

APPEAL NO. 040601
FILED MAY 6, 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 consolidating these two dockets was held on February 17, 2004. As to (Docket No. 1), the hearing officer determined that the compensable injury of (date of injury for docket No. 1), includes aggravation of osteoarthritis of the right knee. As to (Docket No. 2), the hearing officer determined that the compensable injury of (date of injury for docket No. 2), includes aggravation of osteoarthritis of the left knee, and that the appellant (carrier) waived the right to contest compensability of aggravation of osteoarthritis of the left knee by not timely contesting the injury in accordance with Section 409.021. The carrier appealed, arguing that the determinations of the hearing officer were against the great weight and preponderance of the evidence, were not supported by the evidence, or were arbitrary and in error. The respondent (claimant) responded, urging affirmance of the disputed determinations.

DECISION

Affirmed.

The carrier argues that the claimant failed to prove by a preponderance of the evidence that he suffered new harm or damage to the structure of the bilateral knees with respect to the aggravation of the osteoarthritis. Extent of injury is a question of fact. It was for the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (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 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer found the medical evidence persuasive in proving that the claimant's compensable right and left knee injuries included aggravation of osteoarthritis of both the right and left knees. In view of the evidence presented, we cannot conclude that the hearing officer's disputed extent-of-injury determinations are 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).

The hearing officer specifically found that the carrier failed to dispute compensability of the claimant's (date of injury for docket No. 2), injury within 7 days or within 60 days from the date it first received written notice of the injury. However, the carrier argues that Section 409.021 does not apply in the instant case because the aggravation of osteoarthritis of the claimant's left knee is an extent-of-injury issue and not one of compensability. We note that pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)), Section 409.021 does not apply to disputes of extent of injury. See Texas Workers' Compensation Commission Appeal No.

023106, decided January 22, 2003. Although Rule 124.3(c) states that Section 409.021 does not apply to an "extent-of-injury" dispute, the rule cannot be interpreted in a way that would simply allow a dilatory carrier to recast the primary claimed injury issue as an "extent issue" and thereby read the mandates of Section 409.021 out of existence entirely. Texas Workers' Compensation Commission Appeal No. 021569, decided August 12, 2002. There is evidence in the record to support that the claimed injury included aggravation of osteoarthritis to the claimant's left knee. As such, the carrier was obligated to dispute the compensability of the aggravation of osteoarthritis of the claimant's left knee in accordance with Section 409.021. We perceive no error in the hearing officer's waiver determination.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **OLD REPUBLIC INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**PRENTICE HALL CORPORATION SYSTEM, INC.
800 BRAZOS
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Chris Cowan
Appeals Judge