APPEAL NO. 023291
FILED FEBRUARY 21, 2003

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 November 19, 2002. The hearing officer determined that the compensable injury of appellant (claimant) does not extend to include the degenerative joint disease and degenerative disc disease to the low back at L3-4, L4-5, and L5-S1, and that claimant had disability beginning August 11, 2000, and ending May 4, 2001. The parties also stipulated that claimant attained maximum medical improvement (MMI) on July 5, 2002, with an impairment rating (IR) of five percent. Claimant appealed, contending that the hearing officer erred in: (1) ending claimant's disability on May 4, 2001; (2) failing to make findings regarding carrier waiver; and (3) making the adverse determination regarding extent of injury. There is no response from respondent (carrier) contained in our file.

DECISION

We affirm.

Claimant contends that the hearing officer erred in failing to make findings regarding carrier waiver. However, an issue with regard to Section 409.021 was not reported out of the benefit review conference (BRC), there is no response to the BRC report in the record, and the issue was not tried by consent. *See* Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7). Claimant contends that it raised the waiver issue in stating its position with regard to the disability issue at the BRC. Claimant's position with regard to disability set forth in the BRC report included the statement, "[t]he carrier has waived their right to dispute entitlement to disability." However, this statement does not raise the issue of whether carrier waived the right to contest the compensability of the injury pursuant to section 409.021, and claimant did not file a response to the BRC report regarding the fact that carrier waiver was not expressly listed or addressed as a separate issue. If claimant wanted to raise carrier waiver as an issue, she needed to do so in such a way as to give notice to carrier so that it might have an opportunity to respond. We perceive no error.

Claimant contends that the hearing officer erred in ending disability on May 4, 2001, noting that her IR is five percent. The fact that a claimant has impairment reflected in an IR does not automatically mean the claimant has disability. Claimant complains that no doctor has released her to return to work and that she was not required to look for work. However, in order to prove that she had disability, claimant had to prove that she was unable *because of the compensable injury* to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). Here, the hearing officer made it clear that she did not think claimant was suffering the effects of the compensable injury as of May 5, 2001. The hearing officer did not believe that the

compensable injury caused claimant to be unable to earn her preinjury wage after May 4, 2001. We perceive no error.

Claimant contends that the hearing officer erred in placing the burden of proof regarding disability on claimant. However, the hearing officer could find from the evidence that claimant did not meet her initial burden to prove that she was unable because of the compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. The hearing officer did not err in the placement of the burden of proof in this case. *See* Texas Workers' Compensation Commission Appeal No. 961390, decided August 30, 1996.

Claimant contends that the hearing officer did not consider certain evidence in making the disability determination. We will treat this as an assertion that the determination is against the great weight and preponderance of the evidence. Claimant also contends the hearing officer erred in determining that the injury does not extend to the degenerative joint disease and degenerative disc disease to the low back at L3-4, L4-5, and L5-S1. We have reviewed the complained-of determinations and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer=s determinations are supported by the record and are 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).

We affirm the hearing officer=s decision and order.

According to information provided by carrier, the true corporate name of the insurance carrier is **UNIVERSAL UNDERWRITERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RON JOHNSON
101 EAST PARK BOULEVARD, SUITE 200
PLANO, TX 75074.

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Judy L. S. Barnes
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Roy L. Warren
Appeals Judge