

APPEAL NO. 040426
FILED APRIL 20, 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 January 26, 2004. The hearing officer decided that the respondent/cross-appellant (carrier herein) did not waive its right to contest the compensability of the claimed injury and that the appellant/cross-respondent's (claimant herein) compensable injury extends to include herniation at C5-6. The claimant appeals the hearing officer's resolution of the carrier waiver issue, arguing that the carrier waived its right to contest the compensability of the claimant's cervical spine injury. The carrier responds that the hearing officer correctly determined that the carrier did not waive its right to dispute the compensability of the claimant's C5-6 herniation. The carrier files a request for review in which it appeals the hearing officer's determination that the claimant's injury extended to include her C5-6 herniation. The claimant responds that the evidence supported the hearing officer's determination that her compensable injury included a C5-6 herniation.

DECISION

Reversed and rendered in part; affirmed in part.

The claimant testified that since July 1999 she has worked as a receptionist answering telephone calls, entering data and typing. The claimant testified that she began experiencing numbness and tingling in her arms, particularly the right arm, and pain radiating to her neck. On _____, the claimant consulted Dr. M, her family doctor, concerning these problems. The claimant testified that Dr. M related these problems to her work and this is borne out by Dr. M's medical reports. The claimant testified that based upon Dr. M's opinion she reported an on-the-job injury to her employer. The claimant underwent a cervical MRI on October 22, 2001, which showed a herniated disc at C5-6. The claimant has continued treatment with Dr. M, and, at his referral, has seen Dr. F, a neurosurgeon. The claimant has also been seen by Dr. G, a designated doctor, as well as Dr. A.

The carrier initially accepted the claimant's workers' compensation claim, but on January 14, 2002, filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in which it disputed that the claimant's injury extended to any cervical disc herniations. In the TWCC-21, the carrier stated that it first received written notice of the claimant's injury on October 9, 2001.

CARRIER WAIVER

The first and most troubling issue in the present case is whether the carrier 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 carrier argued that it never waived the compensability of the cervical disc injury, but that it had only accepted

an upper extremity strain. The hearing officer concludes that the carrier did not waive its right to dispute compensability, but his own decision appears to believe this conclusion.

The hearing officer stated as follows in the portion of his decision labeled, "Statement and Discussion of the Evidence":

Upon review of the record in this case, I find that the Claimant's compensable injury of _____, does extend to include C5-6 herniation. This was the injury all along. The pain in the right upper extremity was referred pain from the herniation. The Carrier's willingness to accept an unspecified right upper extremity injury at a time well before proper diagnostic and clinical analysis established the nature of the injury cannot shield it from the consequences of what those later tests and evaluations showed. Put another way, the Carrier's acceptance in this case of a vague, presumably minor injury, is not a defense to a later diagnosis of a more serious condition based on the same facts which led to the acceptance of the vague minor injury in the first place. As was noted in Texas Workers' Compensation Commission Appeal No. 94591, [decided June 22, 1994], the immediate effects of an injury are not solely determinative of the nature and extent of the compensable injury.

What we do not understand is how the hearing officer could find no carrier waiver in light of the foregoing statement and applicable Appeals Panel decision. We stated in Texas Workers' Compensation Commission Appeal No. 030767, decided May 19, 2003:

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's own analysis in the present case shows that the situation in the present case is analogous to that in Appeal No. 030767, *supra*, which we find controlling to the present case. We, therefore, reverse the determination by the hearing officer that the carrier did not waive the right to contest the compensability of the claimed injury and render a new decision that the carrier did waive the right to contest the compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022.

EXTENT OF INJURY

The issue of extent of an 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 to 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).

In the present case, there was simply conflicting evidence concerning the extent of the claimant's injury, and it was the province of the hearing officer to resolve these conflicts. Applying the above standard of review, we find that the hearing officer's resolution of the extent-of-injury issue was sufficiently supported by the evidence in the record.

The decision and order of the hearing officer is reversed and rendered in part and affirmed in part.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

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

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Veronica L. Ruberto
Appeals Judge