

APPEAL NO. 033264
FILED JANUARY 28, 2004

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 14, 2003. The hearing officer determined that the respondent's (claimant) compensable injury on _____, does include an injury to the cervical spine, and that the appellant (self-insured) waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022. The self-insured appealed, arguing that the hearing officer's extent-of-injury and waiver determinations are against the great weight and preponderance of the evidence. The claimant responded, urging affirmance.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The claimant testified that on _____, he lifted two tables up on his shoulders and the tables slipped hitting him on his right shoulder and behind his ear. The claimant contends that he injured his back and neck. The claimant stated that he sought medical care for his shoulder and neck the next day. A medical report dated April 28, 2001, from (medical center) reflects that the claimant complained of neck and shoulder pain after lifting a heavy table to his shoulders. A medical report dated April 30, 2001, from (clinic) reflects that the claimant was diagnosed with a cervical strain, right shoulder strain, and right trapezius strain. The claimant contends that he injured his neck and shoulder on _____. The self-insured has accepted the right shoulder injury, however, it contends that the claimant's neck injury did not occur on _____.

With regard to carrier waiver, it is undisputed that the self-insured first received written notice of the claimed injury on May 2, 2001, accepted a right shoulder injury, and initiated the payment of benefits on May 6, 2001, pursuant to Section 409.021(a). 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. Section 409.021(c), provides that 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.

In the present case, the evidence reflects that the self-insured filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) with the Texas

Workers' Compensation Commission (Commission) on September 24, 2001, stating that:

Injury of _____ is the Right Shoulder ONLY. Injury of _____ does not involve any other part of the body. Claimant did not sustain injury to cervical spine in the course and scope of employment. Any injury to the Cervical Spine [claimant] might have is not related to the incident of _____.

The self-insured argues that it did not waive its right to dispute the claimant's neck injury, asserting that this presented an extent-of-injury issue not a waiver issue. The hearing officer considered the evidence and correctly relied on Texas Workers' Compensation Commission Appeal No. 021569, decided August 12, 2002, which states that 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 right shoulder as well as the cervical spine. As such, the self-insured was obligated to dispute the compensability of the claimed right shoulder and the cervical spine in accordance with Section 409.021. The self-insured failed to do this. The hearing officer determined that although the self-insured had 60 days to further investigate the claim, it did not reasonably investigate and failed to contest compensability within 60 days, and there is no evidence of newly discovered evidence that would allow it to reopen the claim. We perceive no error in the hearing officer's finding of carrier waiver.

The issue of extent of injury is a question of fact. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence

would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find sufficient evidence in the record to support the hearing officer's resolution of the injury and disability issues.

The hearing officer's decision and order are affirmed.

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

**CORPORATION SERVICE COMPANY
800 BRAZOS, COMMODORE 1, SUITE 750
AUSTIN, TEXAS 78701.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Margaret L. Turner
Appeals Judge