APPEAL NO. 001982

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 3, 2000. With respect to the issues before him, the hearing officer determined that the respondent's (claimant) compensable injury of _____, is a producing cause of claimant's right carpal tunnel syndrome (CTS) and other right upper extremity problems after _____; that the appellant/cross-respondent, (self-insured) did not waive the right to raise the issue of whether the claimant sustained a new compensable injury on _____; that the Texas Workers' Compensation Commission (Commission) has jurisdiction to determine the issue of whether the compensable injury of _____, is a producing cause of the claimant's right CTS and other right upper extremity problems after _____; and that claimant did not sustain an injury to her right upper extremity in the course and scope of her employment on or about _____. In its appeal, the self-insured argues that the hearing officer erred in his determinations that the _____, compensable injury is a producing cause of the claimant's right upper extremity problems after _____, and that the claimant did not sustain an injury to her right upper extremity in the course and scope of her employment on _____. In its cross-appeal, the respondent/cross-appellant, (carrier) argues that the hearing officer erred in determining that the self-insured had not waived its right to raise the issue of whether the claimant sustained an injury in the course and scope of her employment on _____. In her response to the appeals from the self-insured and the carrier, the claimant urges affirmance of the hearing officer's decision; however, she agrees that the self-insured waived its right to raise the issue of whether she sustained an injury in the course and scope of her employment on _____.

DECISION

Reversed and a new decision rendered that the hearing officer erred in determining that the self-insured was permitted to reopen the issue of compensability pursuant to Section 409.021(d) and that the self-insured waived its right to reopen compensability in this instance.

It is undisputed that on _____, the claimant was an employee of the University of (employer 1); that employer 1 was self-insured for purposes of workers' compensation; that on January 1, 1998, the claimant became an employee of (employer 2), which began to operate the hospital formerly operated by employer 1 as of that date; that employer 2 had workers' compensation coverage with the carrier; that on _____, the claimant sustained a compensable injury to her right upper extremity for which the self-insured accepted liability; and that on _____, the claimant sustained a compensable injury to her left upper extremity for which the carrier accepted liability. On September 30, 1998, the first hearing in this claim was held to address the issue of whether the self-insured or the carrier was liable for the claimant's right upper extremity injury of _____. That hearing resulted in a determination that the self-insured was liable for the claimant's injury because she had not undergone a last injurious exposure while working for employer 2.

That decision was affirmed by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 982661, decided December 30, 1998 (Unpublished). On November 2, 1999, a second hearing was held in this claim to determine the percentage of temporary income benefits (TIBs) owed by the self-insured and carrier respectively for the claimant's disability. The hearing officer in that case determined that both compensable injuries contributed to the claimant's disability from November 13, 1998, to November 2, 1999, the date of the hearing, and that the self-insured and the carrier each owed 50% of the TIBs for the period of concurrent disability. In Texas Workers' Compensation Commission Appeal No. 992861, decided February 9, 2000, we affirmed the hearing officer's decision and order. In that decision, we rejected the self-insured's request that the case be remanded to determine if there was a "new injurious exposure" sometime in _____ or _____, noting that we would not remand for consideration of "the fruits of a deferred investigation." Appeal No. 992861 also rejected the self-insured's contention that the carrier had waived its right to raise the question of the self-insured's full or partial TIBs liability for the period because it had already paid full TIBs for that period. In so doing, Appeal No. 992861 stated that "[i]f there is a waiver in this case, it may be the self-insured's 12th hour revival of its 'last injurious exposure' and aggravation arguments rejected in Appeal No. 982661, *supra*, for the new periods of time under review in this [hearing]."

At the hearing which is the basis of this appeal, the self-insured raised the issues that Appeal No. 992861 rejected as providing a basis for a remand, namely the issues of whether the claimant sustained a new injury in the course and scope of her employment on _____, and whether her compensable injury of _____, is a producing cause of her right upper extremity problems after _____. Even though they are framed as two separate issues, in substance each issue arises out of the self-insured's contention that the claimant had her last injurious exposure, which caused a right upper extremity injury, while working for employer 2 after the date of the first hearing in this claim. It appears that the hearing officer determined that the self-insured was permitted to reopen the issue of compensability under Section 409.021(d) based on newly discovered evidence, specifically the evidence that the claimant was required to perform duties beyond her restrictions when she was assigned to work in the laundry room for about a month in _____ and _____, while she was working light duty for employer 2. In his discussion section, the hearing officer states that the self-insured "only discovered at the last [hearing] that the claimant had been made to work in the laundry room and thus could not have known that it needed to litigate whether a new injury had been suffered and whether the compensable injury of _____ was a cause of the right [upper extremity] injury after _____." The hearing officer improperly focuses on when the self-insured "discovered" the basis for the compensability challenge, as opposed to properly focusing on whether that evidence could have been discovered earlier. It is on that score that the self-insured's attempt to reopen compensability in this case fails. Before the self-insured litigated the disability issue at the November 2, 1999, hearing, it had an obligation to conduct an investigation and to determine if it had any grounds for raising a compensability challenge at that time. If the self-insured had conducted an investigation, it would have learned of the claimant's activities in the laundry room and the basis for it to reopen the

compensability issue. The hearing officer erred in permitting the self-insured to reopen the compensability issue in this instance because the evidence that formed the basis of its self-insured's reopening argument was not evidence that could not reasonably have been discovered earlier as is required in Section 409.021(d).

In addition, we note that in Texas Workers' Compensation Commission Appeal No. 000447, decided April 5, 2000, we determined that a claimant had waived his right to raise the issue of whether the carrier had timely contested compensability when he raised the issue at a second benefit review conference (BRC) after the issue of compensability had been raised at a prior BRC, taken to a hearing, appealed to the Appeals Panel, and thereafter appealed to the district court. Appeal No. 000447 relied upon Texas Workers' Compensation Commission Appeal No. 950140, decided March 8, 1995, which had held that "the issues of contest of compensability of the injury and compensability are so interlinked that to have the latter determined without raising and determining the former will constitute waiver of the former." Appeal No. 950140 acknowledged that the 1989 Act "contemplates an issue driven system"; however that case concluded that the 1989 Act did not contemplate that different issues in the same case would proceed separately through the Commission and the courts "resulting in conflicting determinations as to whether or not a claimant is entitled to benefits," and that "[s]uch a system would obviously be untenable." The situation here is analogous to the situation considered in Appeal Nos. 000447 and 950140 in that the Commission has previously determined that the claimant had disability as a partial result of her _____, injury for the period from November 13, 1998, to November 2, 1999. The self-insured has apparently appealed that determination to the district court. By definition, the existence of disability is dependent upon there being a _____, compensable injury, which is a partial cause of the claimant's disability for the period found. That is, implicit in the determination that the claimant had disability in part because of her _____, compensable injury, is a determination that the claimant continues to suffer the effects of her _____, compensable injury and that, as a partial result of that compensable injury, she had the inability to obtain and retain employment at her preinjury wage. The self-insured litigated the disability issue at the November 2, 1999, hearing without reopening the compensability issue; thus, under the reasoning of Appeal Nos. 000447 and 950140, it waived its right to reopen the compensability issue at a subsequent hearing.

The hearing officer's decision and order are reversed and a new decision rendered that the self-insured did not meet the requirements for reopening compensability under Section 409.021(d) and that it waived its right to reopen compensability in this instance by failing to do so prior to litigating the disability issue at the November 2, 1999, hearing.

Elaine M. Chaney
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Susan M. Kelley
Appeals Judge