APPEAL NO. 030053
FILED FEBRUARY 24, 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 (CCH) was held on November 20, 2002. With respect to the disputed issues before her, the hearing officer determined that: (1) the appellant (claimant) did not sustain a compensable injury on _____; (2) the claimant did not have disability resulting from his alleged _____, injury; (3) the claimed injury does not extend to and include a posterior central and Para central disc bulge with thecal sac impingement at T12-L1 and right posterior lateral disc protrusion at L5-S1 with associated mild posterior disc bulge; and, (4) the defense of untimely notice listed in the second Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) was timely and correctly disputed by the respondent (self-insured). The claimant appeals all of the determinations on sufficiency of the evidence grounds. The self-insured responds, urging that the hearing officer be affirmed.

DECISION

Affirmed in part, reversed and rendered in part.

There was a certified issue in this case of whether the self-insured was relieved of liability under Section 409.002 because of the claimant's failure to timely notify his employer of an injury pursuant to Section 409.001. The hearing officer discussed this issue in her Statement of the Evidence; however, she failed to make a specific finding of fact or conclusion of law pertaining to this issue. It is clear from her Statement of the Evidence that the hearing officer believed that the claimant did not timely notify his employer of an injury and that he had no good cause for his failure to do so. In view of our ultimate disposition of this case, the hearing officer's failure to make a specific finding on this issue is harmless error, but is illustrative of the importance of the hearing officer's duty to address all issues certified from the benefit review conference.

The hearing officer did not err in determining that the claimant did not sustain a compensable injury to his mid and/or low back on _____. Under the 1989 Act, the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). There is scant evidence to support the claimant's allegation of injury; in addition, the hearing officer notes that she "finds the Claimant's rendition of the facts to lack credibility." The hearing officer was acting within her province as the fact finder in resolving the conflicting evidence and nothing in our review of the record demonstrates that the hearing officer's determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Furthermore, the hearing officer did not err in determining that the claimed injury did not extend to and include a posterior central and Para central disc bulge with thecal

sac impingement at T12-L1 and right posterior lateral disc protrusion at L5-S1 with associated mild posterior disc bulge. In her Statement of the Evidence, the hearing officer implies that the claimant failed to show a nexus between the aforementioned diagnoses and his alleged compensable injury of _____, and the record supports such a determination.

We likewise affirm the hearing officer's determination that the claimant did not have disability as a result of an injury allegedly sustained on _____. Because the claimant did not have a compensable injury, he could not have disability as a matter of law. Section 401.011(16).

The hearing officer erred in determining that the self-insured's defense of untimely notice first claimed in its second TWCC-21, dated May 10, 2002, was timely and correctly disputed. The record indicates (on the first TWCC-21, dated May 9, 2002) that the carrier received first written notice of this claim on May 2, 2002. The carrier timely filed a TWCC-21 on May 9, 2002, contesting the claim on the grounds of no injury in the course and scope of his employment, and treatment/disability. Then, on May 10, 2002, the self-insured filed a second TWCC-21, listing the claimant's untimely notice of his injury to his employer as a defense. While she did not make a specific finding on this issue, the hearing officer noted in her Statement of the Evidence that she did not believe that the self-insured had to show that it had newly discovered evidence in order for the defense claimed on its second TWCC-21 to be considered. At the CCH, the self-insured argued that the second TWCC-21 was filed with the untimely notice defense after some "other supervisors" evaluated the case and determined that the defense was justified. In other words, the self-insured argued that the "newly discovered evidence" was, in effect, some "other supervisors'" analysis of the case. Regarding the timely notice/newly discovered evidence issues, the self-insured's argument and the hearing officer's determinations are flawed.

Section 409.022(a) and (b) read as follows:

(a) An insurance carrier's notice of refusal to pay benefits under Section 409.021 must specify the grounds for the refusal.

(b) The grounds for the refusal specified in the notice constitute the only basis for the insurance carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date.

Whether due diligence is shown in contesting compensability upon the discovery of new evidence or whether the evidence could have reasonably been discovered earlier are questions of fact for the hearing officer to determine. *See* Texas Workers' Compensation Commission Appeal No. 92218, decided July 15, 1992. There are two components to being allowed to reopen compensability *or* present additional grounds: the information must not only be "newly discovered," but, further, prove to have been

unavailable or inaccessible through the self-insured's reasonable exercise of its duty to investigate the claim (in other words, not discoverable at an earlier time). *See* Texas Workers' Compensation Commission Appeal No. 992828, decided February 2, 2000. Clearly, what resulted from "other supervisors'" analysis of the case cannot, as a matter of law, constitute newly discovered evidence. The hearing officer erred in determining that the self-insured need not show that it had newly discovered evidence in order to assert the additional defense of untimely notice. Absent a showing that the second TWCC-21 was based upon newly discovered evidence, the self-insured is not permitted to assert the untimely notification defense.

We therefore reverse the hearing officer on this issue and render a decision that the self-insured's defense of the claimant's untimely notice to his employer, as espoused in its May 10, 2002, TWCC-21, was not properly asserted as it was not based upon newly discovered evidence. Since the self-insured could not assert the defense that the claimant had not timely notified his employer, it follows that the self-insured is not relieved of liability under Section 409.002.

However, our opinion in this regard is academic, as the record supports, and we have affirmed, the hearing officer's determinations adverse to the claimant on the issues of compensability, disability, and extent of injury.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

MAYOR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Terri Kay Oliver
Appeals Judge

CONCUR:

_____
Michael B. McShane
Appeals Panel
Manager/Judge

_____
Robert W. Potts

Appeals Judge