

APPEAL NO. 002886

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on November 13, 2000, the hearing officer resolved the three disputed issues by determining that the appellant's (claimant) compensable injury of _____, does not extend to an injury to his cervical spine; that the respondent (carrier) did not waive its right to contest the compensability of the claimed cervical injury; and that the claimant's impairment rating (IR) for the compensable injury is 3%. The claimant appeals, asserting that the determination that his neck is not part of his compensable injury is against the great weight of the evidence when all the references to the neck in the medical records are considered; that because the hearing officer erroneously determined that the neck is not part of the injury, he erred in deducting the 10% rating the designated doctor assigned for cervical spine impairment from the designated doctor's 13% IR; and that the hearing officer erred in relying on Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) to determine that the carrier did not waive its right to contest the compensability of the claimed neck injury because Rule 124.3(c) is such a departure from the provisions of Section 409.021(c) as to be "ultra vires." The respondent's (carrier) response details the evidence viewed as sufficiently supportive of the challenged findings and conclusions.

DECISION

Affirmed.

The parties stipulated that on _____, the claimant sustained a compensable sternum and thoracic injury. The claimant testified that on that date he fell from a ladder and landed on his shoulders and neck; that x-rays of his neck were taken at the emergency room (ER); that he told the doctor at the ER, Dr. W, and the physician's assistant at a (clinic), who subsequently treated his injuries, that his neck hurt; that he had another accident on _____, in which his low back, but not his neck, was injured; that on May 1, 2000, he commenced chiropractic treatment with Dr. F for the low back injury; and that Dr. F subsequently began treating his neck injury. Despite contending that he told all the health care providers who treated him that he had neck pain, the claimant conceded that he did not list his neck as an injured body part on the Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) he prepared on February 4, 2000; that on February 4, 2000, he told Dr. W he was not having problems with his neck; that the clinic records do not reflect that he complained of neck pain; and that he did not include the neck on the pain drawings he prepared for Dr. F. Dr. F testified that based on his review of the claimant's medical records and his understanding of the mechanism of injury as related by the claimant, it is his opinion that the claimant injured his neck in the accidental fall on _____.

The claimant had the burden to prove by a preponderance of the evidence that his compensable injury of _____, extended to his neck. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas

Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). We are satisfied that the challenged factual findings relating to the extent-of-injury issue are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The only basis for the challenge to the 3% IR determined by the hearing officer is the claimant's contention that his neck injury is part of his compensable injury and thus that the hearing officer erred in deducting the 10% the designated doctor assigned for abnormal range of cervical motion from the designated doctor's 13% IR. Since we affirm the hearing officer's determination that the compensable injury does not extend to the neck, we, performce, affirm the hearing officer's determination that the claimant's IR is 3%.

The claimant disputes a finding that the carrier was not required by any applicable statute or rule of the Texas Workers' Compensation Commission to contest the compensability of the claimed neck injury and to file an extent of injury dispute for the neck injury. The claimant also challenges the conclusion that the carrier did not waive its right to contest the compensability of the claimed neck injury. The claimant stated in closing argument below that he recognizes that a carrier can no longer be found to have waived into liability for an extension of compensable injury under Section 409.021. However, he contended that the carrier is required by Rule 124.3(c) (which refers to Rule124.2) to have filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing liability for the payment of medical bills for the claimed neck injury within 45 days of the date such payments are due and that the carrier's failure to do so constitutes a waiver of its right to contest the compensability of the claimed neck injury. The claimant cited no authority to the hearing officer for this proposition nor has he favored us with any such authority. On appeal, the claimant's argument, again with no citation to authority, asserts that the hearing officer erred in relying on Rule 124.3(c) because that rule would, in effect, trump Section 409.021 and is thus "ultra vires." To extent that we comprehend the claimant's various contentions on the waiver issue, we find no merit in his assertion of error by the hearing officer.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge