

APPEAL NO. 030559
FILED APRIL 15, 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 February 6, 2003. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____; that the compensable injury extends to and includes a herniation at L5-S1; that the compensable injury does not include the claimant's neck, thoracic, head, bilateral hip, osteoporosis osteophytes, or worsening of the preexisting degenerative disc disease in the back; that the claimant had disability from May 19, 2002, and continuing through the date of the CCH; and that the appellant's (carrier) contest of compensability was not based on newly discovered evidence that could not reasonably have been discovered at an earlier date.

The carrier appeals the hearing officer's determinations on the injury issue (although the carrier had accepted a low back strain/sprain); the determination that the compensable injury extends to a herniation at L5-S1; the determination that the carrier's contest of compensability was not based on newly discovered evidence; and the disability issue. The claimant responds, urging affirmance. Neither party appealed the hearing officer's determination that the neck, thoracic, head, bilateral hip, osteoporosis osteophytes, and worsening of the preexisting degenerative disc disease in the back were not part of the compensable injury and that determination has become final.

DECISION

Affirmed.

The claimant, a long-distance truck driver, testified that on _____, she sustained a compensable injury getting into the cab of her truck when she slipped and fell backwards on her buttocks. The claimant went to the emergency room the same day with complaints of pain to her lumbar spine and leg. The carrier accepted liability for a low back sprain/strain. The carrier subsequently disputed the disc herniation and other claimed injuries on an extent-of-injury basis. Subsequently an MRI performed on September 23, 2002, indicated a "[b]road-based posterior disc bulge . . . likely contacting exiting bilateral S1 nerve roots" The parties refer to this as a disc herniation. It is undisputed that the claimant had prior compensable back injuries in 1992 and 2001, and that the carrier's adjuster took a transcribed statement of the claimant on May 14, 2001, regarding the 2001 injury.

The main thrust of the carrier's case, both at the CCH and on appeal, is that at a benefit review conference on October 8, 2002, it first learned of "extensive chiropractic and medical treatment of [the claimant's] neck and back between 1996 and 2001" with a chiropractic clinic and another medical facility. The carrier contends that the medical evidence it obtained was newly discovered evidence that could not reasonably have been discovered earlier.

Under the provisions of Section 409.021(d), an insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier. 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. 010386, decided March 27, 2001.

There are two components to being allowed to reopen compensability or present additional grounds: the information must not only be "newly discovered" but, further, must prove to have been unavailable or unaccessible through the carrier'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.

As the claimant notes, the date of injury in this case was _____, and the carrier did not seek authorization for the release of medical records until October 8, 2002. The carrier's adjuster had taken a statement and had knowledge of the _____ injury including the chiropractic treatment in May 2001. The hearing officer, in her Statement of the Evidence, commented:

Carrier's dispute of the injury was not based on newly discovered evidence as much of the medical reports that they rely on were not obtained until well after the many disputes were filed. All of them were well after the statutory required time. Though Carrier can raise extent at any time, based on new evidence, it did not stretch in this case to the entire injury.

We conclude that there is sufficient legal and factual evidentiary support for the hearing officer's determination that the carrier's contest of compensability was not based on newly discovered evidence that could not reasonably have been discovered earlier.

The carrier also appeals, asserting that the "mechanism of injury is not credible." We first note that the carrier accepted a compensable strain/sprain injury and only later disputed the injury when the MRI revealed a disc bulge/herniation. In any event it is the hearing officer, as the trier of fact, who is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), and it was the hearing officer who decides whether the mechanism of the injury is credible. The hearing officer heard the claimant's description of the incident and the carrier's cross-examination. The record includes medical reports which support the claimant's position, and there is no evidence to support that the L5-S1 disc bulge/herniation was present prior to _____. The hearing officer was acting within her province as the fact finder in resolving the conflicts and inconsistencies in the evidence in favor of the claimant. Nothing in our review of the record reveals that the challenged determinations are so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier's appeal of the disability issue is premised on the carrier's assertion that either the claimant did not sustain a compensable injury or that the compensable injury does not extend to the L5-S1 disc bulge/herniation. In view of the fact that we are affirming the hearing officer's determinations on those issues, we also affirm the hearing officer's determination on the disability issue.

We conclude that 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. Cain, *supra*.

We affirm the decision and order of the hearing officer.

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

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Roy L. Warren
Appeals Judge