APPEAL NO. 992343
FILED DECEMBER 6, 1999

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 September 30, 1999. [The hearing officer] determined that the respondent (claimant) did not sustain a compensable occupational disease (repetitive trauma) injury on (date of injury), but that he did sustain a compensable specific trauma injury on that date and had disability from March 8, 1999, through the date of the hearing. The appellant (self-insured) appeals these determinations, contending that the hearing officer improperly added an issue to resolve the compensability question and that the determinations are otherwise contrary to the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed as reformed to reflect the proper parties.

The record reflects that the self-insured was the carrier in this case and that the (administrator) was the third-party administrator. We, therefore, reform the decision and order to reflect the proper carrier.

The claimant worked in the parks department of the self-insured. He had an injury in (previous date of injury), which, he said, included a lumbar herniation and neck injury other than herniation. He testified that on (date of injury), he was operating a tractor to level a baseball field. He did this for six hours that day. He said the job involved constant turning and twisting and looking back to make sure the equipment was operating properly. At some point his back started hurting. He operated the tractor again the next day and told his supervisor about the pain and that he needed to see a doctor. On (day after date of injury), he saw (Dr. J), D.C., who performed manipulations. Over the weekend, the pain increased so he returned to Dr. J and was taken off work. He described the pain as in his mid-back and neck. An MRI showed both cervical and thoracic herniation. Dr. J testified by telephone that in her opinion, this was a new injury because the thoracic spine was never part of the (previous date of injury) and that injury did not involve cervical herniation. She admitted that she had been treating him for the prior injury and as late as February 1999 was performing manipulation therapy of the claimant's entire spine.

(Dr. P) examined the claimant on July 15, 1999, at the request of the self-insured. He wrote that he was "unable to appreciate the thoracic spine herniation on my review of the films" and noted the claimant's prior treatment for back problems. His conclusion was that "we are really dealing with the same exact process and 'serendipitously' a disc abnormality has been picked up on the thoracic MRI." He did not believe the claimant sustained a new injury, but was suffering from, at most, an ordinary disease of life or an "asymptomatic abnormality" present in a substantial number of the general population.

In his decision and order the hearing officer mentioned for the first time that he was adding the issue of "Did the claimant sustain a compensable injury on (date of injury)," because he believed this issue was "actually litigated." He then found that the claimant did not sustain a repetitive trauma injury, but did sustain a "single-event" injury and had resulting disability from March 8, 1999, through the date of the CCH. The self-insured appeals these determinations on the bases that the hearing officer impermissibly added an issue and that the evidence was insufficient to support a finding of injury on any theory. The claimant did not file a protective appeal of the finding that there was no repetitive trauma injury, which has now become final. Section 410.169.

Section 401.011(26) defines injury in pertinent part as "damage or harm to the physical structure of the body" and includes an occupational disease. Included in the definition of occupational disease (Section 401.011(34)) is a repetitive trauma injury which is an injury "occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Section 401.011(36). The hearing officer commented that the issue of injury was originally framed as a repetitive trauma injury because the "pain came on gradually." While this comment accurately reflects the claimant's testimony, we cannot agree that the parties actually litigated this case as a repetitive trauma injury. *See* Texas Workers' Compensation Commission Appeal No. 990396, decided April 12, 1999, where a similar case was decided this way. Perhaps the hearing officer may also have thought that the time period during which the activities claimed to have caused the injury was too compressed to support a finding of repetitive trauma. In any case, the question presented is whether the hearing officer improperly decided this case in terms not put forth by either of the parties. We believe he did not.

Initially, we start with the proposition that dispute resolution proceedings are not governed by strict rules of pleading. Texas Workers' Compensation Commission Appeal No. 950061, decided February 24, 1995. Nonetheless, there is a requirement of fundamental fairness which would preclude a decision in favor of one party at the expense of the other party's ability to fairly be heard on the issues in dispute. The self-insured's appeal is presented largely in technical terms of how an issue can be properly before a hearing officer. It does not point to specific prejudice or that it was deprived of the right to present a defense to liability. Indeed, if the self-insured was prepared to defend against a claim of repetitive trauma from riding the tractor on one day and perhaps the next, one is hard-pressed to conclude it was somehow prevented from defending against a "single-event" claim on that same day derived from the same set of facts. This conclusion is further supported by the fact that the date of injury was never in dispute. *See* Section 408.007.

In Texas Workers' Compensation Commission Appeal No. 980359, decided April 1, 1998, a case relied on by the self-insured for the proposition that the hearing officer was without authority to decide a repetitive trauma claim on the basis of a single-incident injury, the Appeals Panel reversed the hearing officer's finding of a single-event injury when the

claimant had claimed only a repetitive trauma injury. The primary reason for this result was that the determination was against the great weight and preponderance of the evidence. The Appeals Panel wrote that "we are struck by the lack of evidence pinpointing an incident or even a series of activities leading to the injury." Though an issue, the claimant could not even establish a date of injury. Although perhaps overbroad dicta in the decision could be read to support the proposition that a hearing officer may never on his or her own motion change a claimant's theory from repetitive trauma to single event, the Appeals Panel stressed that the hearing officer was "invited" to consider the single-event theory by the self-insured. We cannot accept the self-insured's argument that, disregarding the lack of evidence supporting the decision and the self-insured's action inviting a decision on a single-event theory, the Appeals Panel would have as a matter of law found error.

