APPEAL NO. 000129

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 27, 1999, a hearing was held. The hearing officer determined that the _____, compensable low back injury is a producing cause of the respondent's (claimant) low back condition after (2nd date of injury); that claimant reached maximum medical improvement (MMI) from the _____ injury on May 11, 1999, with a seven percent impairment rating; (IR) and that claimant had disability from the low back injury beginning April 22, 1998, and continuing to May 11, 1999. The hearing officer also determined that claimant's compensable injury of _____, did not aggravate or injure her low back and is not a producing cause of the claimant's low back condition; that claimant reached MMI from the 1998 injury on (1st date of injury), with a five percent IR; and that claimant had disability from the 1998 injury from April 22 through August 7, 1998; the hearing officer also determined that respondent (carrier 2), as a subclaimant, is entitled to reimbursement from appellant (carrier 1) for certain medical treatment and (possibly) for temporary income benefits (TIBS) paid. Carrier 1 asserts that claimant did aggravate her low back condition on _____; that claimant sustained no disability until after the compensable injury of _____; and that carrier 2 did not dispute payment of TIBS relative to the low back condition. Carrier 1 also states that carrier 2 did not timely file a claim as a subclaimant and that the hearing officer should not order reimbursement from one carrier to another. Both claimant and carrier 2 replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer). The affected parties stipulated that claimant sustained a compensable low back injury on (2nd date of injury); that on September 1, 1997, employer, who had been self-insured, purchased a workers' compensation policy; and that on May 11, 1999, claimant reached MMI with a seven percent IR for the (2nd date of injury) injury. Also stipulated was that claimant sustained a compensable cervical spine injury on (2nd date of injury); that carrier 2 paid TIBS to claimant from April 22, 1998, to April 11, 1999; and that claimant reached MMI on (1st date of injury), with a five percent IR for the (2nd date of injury) injury. Other stipulations were also made that will not be set forth herein. Basically, carrier 1 argued that claimant injured/re-injured/aggravated her low back condition in the compensable injury of (2nd date of injury), while carrier 2 argued that the compensable injury of (2nd date of injury), affected the cervical spine with any low back pain thereafter being a continuation of the (2nd date of injury) compensable injury. Claimant, at the hearing, said she was caught in the middle.

The hearing officer found that the (2nd date of injury) compensable cervical injury did not constitute an injury to the low back. With MRIs available from April 3, 1998 (after the (2nd date of injury) injury but before the (2nd date of injury) injury), and from August 12, 1998 (after the (2nd date of injury) injury), there was objective evidence for consideration in

determining whether the (2nd date of injury) injury was a producing cause of claimant's current low back condition and whether the (2nd date of injury) injury included a low back injury. Dr. GV and Dr. H described the two MRIs as "exactly the same" and "no change between the two MRIs" respectively. In addition, Dr. H told claimant, after comparing the two MRIs, "[c]linically, also if you remember there was really no significant clinical change in your back and leg symptoms." Dr. H did then allude to a "slight worsening" of pain.

It is true as argued by carrier 1 that claimant did not sustain disability after the (2nd date of injury) injury until the (2nd date of injury) injury, but the record also shows that she was working under restrictions during the period of time up to her (2nd date of injury) compensable injury. The hearing officer found that disability for the cervical injury only lasted from April 22, 1998, through August 7, 1998, whereas disability for the low back injury ran from April 22, 1998, to May 11, 1999. While the evidence presented two significant opposing factors for consideration (no apparent change in the physical structure of the body (low back) compared to no loss of work until after the (2nd date of injury) injury), the determination that there was no (2nd date of injury) low back injury is a factual one that is sufficiently supported by the medical opinions referenced.

While carrier 1 argues that carrier 2 made a mistake in continuing to pay benefits to claimant, carrier 1 also referred to Section 409.021(c) in stating that carrier 2 did not dispute the payment of TIBS to claimant until April 22, 1999; in the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated April 22, 1999, carrier 2 also said it requested reimbursement of carrier 1. In regard to disputing compensability, which is what Section 409.021 addresses, carrier 2 had also filed a TWCC-21 on April 29, 1998, stating that it received written notice of the (2nd date of injury), injury on April 24, 1998; it disputed compensability saying that "all disability and benefits are payable under the previous claim. . . ."

Carrier 2, in its reply, is correct in saying that there was no issue at the hearing involving waiver based on its failure to file a dispute within seven or sixty days. Similarly, there was no issue at the hearing involving whether carrier 2 timely filed a claim as a subclaimant. As a result (and without agreeing that Section 409.021 applies to disputes between two carriers), arguments on appeal concerning carrier 2's waiver and resultant estoppel to argue disability will not be considered on appeal.

In addition to the issues of injury, MMI, IR, and disability, there was an issue of recoupment concerning carrier 2 being able to "recoup income and medical benefits in connection with the lumbar injury." The hearing officer made Finding of Fact No. 21 which said that carrier 2 "filed as a Sub Claimant" in regard to the (2nd date of injury) injury; this finding of fact was only attacked on appeal in regard to its failure to say when the filing was accomplished (as stated, there was no issue of an untimely claim). Next, the hearing officer's Finding of Fact No. 22 said "a Sub Claimant is entitled to be reimbursed for reasonable and necessary medical treatment for the compensable injury, and the insurance carrier that is a party to the claim in which the medical treatment is administered is responsible for reimbursing the Sub Claimant." Finding of Fact No. 22 was not attacked on

appeal. As a result, there is no argument concerning carrier 2's status as a subclaimant, except in regard to when a claim was filed (which was not an issue).

Carrier 1 cited Texas Workers' Compensation Commission Appeal No. 992012, decided November 4, 1999, as prohibiting reimbursement between carriers unless based on an order of the Texas Workers' Compensation Commission (Commission) requiring payment of a "share" of the benefits. We do not argue with that decision, but also do not find it applicable under the facts here, since the hearing officer based reimbursement on carrier 2's status as a subclaimant. We do not hold that the subclaimant provisions of Section 409.009 do, or do not, apply to a carrier. That question was not before this Appeals Panel. As stated, Finding of Fact No. 21 and Finding of Fact No. 22 were not appealed insofar as they indicate that carrier 2 was a subclaimant and that a subclaimant is entitled to reimbursement. There was no argument at the hearing that the provisions of Section 409.009 were not available to a carrier.

We note that Section 409.009 does not spell out when entitlement to reimbursement accrues or say what "compensation" provided will be reimbursed (presumably it would be for compensation that is payable under the 1989 Act as was set forth in Art. 8308-1.03(44) V.A.T.S.). In addition, Section 409.009 does not limit subclaimants to reimbursement for payments the subclaimant was required to make and does not rule out "voluntary" compensation paid as being ineligible for reimbursement. In comparison, we observe that Section 410.033 is much more specific in addressing two disputing carriers; it addresses the issuance of an order by the Commission and, based on that order, it then spells out that one carrier "is entitled to reimbursement" for the share it paid pursuant to the order when that order is later ruled to be incorrect. Presumably, if a carrier may use the general provisions of Section 409.009 which only say that a claim may be filed, then it may, in effect, expand the provisions of Section 410.033 to allow reimbursement whether or not there has been a Commission order involved. In addition, if a carrier may use the general provisions of Section 409.009, then an employer should also be able to use Section 409.009 even though Section 408.003 specifically sets forth reimbursement to the employer under certain conditions and then adds that payments not reimbursable under 408.003 "<u>may</u>" be addressed under Section 408.127, but it does <u>not</u> mention Section 409.009 (the subclaimant section) at all. We also note that in this case, there is an indication that both carriers initially refused to pay benefits immediately after the (2nd date of injury), injury.

With reimbursement ordered by the hearing officer based on carrier 2's "status" as a subclaimant, and with no assertion of error in regard to consideration of carrier 2 as a subclaimant (except in regard to when its claim was filed), that part of the decision calling for reimbursement to be paid by carrier 1 for part of the benefits paid by carrier 2 is affirmed.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Judy L. Stephens
Appeals Judge