

APPEAL NO. 021625
FILED AUGUST 20, 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 (CCH) was held on May 22, 2002. Hearing officer 1 resolved the disputed issues by deciding that the appellant/cross-respondent's (claimant) compensable injury extends to include an injury for psoas muscle compartment syndrome, but does not extend to include a bulging disc at the L4-5 level and a herniated disc at the L5-S1 level; that the claimant had disability from October 25, 2001, through the date of the CCH, May 22, 2002; and that two prior CCH decisions had not determined an issue of whether the compensable injury extends to include a back injury. The claimant appealed hearing officer 1's determination that the compensable injury does not include a bulging disc at the L4-5 level and a herniated disc at the L5-S1 level. The respondent/cross-appellant (carrier) appealed hearing officer 1's determinations that the compensable injury includes psoas muscle compartment syndrome; that the claimant has had disability from October 25, 2001, through the date of the CCH; and that the two prior CCH decisions had not determined an issue of whether the compensable injury extends to include a back injury. Both parties filed responses.

DECISION

As reformed herein, hearing officer 1's decision from the May 22, 2002, CCH, is affirmed in part and reversed and rendered in part.

In listing the disputed issues, hearing officer 1 inadvertently left out the disputed disability issue. We reform hearing officer 1's decision to reflect that one of the three disputed issues at the May 22, 2002, CCH was whether the claimant had disability "from October 25, 2001, through the present."

This case involves three CCHs.

FIRST CCH

The first CCH was held on May 24, 2001. The issues in the first CCH were whether the claimant sustained a compensable injury on _____, and whether the claimant had disability from November 28, 2000, through February 2, 2001, and from March 5, 2001, "through the present." Hearing officer 1 found that the claimant sustained an injury to his right groin area on _____, while in the course and scope of his employment. Hearing officer 1 determined that the claimant did sustain a compensable injury on _____, and that the claimant had disability from November 28, 2000, through February 2, 2001, but did not have disability from March 5, 2001, through the date of the first CCH. The first CCH decision was not appealed to the Appeals Panel and thus became final under Section 410.169.

SECOND CCH

The second CCH was held on October 24, 2001, with (hearing officer 2). The issue in the second CCH was whether the claimant had disability from May 25, 2001, “through the present.” The parties stipulated that the claimant sustained a compensable injury to his right groin area. Hearing officer 2 found that from May 25, 2001, through “the present,” the claimant was not unable, due to his compensable groin injury, to obtain and retain employment at wages equivalent to his preinjury wage, and that any inability since August 6, 2001, to earn equivalent wages was due solely to the claimant’s psoas muscle medical condition. Hearing officer 2 determined that the claimant did not have disability from May 25, 2001, “through the present.” The claimant appealed the second CCH decision to the Appeals Panel. Because the Appeals Panel did not issue a decision within the 30-day time period provided by Section 410.204(a), pursuant to Section 410.204(c), hearing officer 2’s decision became final and is the final decision of the Appeals Panel.

THIRD CCH

The third CCH was held on May 22, 2002, with hearing officer 1 presiding. The issues in the third CCH were whether the claimant’s compensable injury includes an injury for psoas muscle compartment syndrome, a bulging disc at the L4-5 level, and a herniated disc at the L5-S1 level; whether the claimant had disability from October 25, 2001 “through the present”; and whether “as a result of a [sic] Decision and Order [sic] under two previous Benefit [CCHs], has the issue for [sic] extent of injury to include a back injury been determined by the Commission [Texas Workers’ Compensation Commission].” The parties stipulated that the claimant sustained a compensable injury to the area of the right groin. Hearing officer 1 determined that the compensable injury does include an injury for psoas muscle compartment syndrome; that the compensable injury does not include a bulging disc at the L4-5 level and a herniated disc at the L5-S1 level; that the claimant had disability from October 25, 2001, through the date of the May 22, 2002, CCH; and that “As a result of a [sic] Decision and Order [sic] under two previous Benefit [CCHs], the issue for [sic] extent of injury to include a back injury has not been determined by the Commission.” Both parties have appealed the third CCH decision to the Appeals Panel and it is those appeals that we address in this decision.

The claimant’s job with the employer was to work on air conditioners. The compensable injury occurred on _____. Prior to the first CCH, the following things occurred. The claimant initially treated with Dr. L, who noted on _____, that the claimant was at the job site on _____, soldering copper lines, and that upon standing up, the claimant felt pain in his right testicle. Dr. L diagnosed an inguinal strain. In his October 3, 2000, Employee’s Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), the claimant noted that the body part affected was his right testicle. The claimant underwent a CT scan of his abdomen and pelvis on February 16, 2001, and the report of that study states an impression of “fatty metamorphosis of the liver otherwise negative CT scan of the abdomen and pelvis.”

The claimant began treating with Dr. S in February 2001. Dr. S noted that the claimant told him that he was lifting heavy equipment on _____, when he felt pain in his right inguinal and testicular region. Dr. S noted that Dr. V ordered a CT scan which showed no abnormalities in the right inguinal area. Dr. S also noted that the claimant told him that when he sits for a long period of time, he has to stand up to alleviate pain in his lower back. In his initial February 28, 2001, report, Dr. S diagnosed the claimant as having right lumbar facet joint nerve radiculopathy with psoas muscle compartment syndrome, a right ilioinguinal ligament strain, sleep deprivation, and a fatty liver. On March 1, 2001, Dr. S gave the claimant a facet joint injection in the right lumbar area for facet joint radiculopathy with myofascial pain. Dr. S noted that the claimant's history and physical exam were consistent with mechanical low back pain.

After the first CCH, but before the second CCH, the following things occurred. On June 26, 2001, Dr. S gave the claimant another facet joint injection in the right lumbar area, again noting that the claimant's physical exam was consistent with mechanical low back pain. On August 3, 2001, Dr. S noted a preoperative diagnosis of right-sided lumbar facet joint nerve radiculopathy with psoas muscle compartment syndrome and performed the following procedure on the claimant: Right L3, right L5 facet joint de-nerivation with Botox under fluoroscopy with myelogram. On September 6 and October 17, 2001, Dr. S provided the same diagnoses as he had in his initial report in February 2001. In the October 17, 2001, report, Dr. S noted that the claimant had low back pain which radiates to his right groin. On October 11, 2001, a physical therapist reported that the claimant was unable to complete a functional capacity evaluation (FCE) due to pain, but based on the partial FCE, the therapist wrote that the claimant functioned at the light-medium level, but would benefit from two more weeks of work conditioning before beginning work hardening. On October 23, 2001, Dr. S noted the diagnosis of right psoas muscle syndrome, clinical findings of severe low back pain, and recommended an MRI.

After the second CCH, but before the third CCH, the following things occurred. On October 29 and November 12, 2001, Dr. S provided the same diagnoses as he had in his February 2001 report. In the November 12, 2001, report, Dr. S wrote:

Patient continues to have the groin pain on the right side which is related to his psoas muscle which starts in the lumbar spine and goes down into his right femur. This has been the cause of his [sic] all along. He was misdiagnosed solely with a right inguinal sprain initially. However, he may in fact may have had that along with the psoas muscle compartment syndrome, however, he is left with a residual psoas muscle compartment syndrome which is causing all the pain in his right groin. He states this is the same pain he's always had which makes me think that perhaps he did not have a right inguinal strain, initially. However, since I did not examine the patient initially there is no way of ruling that in or out. He has responded to treatment and this should be compensable with his injury.

On November 28, 2001, Dr. S noted that the claimant had right lumbar paraspinal tenderness, right inguinal tenderness to palpation, and right lower abdominal tenderness. On November 30, 2001, the claimant underwent a second FCE, which concluded that the claimant can only lift up to 30 pounds, that he is limited to less than one hour of constant standing or sitting, and that he would benefit from 20 sessions of work hardening. On December 12, 2001, Dr. S provided the same diagnoses as he had in February 2001, and noted that he had ordered an MRI of the claimant's pelvis to try and ascertain the cause of the continued groin pain.

On December 13, 2001, Dr. O examined the claimant at the carrier's request. Dr. O diagnosed the claimant as having possible right radiculopathy and recommended a lumbar MRI. Dr. O noted that the claimant was not at maximum medical improvement and that the claimant could return to only sedentary work.

On January 23, 2002, the claimant underwent a lumbar spine MRI, and the impression stated in the MRI report is: 1. At L4-5 a diffuse annular disc bulge is seen with mild bilateral foraminal narrowing. 2. At L5-S1 a focal subligamentous disc herniation is seen with a concentric annular tear. There is mild bilateral foraminal narrowing.

