APPEAL NO. 012657
FILED DECEMBER 6, 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 October 10, 2001. The appellant (self-insured) appeals the hearing officer's determinations that the self-insured waived the right to dispute the compensability of the claimed injury by not contesting the injury in accordance with Section 409.021 of the 1989 Act; that the respondent (claimant) sustained a compensable injury on _____; and that the claimant's impairment rating (IR) is 28%. The claimant responds, urging affirmance. The hearing officer's determination that the self-insured did not waive the right to dispute the Texas Workers' Compensation Commission (Commission)-appointed designated doctor's IR has not been appealed and is final.

DECISION

We affirm the hearing officer's determinations.

WAIVER OF THE RIGHT TO DISPUTE INJURY

The hearing officer did not err in holding that the self-insured had waived the right to dispute compensability of the injury and could not reopen the issue of compensability based upon newly discovered evidence. The claimant was injured on _____. The self-insured did not file a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing the compensability of this injury until February 28, 2001, well beyond the initial 60-day period and after the claimant had already been certified at maximum medical improvement with an IR. The self-insured thus waived its right to dispute compensability in accordance with Section 409.021(c).

The only basis upon which the issue of compensability could be revisited was upon a finding of newly discovered evidence that could not reasonably have been discovered earlier. Section 409.021(d). The self-insured asserted that it found evidence of subsequent claims in 1996 and 1997, and that a videotape showed the claimant able to function in ways inconsistent with the claimed injury. We have before noted that the fruits of a deferred investigation do not constitute "newly discovered" evidence for reopening compensability. Texas Workers' Compensation Commission Appeal No. 992365, decided December 6, 1999; Texas Workers' Compensation Commission Appeal No. 991681, decided September 22, 1999 (Unpublished); Texas Workers' Compensation Commission Appeal No. 962210, decided December 18, 1996 (Unpublished). The evidence that the self-insured claims is newly discovered either was in existence well before the date the TWCC-21 was filed, was available to the self-insured within the initial 60-day period, or could have been investigated promptly. It appears that the only "new" aspect of the defense was the decision, several years after the fact, to act on the affirmative duty to investigate the claim. We cannot disagree with the hearing officer's analysis that the evidence produced thereby did not constitute "newly discovered" evidence.

INJURY ISSUE

Although the waiver issue is dispositive of compensability, we affirm the hearing officer's determination that the claimant sustained a compensable injury on _____. The claimant contended that he injured his leg, hip, head, neck, and lower back. These regions were claimed as injured from the beginning; the hearing officer could believe that the mechanics of the injury resulted in the injuries claimed. To the extent that there may have been preexisting physical infirmities, this would not preclude compensability. As we have stated many times, an aggravation of a preexisting condition is an injury in its own right. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ). A carrier that wishes to assert that a preexisting condition is the sole cause of an incapacity has the burden of proving this. Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992. The self-insured's argument that expert medical evidence is required to prove aggravation is overbroad; the evidence in this case is sufficient to support findings of the claimed injuries, including any aggravation of preexisting conditions.

IMPAIRMENT RATING

The IR report of the designated doctor chosen by the Commission has presumptive weight, and the Commission shall base its determination of IR on that report unless the great weight of the medical evidence is to the contrary. Sections 408.122(c) and 408.125(e). The self-insured contests the assignment by the designated doctor of an IR for the claimant's low back and neck injuries based upon its contention that no compensable injury occurred. However, the self-insured waived this right and the hearing officer otherwise held that the claimant was injured as he stated. Moreover, the self-insured's witness at the CCH, a physician, agreed that the designated doctor complied with the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association in his assignment of an IR.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer found that the report of the designated doctor, is entitled to presumptive weight and that the great weight of the other medical evidence is not contrary to the report. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **(SELF-INSURED)** and the name and address of its registered agent for service of process is

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

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Philip F. O'Neill
Appeals Judge