

APPEAL NO. 033289
FILED JANUARY 22, 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 October 31, 2003. With respect to the issues before him, the hearing officer determined that respondent 2's (claimant) compensable injury of _____, does not include lumbar degenerative disc disease or spondylosis and that respondent 1/cross-appellant (carrier) waived its right to contest compensability of the lumbar disc disease and spondylosis; thus, those conditions became compensable as a matter of law. In its appeal, the appellant/cross-respondent (subclaimant), a medical provider that treated the claimant in a pain management program, contends that the hearing officer erred in his determination that the compensable injury does not include the lumbar degenerative disc disease and/or spondylosis. In its response to the subclaimant's appeal, the carrier urges affirmance of the determination that the compensable injury does not include lumbar degenerative disc disease and/or spondylosis. In its cross-appeal, the carrier asserts error in the hearing officer's determination that it waived the right to contest the lumbar degenerative disc disease and spondylosis and that, as a result, those conditions became compensable as a matter of law. In its response to the cross-appeal, the subclaimant urges affirmance of the waiver determination. The claimant did not appear at the hearing and likewise did not respond to the appeal.

DECISION

Affirmed in part and reversed and rendered in part.

Conflicting evidence was presented on the issue of whether the compensable injury of _____, included lumbar degenerative disc disease and/or spondylosis. That issue presented a question of fact for the hearing officer. 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 and inconsistencies in the evidence and determines what facts have been established. Nothing in our review of the record reveals that the hearing officer's determination that the compensable injury does not include lumbar degenerative disc disease and/or spondylosis is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Thus, no sound basis exists for us to disturb that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

However, the hearing officer did err in determining that the carrier waived its right to contest compensability of the lumbar degenerative disc disease and spondylosis. The question of whether the compensable injury included those conditions was a true extent-of-injury dispute. Thus, in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)), Section 409.021 does not apply to this dispute and the hearing officer improperly determined that the lumbar degenerative disc disease and spondylosis became compensable as a matter of law due to carrier waiver. This is not

a case where the carrier's challenge to the lumbar degenerative disc disease and spondylosis was an attempt by the carrier to recast the nature of the injury it had accepted in order to circumvent the waiver provision of Section 409.021.

The hearing officer's factual determination that the compensable injury does not include the lumbar degenerative disc disease and spondylosis is affirmed. His determinations that the carrier waived its right to contest compensability of the lumbar degenerative disc disease and spondylosis and that those conditions, therefore, became compensable as a matter of law, are reversed and a new decision rendered that the carrier did not waive its right to contest the lumbar degenerative disc disease and spondylosis and that those conditions are not compensable.

The true corporate name of the insurance carrier is **THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

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

Elaine M. Chaney
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert W. Potts
Appeals Judge