Dr. S issued work status reports for the period of October 29, 2001, through March 1, 2002, noting in them that the claimant is unable to work and restricted from all work. In some of the work status reports, Dr. S provided ICD-9 codes for spinal enthesopathy (disorder of peripheral ligamentous or muscular attachments of spine) and for abdominal or pelvic swelling, mass, or lump.

The claimant testified at the first CCH that he felt right groin pain on _____, when he was lifting the air conditioners, and that when he was soldering he could not take the pain anymore and stood up. He also said that Dr. S told him he had muscle compartment syndrome and that he had torn a muscle going through his right testicle area. He said that Dr. S gave him an injection in his lower back because he could not inject the right groin area. The following questions and answers occurred on cross-examination of the claimant:

Q: Now, it sounds like today you're claiming an injury to your right groin; is that correct?

A: That is correct.

Q: So you're not alleging that you suffered a back injury?

A: That is correct.

In closing argument at the first CCH, the attorney who was then representing the claimant, stated that the claimant had always maintained that there was a problem with

his groin area, and that today he has been diagnosed with muscle compartment syndrome to his groin.

At the second CCH, the claimant testified that his pain on his right side had spread to his lumbar spine, that Dr. S had said at the benefit review conference that Dr. L had misdiagnosed him with a right inguinal groin strain, and that his condition has gotten worse. The claimant contended that the diagnosed psoas muscle compartment syndrome was part of his compensable injury.

At the third CCH, the claimant testified that he felt right groin pain when he was carrying the air conditioners on _____; that at some unspecified time Dr. S told him that he thought a back problem was causing the claimant's pain; that he has been unable to work since _____; that it was not until recently that his pain has been radiating to his leg and back; that the back pain started during the first few days of therapy, which he indicated was from about August through October (a therapist report indicates this was in 2001) but was uncertain about the dates; that his doctors have told him that the bulge and herniation that showed up on the lumbar MRI are causing his right groin pain; and that he has appealed the second CCH decision (which became the decision of the Appeals Panel) to district court. The following question and answer occurred on cross-examination of the claimant:

Q: Now, do you also remember during that hearing (the first CCH) the attorney (the carrier's attorney at the first CCH) asked you whether you were asserting a low back injury, and you confirmed that you were not asserting a low back injury. Do you recall that?

A: Well, I didn't feel any pain at the moment, you know, because the chronic pain was to my right groin, but we didn't find out - - We wanted to know what the cause of it. We don't - - we didn't know what was really causing it. The doctor started saying it was psoas compartment syndrome or this and that, because he didn't have the last MRI of the spine done. Once he had the MRI of the spine done, he can put all the puzzle together and that's what's causing the pain.

In closing argument at the third CCH, the claimant's attorney argued that all the doctors had been telling the claimant that he had a groin injury and there was no reason for the claimant to have known that it was something else until the MRI came back positive. The carrier argued that the extent of the compensable injury was addressed in the prior two CCH decisions, that the claimant had previously testified he was not claiming a back injury, and that the second CCH decision was appealed to district court by the claimant and so the Commission does not have jurisdiction over "that particular issue." Both parties also addressed the disability issue.

DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 27th Edition, which hearing officer 2 took official notice of, gives the following definitions in the Table of Musculi:

m. psoas major [NA], greater psoas muscle: *origin*, lumbar vertebrae and fascia; *insertion*, lesser trochanter of femur; *innervation*, second and third lumbar; *action*, flexes trunk, flexes and rotates thigh medially.

m. psoas minor [NA], smaller psoas muscle: *origin*, last thoracic and first lumbar vertebrae; *insertion*, iliopectineal eminence; *innervation*, first lumbar; *action* flexes trunk on pelvis.

We first address the carrier's appeal. The carrier contends that hearing officer 1 erred in determining that the prior two CCH decisions did not determine an issue of whether the compensable injury included a back injury. The carrier contends that the claimant is judicially estopped from asserting that he sustained a low back injury on _____, because he previously admitted under oath that he did not suffer a back injury. In Highway Contractors, Inc. v. West Texas Equipment Company, Inc., 617 S.W.2d 791 (Tex. Civ. App.-Amarillo 1981, no writ), the court stated:

The rule may be summarized as follows: A party is judicially estopped in a subsequent proceeding by having alleged or admitted in pleadings in a former proceeding, under oath, the contrary of the assertion sought to be made in the subsequent proceeding, in the absence of proof that the averment in the former proceeding was made inadvertently or by mistake, fraud or duress.

The Appeals Panel has previously addressed the rule of judicial estoppel in Texas Workers' Compensation Commission Appeal Nos. 94192, decided March 31, 1994, and Texas Workers' Compensation Commission Appeal No. 941495, decided December 16, 1994, and both of those decisions recognize that "inadvertence or mistake may be shown to negate the rule." Although the carrier raised the rule of judicial estoppel at the third CCH, hearing officer 1 did not address it in her decision. However, there is evidence that could support a determination that the claimant's testimony at the first CCH that he was not claiming a back injury was made by mistake in view of Dr. S's subsequent report regarding a misdiagnosis and the subsequent findings of the lumbar MRI. Thus, we cannot conclude that the hearing officer erred in not finding that the claimant was judicially estopped from asserting a back injury.

The carrier contends on appeal, as it did at the third CCH, that res judicata prevents the claimant from litigating whether the compensable injury includes a low back injury. Barr v. Resolution Trust Corp., 837 S.W.2d 627 (Tex. 1992), addresses the doctrine of res judicata. The doctrine of res judicata has been applied to administrative action that has been characterized by the courts as "adjudicatory," "judicial," or "quasi-judicial." Bryant v. L.H. Moore Canning Co., 509 S.W.2d 432 (Tex. Civ. App.-Corpus Christi 1974), cert. denied 419 U.S. 845. At the first CCH, there was no issue regarding whether the claimant's injury extended to include a back injury, and we cannot conclude that an extent issue regarding the claimant's back was actually litigated at that CCH. Also, we are not certain that it would have been practicable to

have litigated a back injury at the first CCH, given the claimant's testimony at the first CCH that he was not alleging a back injury, and the subsequent evidence indicating a mistake on his part. In addition, while hearing officer 1 found in the first CCH decision that the claimant sustained a groin injury on _____, no finding was made with regard to a back injury. We are not persuaded that the doctrine of res judicata, in the nature of issue preclusion (according to Barr, *supra*, issue preclusion, or collateral estoppel, prevents relitigation of particular issues already resolved in a prior suit) applies with regard to the first CCH.

The carrier contends that the doctrine of res judicata and Section 410.207 apply to the second CCH decision. Although the only issue at the second CCH was disability from May 25, 2001, "through the present," as part of the disability issue, the parties actually litigated whether the psoas muscle compartment syndrome was part of the compensable injury. Hearing officer 2 stated in the second CCH decision that "The ligament sprain did not keep the Claimant from working; the psoas muscle problem did. But it was not part of the compensable injury." Hearing officer 2 then determined that the claimant did not have disability from May 25, 2001, "through the present." The claimant appealed the second CCH decision to the Appeals Panel, and when the Appeals Panel did not issue a decision within the 30-day time period provided for in the 1989 Act, hearing officer 2's decision became the decision of the Appeals Panel under Section 410.204(c).

The claimant testified that he has appealed the second CCH decision to the district court. Section 410.205(b) provides that the decision of the Appeals Panel regarding benefits is binding during the pendency of an appeal. Section 410.207 provides that during judicial review of an Appeals Panel decision on any disputed issue relating to a workers' compensation claim, the Commission retains jurisdiction of all other issues related to the claim. Since it is clear that hearing officer 2, in resolving the disability issue in the second CCH, determined that the psoas muscle compartment syndrome is not part of the compensable injury, and since the claimant testified that that decision is on appeal to the district court, hearing officer 1 did not have jurisdiction in the third CCH to decide an issue with regard to whether the compensable injury includes a psoas muscle compartment syndrome. We conclude that hearing officer 1 erred in deciding that a prior CCH decision had not determined whether the compensable injury includes a back injury, but only to the extent that the psoas muscle compartment syndrome may be considered to be a back injury.

There was no issue at the first CCH or the second CCH as to whether the compensable injury includes a bulging disc at the L4-5 level and a herniated disc at the L5-S1 level, and no such issue was litigated at those CCHs or decided in the first or second CCH decisions, probably because the lumbar MRI was not performed until after the second CCH but before the third CCH. We conclude that hearing officer 1 did not err in addressing in the third CCH the issue of whether the compensable injury includes the disc bulge and disc herniation.

The carrier contends that hearing officer 1 erred in determining that the claimant had disability from October 25, 2001, through May 22, 2002, the date of the third CCH, noting that the psoas muscle compartment syndrome is not part of the compensable injury and that hearing officer 2 determined in the second CCH decision that the claimant's inability to work was due to that syndrome and not the compensable groin injury. The only period of disability before hearing officer 2 in the second CCH was the period from May 25, 2001, "through the present," which was the date of the second CCH, October 24, 2001. A different period of disability was before hearing officer 1 in the third CCH, that being the period from October 25, 2001, through "the present," which would be the date of the third CCH, May 22, 2002. Additional evidence was presented at the third CCH that was not presented at the second CCH, including the claimant's testimony that his pain has gotten worse and certain work status reports of Dr. S. Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The disputed issue of disability is a question of fact for the hearing officer to determine. The claimant had the burden to prove that he had disability during the disputed time period. The claimant need not prove that the compensable injury was the sole cause of his disability, only that it was a producing cause. Texas Workers' Compensation Commission Appeal No. 012689, decided December 20, 2001.

Although hearing officer 1 erred in determining in the third CCH decision that the compensable injury includes an injury of psoas muscle compartment syndrome, because that had been determined not to be part of the compensable injury by hearing officer 2 in the second CCH, which is on appeal to the district court, hearing officer 1's decision in the third CCH does not reflect that her disability determination was based solely on the psoas muscle compartment syndrome. The parties stipulated at the third CCH that the claimant sustained a compensable injury to the area of the right groin, and in the third CCH decision hearing officer 1 noted that the claimant has never stopped complaining about severe pain in his right groin area, and made a finding that the claimant was unable, due to the continued effects of the compensable injury, to obtain and retain employment at his preinjury wage from October 25, 2001, through May 22, 2002. We conclude that the hearing officer 1's determination that the claimant had disability from October 25, 2001, through May 22, 2002, 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. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We conclude that hearing officer 1 did not err in admitting into evidence the claimant's exhibits, which the carrier objected to based on its assertion of judicial admission or judicial estoppel.

The claimant contends that hearing officer 1 erred in determining in the third CCH decision that the compensable injury does not include a bulging disc at the L4-5 level and a herniated disc at the L5-S1 level. This issue presented a question of fact for the hearing officer to determine. There was conflicting evidence as to when the claimant started to complain of back pain. Although a claimant's testimony alone, if found credible, can establish a back injury, it is clear that hearing officer 1 believed that

the mechanism of injury was as stated in Dr. L's report, that is, the claimant had groin pain when he stood up while working on an air conditioner. It is also clear that hearing officer 1 was not persuaded, in the absence of some medical evidence to explain causation, that that mechanism of injury would cause a herniated lumbar disc. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). We conclude that hearing officer 1's determination in the third CCH decision that the compensable injury does not include the bulging disc at the L4-5 level and a herniated disc at the L5-S1 level 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. Cain, *supra*.

As reformed herein, we affirm hearing officer 1's determinations in the third CCH decision that the compensable injury does not extend to include a bulging disc at the L4-5 level and a herniated disc at the L5-S1 level, and that the claimant had disability from October 25, 2001, through the date of the CCH, May 22, 2002. We reverse hearing officer's 1 determination that the compensable injury includes psoas muscle compartment syndrome and render a decision that the Commission no longer has jurisdiction to determine that issue because hearing officer 2's decision, which determined that psoas muscle compartment syndrome is not part of the compensable injury and which became the Appeals Panel decision, has been appealed to district court. We reverse hearing officer 1's determination that a previous CCH decision did not determine whether the compensable injury includes a back injury, but only to the extent that hearing officer 2 determined that the compensable injury does not include psoas muscle compartment syndrome, and we render a decision that hearing officer 2 in the second CCH decision determined that psoas muscle compartment syndrome is not part of the compensable injury.

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

**CT CORPORATION SYSTEM
811 DALLAS AVENUE
HOUSTON, TEXAS 77002.**

Robert W. Potts
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge