APPEAL NO. 011678
FILED SEPTEMBER 5, 2001

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 June 29, 2001. The hearing officer determined that whether the appellant's (claimant) injury extended to his lower back had been litigated and adjudicated in a previous CCH and he had no jurisdiction to rehear that matter.

The claimant appeals and argues that his back was indeed included in a junior hearing decision, but also came within the ambit of the previous decision's determination that the respondent (carrier) waived the right to dispute compensability, and therefore his lower back should be considered part of the compensable injury. The carrier responds that while it does not necessarily agree that the low back injury was actually adjudicated in a prior hearing, the hearing officer's conclusion that any resolution of that matter was favorable to the carrier is supported. The carrier further argues that an extent-of-injury issue cannot be waived.

DECISION

Reversed and rendered that the "compensable injury" extends to the claimant's back because of *res judicata*.

The CCH concerned an injury attributed by the claimant to a slip and fall that occurred on _____, at a manufacturing plant where he worked for nearly 25 years. The claimant first sought treatment for this injury on December 13, 1999, had a total hip replacement on January 20, 2000, and began losing time after this. At the outset, we note that the issue before the hearing officer in the case under appeal here was only:

> Does the compensable injury of _____, include an injury to the low back?

The parties further stipulated that the claimant sustained "a compensable injury" on _____. However, it was agreed by the parties that compensability of that injury was based only on the holding of a previous hearing officer, at a CCH held on September 13, 2000, that the carrier had waived its right to dispute compensability. In that same decision, the hearing officer had found that the claimant did not sustain injury to his body on the date in question.

At the beginning of the CCH under appeal here, the claimant argued that the previous decision was *res judicata* on the compensability of the back injury issue before this hearing officer. The carrier denied that the previous CCH had involved more than a dispute over the claimant's claimed left hip injury and total hip replacement in January 2000. The transcript of the previous CCH was put into evidence along with the decision and later Appeals Panel decision that resulted. Because a determination of the

correctness of the *res judicata* issue in this decision depends upon what was covered in that proceeding, we will summarize it here.

The Previous CCH

The issues before the hearing officer in September 2000 were whether the claimant sustained "a compensable injury" on _____; whether he had disability resulting from this injury (and if so, the periods involved); and whether the carrier waived the right to "dispute compensability of the *claimed* injury" (emphasis added) by not contesting it in accordance with Section 409.021.

Confusion arose at the beginning of the CCH concerning the first issue of the occurrence of a compensable injury. The attorney for the carrier, admitting that the carrier "clearly" had not filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) within 60 days of notice of "the incident," argued that it was not disputing the "incident" but only the extent of the resulting injury "and whether the hip surgery that . . . took place was related to that incident." The hearing officer's suggestion that the first issue be replaced with an extent-and-severity issue was opposed by the claimant (assisted by an ombudsman), who said he was nevertheless prepared to go forward on an extent issue.

A somewhat ambiguous discussion then ensued as to whether extent was subsumed in either the compensable injury or disability issues, with the hearing officer of two apparent minds on the matter. In the course of this discussion, the carrier's attorney noted that two TWCC-21s had been filed by the carrier in 2000, with the second TWCC-21 adding a dispute over the back "because that has been claimed now as well." The hearing officer then decided to adjudicate the issues as stated, with no added issues or revision to the language of the existing issues.

The hearing officer further noted that it was his belief that even if he found that there had been a waiver by the carrier of the right to say that there was no compensable injury, the carrier would not thereby lose the right to dispute the "consequences" of that injury, which would include whether or not surgery was proper as well as the "extent" of that injury.

Most of the testimony at the CCH concentrated on whether the claimant had preexisting arthritis in his hip, and whether he had problems with his hip prior to the alleged injury. However, the claimant was cross-examined concerning his back. He agreed that he did not mention any back pain to his doctor prior to his hip replacement surgery and agreed that the first time he sought or received treatment for his back was on July 28, 2000. The claimant filed an injury report with his employer on December 15, 1999, identifying his hurt body part as his left hip. The parties referred to the Employer's First Report of Injury or Illness (TWCC-1), which reported that no time was lost and that the only injured area was the hip. This was filed December 16, 1999, and apparently forwarded to the carrier at that time. (These documents are in evidence in the currently appealed proceeding as well.) The claimant testified that his Employee's Notice of Injury or

Occupational Disease & Claim for Compensation (TWCC-41) claimed injury to the "left hip and other parts of my body" without specifically mentioning the back (that document, also in evidence in this CCH, stated further that he popped his left hip when he slipped). The TWCC-41 was filed January 18, 2000.

During final argument, the ombudsman focused on the hip condition and called attention to a medical record attributing back pain as secondary to the hip replacement surgery. The carrier covered the back by noting that if it was related to anything, it was related to the surgery and not the fall itself, noting that the first medical evidence to mention the back was dated July 28, 2000.

The hearing officer in this first proceeding made the following findings of fact that relate to the current appeal:

2. The claimant slipped and fell to the floor on _____, while in the course and scope of his employment.

3. The claimant's fall did not cause any harm or damage to his body structure.

4. The claimant sustained an arthritic condition in his left hip as of 1993.

5. The claimant's _____, fall did not worsen, hasten, or otherwise aggravate the arthritic hip injury.

6. The carrier had notice of the claimed injury as of December 16, 1999.

7. The carrier first properly filed a dispute of the compensability of the claimed injury on March 8, 2000.

He further found that any inability to work resulted from a preexisting arthritic condition and surgical treatment thereof. In his discussion, the hearing officer noted that the "low back component of the claimed injury" appeared to be a fairly recent addition to the case and there was no persuasive support for it in the evidence.

This decision was appealed by the carrier on the waiver issue and the failure of the hearing officer to reword the issues. The Appeals Panel decision, Texas Workers' Compensation Commission Appeal No. 002361, decided November 27, 2000, is a summary decision that affirms and distinguishes the case of Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.). The Appeals Panel decision further found no error in not rewording the issues, noting that the carrier's motion was an attempt to avoid the waiver issue by casting the matter as extent of injury. The Appeals Panel described the claimant's testimony as identifying injury to the left hip and lower back.

The Current CCH

Essentially the same evidence was brought forward in the current CCH, although the focus was on the back condition. The claimant said he was in constant pain from his back, with extension of pain and numbness into his legs. The claimant said that the carrier had denied coverage for an MRI of his back. He said that he had no problems with his lower back at all prior to the accident and was active in sports, especially softball, before the accident. The claimant further testified that he was not aware of his back pain right away due to pain medication.

The carrier argued in final argument that the back injury was not an issue of a "follow on" injury but was asserted to have occurred on the date of the fall. However, it also observed that the back was not asserted until after hip surgery.

WHETHER THE EXISTENCE OF A BACK INJURY WAS PREVIOUSLY ADJUDICATED

We agree with the hearing officer that the matter of the back injury was previously adjudicated by the hearing officer in the earlier September 2000 CCH as part of the fall. However, after careful consideration of the entire record, we agree that the hearing officer erred by not giving complete effect to the prior decision under *res judicata*; the previous decision held not only that there was no bodily injury as a result of the _____, slip and fall, but that the carrier had waived the right to dispute "the claimed injury" by not filing a dispute within 60 days after first written notice of the injury.

It is unfortunate that the previous hearing officer lapsed into global and imprecise language of "claimed injury" when he made his fact findings and conclusions on waiver. However, the discussion of the previous hearing officer makes clear that what he called the "claimed injury" included a "low back component." Therefore, we cannot agree with the present hearing officer's characterization of this decision as finding only a waiver of the left hip injury because the previous hearing officer found waiver applied to "the claimed injury." This is further reinforced by the fact that in the present proceeding, the parties made an unlimited stipulation that the claimant sustained a "compensable injury"--compensable only by virtue of the waiver imposed in the previous decision. The parties did not limit this stipulation to specific body parts. Consequently, although there may not have been an express issue before this hearing officer as to "waiver," the matter was necessarily subsumed in the issue of what the "compensable injury" included, because the injury was compensable only due to waiver.

While it may be that the claimant did not appeal the fact finding of the prior decision that he suffered no bodily injury due to the fall on _____, neither did the carrier raise an appeal about the scope of the "claimed injury" which had been found by that hearing officer to be compensable through waiver. The hearing officer here has recast the previous hearing officer's decision and then given only partial effect to that prior decision by enforcing the fact finding of no bodily injury, but failing to effectuate the waiver component of that decision that was in turn affirmed by the Appeals Panel.

Accordingly, we reverse the determination that the compensable injury did not include a back injury, and render the decision that amends Finding of Fact No. 3 and Conclusion of Law No. 5 as follows (deletions are indicated in strikeout, additions are underlined):

> FINDING OF FACT 3. After the contested case hearing on September 13, 2000, the hearing officer issued a decision and order which determined that the carrier had failed to dispute ~~an~~ the claimed injury ~~to the claimant's left hip~~ and that the claimed injury ~~to the left hip~~ had become compensable as a matter of law.
>
> CONCLUSION OF LAW 5. As determined in Docket No. 1 and affirmed in Appeal No. 002361, the compensable injury of _____, ~~does not~~ includes an injury to the low back.
>
> The carrier is ordered to pay benefits in accordance with this decision.

The true corporate name of the insurance carrier is **THE CONTINENTAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

C.T. CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge