BRO can issue an interlocutory order directing each carrier to pay "a proportionate share of benefits due pending a final decision on liability." Section 410.033(b) provides:

> On final determination of liability, an insurance carrier determined to be not liable for the payment of benefits is entitled to reimbursement for the share paid by the insurance carrier from any insurance carrier determined to be liable. [Emphasis added.]

By speaking in terms of reimbursement "for the share paid," subsection (b) is referring back to subsection (a). Thus, it follows that an interlocutory order must have been issued before the Commission has the authority to order reimbursement under Section 410.033(b). In this instance, carrier A's payment of benefits was not made pursuant to an interlocutory order. Rather, it mistakenly paid benefits to the claimant based upon an apparent erroneous determination that it provided coverage for the claimant's injury. As carrier A noted, Appeal No. 961448, *supra*, reversed a hearing officer's determination that he did not have jurisdiction to order reimbursement because an interlocutory order had not been issued, stating that an interlocutory order was not required. That case cited Appeal No. 941124, *supra*, which stated that "there is some support for the proposition that reimbursement between multiple carriers may be made in the absence of an interlocutory order." Notwithstanding Appeal Nos. 961448 and 941124, a review of the language in Sections 410.032 and 410.033 reveals that the Commission does not have the authority to order reimbursement in a situation where, as here, the overpayment was not made under an interlocutory order. Sections 410.032 and 410.033 do not expressly confer the power to order reimbursement in the absence of an interlocutory order and that power is not one that is necessarily implied from powers and duties expressly given or imposed. In addition, in Houston General, the court characterized a claim for reimbursement, such as the one made by carrier A in this case, as a claim for equitable subrogation, which simply does not fall within the express or implied powers of the Commission. We affirm the hearing officer's determination that she did not have the authority to resolve the issue of whether carrier B should reimburse carrier A for the workers' compensation benefits that carrier A paid to the claimant in this case.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge