

APPEAL NO. 001107

On April 18, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* The hearing officer resolved the disputed issues by deciding that appellant's (claimant) avascular necrosis condition of his right hip is neither related to nor caused by the compensable injury and that respondent (carrier) disputed the compensability of the claimed avascular necrosis within 60 days of written notice of the injury. The claimant requests that the hearing officer's decision be reversed and that a decision be rendered in his favor. The carrier contends that the Appeals Panel lacks jurisdiction because it was not served with a copy of the claimant's request for review on the same date that the claimant sent his request for review to the Texas Workers' Compensation Commission (Commission) and requests that the hearing officer's decision be affirmed.

DECISION

Affirmed.

The claimant's request for review was timely filed with the Commission. In accordance with our decision in Texas Workers' Compensation Commission Appeal No. 92397, decided September 21, 1992, the carrier's receipt of the request for review on May 18, 2000, did not render the request for appeal untimely but did extend the time for the carrier to file its response.

It is undisputed that the claimant sustained a compensable injury on _____. The claimant testified that on that day he was operating a front-end loader on top of a 25-foot pile of rubber when the loader turned over and fell 25 feet to the ground and landed on its left side. The claimant said that he was inside the enclosed cab of the loader wearing his seat belt when the accident occurred. The claimant said that he injured his head, back, neck, hips, shoulders, legs, and practically his whole body in that accident. The claimant said that he was told he had an internal bruise of the right hip. Following the accident, the claimant had cervical spine surgery in 1996, bilateral rotator cuff repairs in 1997, and lumbar spine surgery in 1999. He also had a hernia repair and placement of a spinal cord stimulator.

Dr. D, the claimant's treating doctor, referred the claimant to Dr. G who noted in May 1998 that x-rays of the lumbar spine showed avascular necrosis of the right hip. Dr. D noted in August 1998 that the claimant may need a hip replacement due to the avascular necrosis. An MRI done in January 1999 showed bilateral avascular necrosis of the claimant's hips. Dr. D wrote on September 21, 1999, that the claimant was scheduled to have his hips replaced but did not state whether the hip problem was part of the compensable injury or whether the carrier had authorized the hip surgery. Dr. D wrote in December 1999 and February 2000 that the claimant's avascular necrosis is related to his work injury of _____. Dr. GO, who has been treating the claimant's back on referral

from Dr. D, wrote in February 2000 that the claimant's hip problems are related to his work injury of _____.

On November 19, 1999, Dr. W examined the claimant and reviewed the claimant's medical records at the carrier's request and wrote that he did not see any relation between the claimant's work injury of _____, and his avascular necrosis of the hips. Dr. S reviewed the claimant's medical records at the carrier's request and he wrote that the claimant's avascular necrosis of the hips is not related to his work injury of _____. Dr. GU report of November 1998, which is mentioned by the claimant in his appeal, notes an abnormality at L4-5. A physical therapy report of April 1999, also mentioned by the claimant in his appeal, notes the claimant's complaints of hip pain. Dr. D mentions the claimant's right hip pain in his chart notes from May 1998 through September 1999.

With regard to the extent-of-injury issue concerning avascular necrosis of the right hip, the hearing officer made findings of fact and concluded that the claimant's avascular necrosis condition of the right hip is neither related to nor caused by the compensable injury. The claimant had the burden to prove the extent of his compensable injury. There is conflicting evidence in this case concerning the extent-of-injury issue. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's decision on the extent-of-injury issue is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

With regard to the waiver issue, none of the exhibits, other than a Notice of Utilization Review Findings (the Notice) dated November 16, 1999, indicate when the carrier first received written notice that the claimant was claiming that his avascular necrosis was part of his compensable injury because the exhibits do not have date stamps on them showing when the carrier received them. The Notice reflects that in November 1999 Dr. D requested authorization to perform a right hip replacement and that the carrier denied that request. The carrier represented that it first received written notice that the claimant was claiming that his right hip avascular necrosis is part of his compensable injury when it received Dr. D's request to authorize right hip surgery. The carrier disputed compensability of the claimant's hip condition in a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated November 19, 1999. The hearing officer concluded that the carrier disputed the compensability of the claimed avascular necrosis within 60 days of written notice of the injury.

Although we conclude that the hearing officer's decision on the waiver issue is supported by sufficient evidence and that it is not contrary to the overwhelming weight of the evidence, we note that in Texas Workers' Compensation Commission Appeal No. 000784, decided May 30, 2000, the Appeals Panel noted that in the preamble to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3), effective March 13, 2000, the Commission had construed Section 409.021 as not providing for waiver of extent of injury

and, based on the Commission's construction of Section 409.021, rendered a decision that the carrier in that case had not waived its right to contest the compensability of the claimed bowel and erectile dysfunctions. Thus, in accordance with our holding in Appeal No. 000784, the carrier would not have waived its right to contest compensability of the claimant's avascular necrosis condition.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Philip F. O'Neill
Appeals Judge