

APPEAL NO. 030767
FILED MAY 19, 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 January 29, 2003. The hearing officer determined that (1) the compensable injury of _____, does not include an injury to the cervical spine and reflex sympathetic dystrophy (RSD); and (2) the respondent (self-insured) has not waived the right to dispute the compensability of the claimed injury under Section 409.021. The appellant (claimant) appealed these determinations on sufficiency of the evidence grounds and attached additional documentation which would purportedly show that the compensable injury includes an injury to the cervical spine and RSD. The claimant's attorney filed a separate appeal, on the claimant's behalf, asserting that the dispute with regard to the cervical injury presented a waiver issue, not an extent-of-injury issue. The claimant's attorney also asserts error in the admission of Hearing Officer's Exhibit Nos. 5, 6, and 7. self-insured urges affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant attached additional documentation to her appeal which would purportedly show that the compensable injury includes an injury to the cervical spine and RSD. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. See *generally* Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). Upon our review, the evidence offered is not so material that it would probably produce a different result, nor is it shown that the documents could not have been obtained prior to the hearing below. The evidence, therefore, does not meet the requirements for newly discovered evidence and will not be considered on appeal.

We next address the claimant's assertion of error in the admission of Hearing Officer's Exhibit Nos. 5, 6, and 7. The exhibits were admitted for the purpose of resolving the issue of carrier waiver. We have, in analogous cases, required that a hearing officer take official notice of essential Texas Workers' Compensation Commission (Commission) records where compliance with the 1989 Act is at issue. See Texas Workers' Compensation Commission Appeal No. 941171, decided October 17, 1994; Texas Workers' Compensation Commission Appeal No. 002287, decided November 13, 2000; Texas Workers' Compensation Commission Appeal No. 010696, decided April 26, 2001; and Texas Workers' Compensation Commission Appeal No. 012101-s, decided October 22, 2001. Additionally, we note that Hearing Officer's Exhibit Nos. 5, 6, and 7 are largely cumulative of the parties' exhibits, which were admitted without objection. Under the circumstances, we cannot conclude that the

hearing officer abused her discretion in admitting Hearing Officer's Exhibit Nos. 5, 6, and 7. We perceive no reversible error.

CERVICAL INJURY

The claimant worked as a full-time customer service representative for the self-insured. Her primary job duties involved answering incoming telephone calls and entering data into the computer regarding those calls. The claimant testified that her work area was not ergonomic, and that she began experiencing neck spasms and locking in her hands. On _____, the claimant reported an injury to her employer. The supervisor testified that the claimant reported pain in her neck and hands and indicated that her doctor suspected carpal tunnel syndrome (CTS). The supervisor completed an Employer's First Report of Injury or Illness (TWCC-1), describing a CTS injury of the left upper extremity. The TWCC-1 is stamped as received by the self-insured on February 9, 2001.

The claimant received treatment for her condition in February 2001. Early medical reports indicate complaints of neck, upper extremity, and bilateral wrist pain. On February 15, 2001, the claimant was diagnosed with a cervical sprain/strain, cervical muscle spasm, and nerve root irritation with radicular pain to the left arm, as well as possible CTS. Also on February 15, 2001, the claimant gave a recorded statement to the self-insured. When asked what body parts were affected by her work-related injury, the claimant answered that the pain goes "around my neck area, around down my shoulders, all down my arm, in my fingers" In the Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), dated March 21, 2001, the claimant again stated that the neck, wrist, arm, and hands were affected by the work-related injury. The claimant received ongoing medical care for these injuries.

On February 21, 2001, the self-insured issued a Notification of First Payment (TWCC-26), which included its first payment of temporary income benefits (TIBs) to the claimant. The self-insured's initial Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), also dated February 21, 2001, indicates that TIBs were paid for the period of February 15, 2001, through February 21, 2001, for an injury to the left wrist/arm. Commission records indicate that the initial TWCC-21 was received by the Commission on March 22, 2001. The documentary evidence shows that the first payment for medical treatment was made on April 20, 2001. On January 18, 2002, the self-insured filed a TWCC-21 disputing an injury to the cervical spine.

The hearing officer erred in determining that the compensable injury did not extend to include a cervical injury. The claimant argues that the dispute with regard to the cervical injury presented a waiver issue, not an extent-of-injury issue as asserted by the self-insured. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) provides that Section 409.021, regarding the initiation of benefits and carrier waiver, does not apply to "extent of injury" disputes. Notwithstanding, we have held that the rule cannot be interpreted in a way that would allow a dilatory carrier to recast the

primary claimed injury issue as an “extent issue” and thereby avoid the mandates of Section 409.021. See Texas Workers’ Compensation Commission Appeal No. 022454, decided November 18, 2002; Texas Workers’ Compensation Commission Appeal No. 021907, decided September 16, 2002; Texas Workers’ Compensation Commission Appeal No. 021569, decided August 12, 2002; and Texas Workers’ Compensation Commission Appeal No. 022183, decided October 9, 2002. The evidence, in this case, clearly shows that the primary claimed injury included the claimant’s cervical region. As such, the self-insured was obligated to dispute the compensability of an alleged cervical injury in accordance with Section 409.021.

The hearing officer erred in determining that the self-insured did not waive the right to dispute compensability of the claimed cervical spine injury. Section 409.021(a), provides, in pertinent part, that an insurance carrier shall, not later than the seventh day after the receipt of written notice of an injury, begin the payment of benefits as required by the 1989 Act or notify the Commission and the employee in writing of its refusal to pay benefits. In Texas Workers’ Compensation Commission Appeal No. 030380-s, decided April 10, 2003, citing Continental Cas. Co. v. Downs, 81 S.W.3d 803 (Tex. 2002), we interpreted this requirement to mean that a carrier must take some action within seven days of receiving written notice of an injury, and we admonished that a carrier which does nothing and later asserts that it “intended to pay in accordance with the 1989 Act [when benefits accrued],” does so at its own risk. Upon review of the record, we find no evidence to support the hearing officer’s determination that the self-insured initiated the payment of benefits within the seven-day period provided under Section 409.021(a). Additionally, the fact that the self-insured paid TIBs for the period beginning February 15, 2001, does not support the inference that the self-insured took the requisite action within seven days of receiving written notice of the injury. Accordingly, we reverse the hearing officer’s waiver determination and render a decision that the self-insured waived the right to dispute the compensability of the primary claimed injuries, including an injury to the cervical spine.

REFLEX SYMPATHETIC DYSTROPHY

The hearing officer did not err in determining that the compensable injury did not extend to include RSD. The claimant contends that she sustained RSD as a direct and natural result of the compensable injury. This was a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer’s determination is 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).

For the foregoing reasons, we affirm the hearing officer’s decision and order with regard to RSD and reverse and render a decision that the self-insured waived the right

to dispute the compensability of the primary claimed injuries, including an injury to the cervical spine.

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

**CITY SECRETARY
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Edward Vilano
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Gary L. Kilgore
Appeals Judge