The self-insured also relies on Texas Workers' Compensation Commission Appeal No. 970107, decided March 5, 1997 (Unpublished). In that case, we affirmed a hearing officer who found a compensable single-event injury although the issue was framed in terms of repetitive trauma. We wrote:

> The carrier argues on appeal that the hearing officer improperly added this issue contrary to the applicable rules regarding what issues may be added at a CCH and that the framing of the issue was fatally defective in that the hearing officer failed to include in his formulation of this issue a date of the claimed injury. We believe that it is important to note that the carrier is not alleging a violation of its due process right of adequate notice of the matters in dispute, nor is it arguing that it was deprived of the ability to present evidence on this added issue. Because the pertinent evidence centered on what happened to the claimant on _____, and on _____, and each party addressed this question, we are hard-pressed to conclude that the carrier was prejudiced or withheld otherwise relevant evidence simply because the claimant had asserted a repetitive trauma injury and not a specific trauma injury. Nonetheless, we agree that the hearing officer, in adding this issue, did not follow the provisions of Section 410.151(b) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7), which provide essentially that issues not considered at a BRC [benefit review conference] may only be added by consent of the parties or upon a showing of good cause. While consent may be inferred if the parties actually litigate an issue not otherwise identified, we do not believe that the record in this case establishes that the parties actually litigated a specific trauma injury. Texas Workers' Compensation Commission Appeal No. 952144, decided January 22, 1996.
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> In a series of cases, the Appeals Panel has stressed that it is not the responsibility of the hearing officer to raise issues that the parties could raise, but do not. *See* Texas Workers' Compensation Commission Appeal No. 961265, decided August 9, 1996; Texas Workers' Compensation Commission Appeal No. 960226, decided March 22, 1996; Texas Workers'

Compensation Commission Appeal No. 92350, decided September 8, 1992. In Texas Workers' Compensation Commission Appeal No. 91113, decided January 27, 1992, the hearing officer determined that the claimant did not sustain a specific trauma injury as claimed, but ordered the parties to return to a BRC to consider whether the evidence supported a claim based on a repetitive trauma injury. The Appeals Panel affirmed the finding of no specific trauma injury, but reversed the order directing the parties back to a BRC on the new theory of compensability as beyond the statutory authority of a hearing officer. It did not otherwise address the authority of a hearing officer to reformulate an issue with or without the consent of the parties.

More instructive for purposes of this appeal is our decision in Texas Workers' Compensation Commission Appeal No. 951848, decided December 18, 1995. In that case, the issue reported out of the BRC was whether the claimant sustained a compensable repetitive trauma injury. The claimant requested that the hearing officer change this issue to whether the claimant sustained a compensable injury, thereby leaving open to the claimant the ability to present his case, based not on a repetitive trauma injury, but on the aggravation for a prior-existing ordinary disease of life. The hearing officer declined to grant the request for a continuance to give the claimant time to address his claim based on a repetitive trauma theory. The Appeals Panel affirmed this part of the decision (denying a request for a continuance or to reformulate the issue) because the hearing officer, in effect, addressed both theories of compensability. It nonetheless questioned the refusal of the hearing officer to allow the rewording of the issue as sought by the claimant. In doing so, the Appeals Panel stressed that CCHs are not governed by the strict rules of pleading that we will affirm a decision of a hearing officer on any legal theory reasonably supported by the evidence, whether or not relied on by the parties; that alternative theories of compensability may be urged, provided they are not contradictory; and that surprise to a party brought about by rewording an issue is to be avoided. Finally, this decision affirmed the proposition that the issues should "emanate" from the parties, not the hearing officer.

While no error was found in this case because the issue of single-event trauma was actually litigated. The case is, nonetheless, instructive for the principles of fairness and no rules of strict pleading that are generally applicable in all CCHs. Appeal No. 970107, *supra*, referenced Appeal No. 91113, *supra*. The important point to be derived from Appeal No. 91113 is that the hearing officer could not force the parties to return to a BRC to refine or add issues. The case does not support the proposition that a hearing officer may never resolve a repetitive trauma claim on a single-event theory as a matter of law.

Based on our review of the applicable cases, we find no merit in the self-insured's contention of error in the resolution of this case on a single-event theory of injury.

The self-insured also appeals the finding of a compensable injury on the basis that the evidence was not sufficient to support this determination. In doing so, it stresses the record of prior treatment of the spine by Dr. J almost up to the time of the new injury and Dr. P's opinion, discussed above. Whether the claimant sustained a compensable injury was a question of fact for the hearing officer to decide. 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). The medical evidence, particularly the opinions of Dr. P and Dr. J on which both parties primarily relied, was in conflict. The hearing officer found Dr. P more credible and persuasive. Under our standard of appellant review, we affirm that determination.

We construe the appeal of the disability finding to be based on the lack of a compensable injury. Having affirmed the finding of a compensable injury, we also affirm the finding of disability.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge