APPEAL NO. 020737
FILED MAY 6, 2002

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 March 1, 2002. The hearing officer resolved the issues before him by determining that the Texas Workers' Compensation Commission (Commission) has jurisdiction to determine the extent-of-injury dispute, even though a similar dispute was resolved in a hearing, and affirmed by an Appeals Panel decision, Texas Workers' Compensation Commission Appeal No. 001828, decided September 7, 2000. The hearing officer also determined that the respondent's (claimant) _____, compensable injury does extend to and include his injury at C6-7. The appellant (carrier) appealed the extent-of-injury determination on sufficiency grounds. The claimant responded, urging affirmance.

DECISION

Affirmed.

Because neither party appealed the hearing officer's determination that the Commission had jurisdiction to determine the extent-of-injury dispute, that determination has become final pursuant to Section 410.169.

The hearing officer did not err in determining that the claimant's compensable injury of _____, extends to and includes an injury to his spine at C6-7. The medical records show that although the claimant had some preexisting neck conditions, including degenerative disc disease, the injury in the form of a bulging disc at C6-7 was far worse than it had been prior to _____, and was causing more serious symptoms. The claimant testified that his neck pain and related symptoms in his thoracic spine and upper extremities became markedly worse after his date of injury, and that his doctor, as well as the carrier's doctor, advised surgery for the injury. The hearing officer is the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). While the carrier introduced conflicting evidence on the issue, upon our review of the record, we conclude that the hearing officer's determination that the claimant's compensable injury extends to and includes his injury at C6-7 is supported by the evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 001360, decided July 27, 2000.

The decision and order of the hearing officer are affirmed.

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

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

Philip F. O'Neill
Appeals Judge

CONCUR:

Roy L. Warren
Appeals Judge

CONCURRING OPINION:

I concur, but because I agree that *res judicata* (which I do not regard as necessarily a "jurisdictional" argument) brings this injured disc level into the ambit of the "neck injury" found to have occurred in the July 2000 decision of the hearing officer. No attempt was made in the previous decision to limit the neck injury to only certain cervical discs. Last time I looked in the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association, C6-7 was included in the "neck" as that term is commonly understood. The previous decision cannot be collaterally attacked by attempting to "divvy up" the previous-adjudicated neck injury into the discrete discs, muscles, or evolving diagnoses in the guise of questions of "extent" of injury, absent a showing of newly discovered evidence.

There has been a certain amount of conceptual carelessness in use of the term "extent of injury." When the carrier seeks to reopen compensability of a previously accepted or adjudicated injury, it must show it has newly discovered evidence to do so. Section 409.021(d). *See also* Texas Workers' Compensation Commission Appeal No. 982282, decided November 9, 1998; Texas Workers' Compensation Commission Appeal No. 992626, decided December 30, 1999 (Unpublished).

The Texas Workers' Compensation Commission is without authority to promulgate a rule, and we are without authority to interpret a rule, in a way that would essentially repeal the statute. The interpretation of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) that does not violate Section 409.021 (or 409.022) is that "disputes of extent of injury" in the rule refers to those situations where the original injury is asserted to have spread to another region of the body or into a disease that could not have reasonably been discovered within the proper time frames for controverting compensability. The evolving diagnosis of the originally injured region, or, for that matter, the results of a delayed investigation, do not constitute "extent" questions, although they may pose issues of newly discovered evidence that would allow a timely reopening of compensability.

To label any new aspect of a claim as an "extent" issue invites untimely adjustment of the claim (and could encourage denial of early medical diagnostic testing) that Section 409.021 was specifically passed to prevent. As stated by Senator Montford in A Guide to Texas Workers' Comp Reform, page 5-52:

> As compared to prior comp law, Section 5.21 [*now 409.021 and 409.022*] significantly accelerates the "processing time" . . . . Promptness of the initial comp payment was considered an important reform objective since delays in initiating benefits under the prior law at times resulted in hardship upon the employee and/or a need (viewed from the employee's perspective) for early attorney involvement.

Moreover, hearings and costs to the system in legal fees can mushroom as the parties moved from litigating a back strain to a disc bulge to a disc herniation, and then moved on to other discrete disc levels to begin the process anew.

There being no newly discovered evidence that leaps out of the record at me, I affirm for the reason that the prior hearing decision, holding that the claimant sustained a neck injury, necessarily included the discrete disc bulge now sought to be adjudicated in this matter.

Susan M. Kelley
Appeals Judge