

APPEAL NO. 032844
FILED DECEMBER 18, 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 September 23, 2003. The hearing officer resolved the disputed issues by deciding that the respondent/cross-appellant's (claimant) compensable injury extends to the left shoulder, but not to the disc protrusions at L3-4 and L4-5; that the claimant had disability from February 14, 2003, through the date of the CCH; and that the appellant/cross-respondent (self-insured) did not waive the right to contest the extent of the _____, injury. The self-insured appealed the determination that the injury extended to the left shoulder and the disability determination, essentially arguing that those determinations are against the great weight and preponderance of the evidence. The claimant did not respond to the self-insured's appeal, but did cross-appeal the determinations that the injury did not extend to the disc protrusions at L3-4 and L4-5, and that the self-insured did not waive the right to contest the extent of the _____, injury. The self-insured responded, urging affirmance.

DECISION

Reversed and rendered in part; affirmed in part.

The self-insured filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) with the Texas Workers' Compensation Commission on November 14, 2002, stating that it would pay benefits when and if due, pending further investigation. In accordance with the decision of the Supreme Court in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), and our decision in Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, taking this action entitled the self-insured to a 60-day period to investigate or deny compensability of the claim. Pursuant to Section 409.021(c):

If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability.

The only other TWCC-21 in the record is dated February 5, 2003, a date more than 60 days after the date on which the self-insured received written notice of the injury. This TWCC-21 states that payment is refused or disputed for the following reasons:

[Self-insured] denies the claimant sustained a compensable injury in the course and scope of employment for "broad based disc bulges at L3-4 & L4-5, strain/sprain right and left shoulders, degenerative disc disease of the lumbar spine, mild AC joint arthrosis." [Self-insured] disputes any

related disability, extent of injury and the producing cause. Peer review attached.

We hold that the self-insured in this case has waived the right to contest compensability of the claim because it did not contest the compensability of the injury on or before the 60th day after it received written notice of the injury. It is clear from the medical evidence in the record, including the MRI dated December 11, 2002, that the self-insured was fully apprised of the conditions which the claimant was asserting as the original compensable injury. The self-insured contended that it did not waive its right to dispute the claimant's disc protrusions and left shoulder injury, asserting that this presented an extent-of-injury issue, not a waiver issue. 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 said that that 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. It is clear from this case that the primary claimed injury included the left shoulder and the disc protrusions as well as the sprain/strain of the lumbar spine. As such, the self-insured was obligated to dispute the compensability of the claimed left shoulder and the disc protrusion injuries in accordance with Section 409.021. The self-insured failed to do this. Since the self-insured waived the right to contest compensability of the injury, the claimant's primary claimed injury to his left shoulder, the disc protrusions at L3-4 and L4-5, and the lower back sprain/strain became compensable as a matter of law, and it was error for the hearing officer to limit the claimant's compensable injury to his left shoulder and the lower back sprain/strain. Texas Workers' Compensation Commission Appeal No. 030831, decided May 22, 2003; Texas Workers' Compensation Commission Appeal No. 023101, decided January 30, 2003; and Appeal No. 022183, *supra*.

The claimant had the burden to prove that he had disability. A finding of disability is based on the determination that the inability to earn the preinjury wage was a result of the compensable injury. Section 401.011(16). The record reflects that the claimant sustained a compensable injury on _____, that he was released to light duty on _____, and that he worked in various positions with the employer until February 14, 2003, when he was taken off work completely by his treating doctor, because the treating doctor felt that the light duty violated the work restrictions he had placed on the claimant. The claimant was again later released to light duty work, but was not offered light duty after that. The hearing officer determined that the claimant's low back and left shoulder injury caused him to be unable to obtain and retain employment at the preinjury wage from February 14 through September 23, 2003.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer was persuaded that the claimant sustained his burden of proving that his compensable injury was a cause of his inability to obtain and retain employment at his preinjury wage. Nothing in our review of the record reveals that the hearing officer's determination in that regard is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb the disability determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We reverse the decision that the self-insured did not waive the right to contest compensability of the extent of the _____, injury, and render a new decision that the self-insured did waive the right to contest the entire injury, which includes the claimant's disc protrusions and left shoulder injury, as well as the lower back sprain/strain. We affirm the disability portion of the hearing officer's decision.

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

**CT CORPORATION SYSTEMS
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Edward Vilano
Appeals Judge