

APPEAL NO. 040959
FILED JUNE 16, 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 (CCH) was held on April 7, 2004. With regard to the disputed issues before her, the hearing officer determined that the appellant/cross-respondent (claimant) did not sustain a work-related injury on _____; that the claimed injury of _____, does not extend to include the low back; that the claimant did not have disability; that the respondent/cross-appellant (carrier) did not waive the right to contest compensability of the claimed low back injury; that the carrier is not allowed to reopen the issue of compensability (of an accepted right foot injury) based upon newly discovered evidence that could have reasonably been discovered at an earlier date; and that because the carrier is not allowed to reopen the issue of compensability the claimant sustained a compensable contusion to the right foot on _____.

The claimant appealed, contending that reliance by the hearing officer on a certain statement (which was admitted without objection from the claimant) constituted reversible error, that the claimant's low back injury was a follow on injury based on an altered gait theory, that the carrier cannot "re-cast its defense to avoid waiver" (regarding the claimed low back injury), and that the claimant had disability. The carrier appeals, contending that newly discovered evidence allowed it to contest the claimant's original foot injury and that it had used due diligence in obtaining a statement from a key witness. Both parties filed responses to the other's appeal.

DECISION

Affirmed.

As the multiple issues and appeals suggest, this is a factually convoluted case summarized in the hearing officer's Background Information. Briefly, the claimant, an outside salesperson, contends that he sustained a right foot injury on _____, when a box of brake parts fell, hitting the claimant on the right foot. The injury was reported, the claimant sought medical treatment on April 21, 2003, and was placed on light duty, which arguably the employer provided. It is undisputed that the carrier accepted a right foot contusion injury. In dispute is whether the claimant was aware that he was released to full duty on Thursday, May 21, 2003, by the clinic where he was receiving treatment. The claimant's employment was terminated the same day. The claimant changed treating doctors and the claimant's new doctor took the claimant off work on June 10, 2003, for both the foot injury and a claimed low back injury caused by limping due to the foot injury.

Sometime in July one of the employer's other employees became aware that one of the employer's customers had information that the claimant had hurt his foot (in dispute is whether it was the injured right foot or the left foot) "while trying to disconnect

the GPS Tracking System on his company truck.” Although the salesperson told the employer’s human resource department about this information in July or August 2003, the carrier was not advised of this new information until a benefit review conference (the third one) on November 7, 2003. The carrier in an exchange of information document dated November 21, 2003, made this witness’ name available to the claimant. The witness signed a statement regarding this information on January 5, 2004. A CCH was apparently convened on January 8, 2004, regarding the extent of injury (and perhaps disability based on the carrier’s Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated in July 2003). The carrier first disputed compensability of the accepted right foot injury based on newly discovered evidence in a TWCC-21 dated January 23, 2004, filed with the Texas Workers’ Compensation Commission on February 12, 2004.

The issues of whether the claimant sustained a compensable injury in the manner alleged, the extent of that injury, and whether there was disability as defined in Section 401.011(16) presented questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the fact finder, the hearing officer was charged with the responsibility of resolving the conflicts and inconsistencies in the evidence and deciding what facts the evidence had established. The hearing officer was not persuaded that the claimant sustained the injury as alleged, nor that it extended to the low back. With conflicting evidence the hearing officer was free to believe all, part, or none of the testimony or evidence (Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ)).

Regarding the claimant’s contention that the hearing officer “relied upon the inadmissible evidence. . . from the alleged statement of [Mr. F], the Claimant’s Exhibit 13” we note the statement was admitted without objection from the claimant. What was objected to, and excluded, was a letter from the claimant’s attorney to a notary public.

The claimant prevailed on the newly discovered evidence issue. The hearing officer found that the carrier had accepted a work-related injury to the right foot (Finding of Fact No. 6), that the carrier did not exercise due diligence in acting on the newly discovered evidence (Mr. F’s information) (Finding of Fact No. 10), and that the carrier would not be allowed to reopen the issue of compensability of the right foot injury. Under the provisions of Section 409.021(d), an insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier. Whether due diligence is shown in contesting compensability upon the discovery of new evidence or whether the evidence could have reasonably been discovered earlier are questions of fact for the hearing officer to determine. See Texas Workers’ Compensation Commission Appeal No. 010386, decided March 27, 2001.

In this case the carrier was aware of Mr. F’s information on November 7, 2003, and for one reason or another did not reduce that information to a statement until January 5, 2004, and did not contest compensability of the right foot injury until at least

January 23, 2004 (and arguably not until February 12, 2004). The hearing officer's determination that the carrier had not used due diligence in disputing the right foot injury is supported by sufficient evidence.

The claimant also contends that this is a "re-casting" case where the carrier accepts a minor injury in order to dispute a more serious injury. In this case, the claimant only reported a right foot injury and the carrier had no reason to believe that dropping a box on the right foot caused a back injury. Indeed the claimant's own theory is that the claimed back injury was not caused by the dropped box but developed later due to limping caused by the foot injury. The hearing officer could well believe that notations of limping after a foot injury, do not automatically translate to notice of a low back injury. We further note that one of the reports (dated April 29, 2003) referenced by the claimant to show limping, actually says "minimal to no limp noted today." We perceive no error by the hearing officer regarding this issue.

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are not 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).

We affirm the hearing officer's decision and order.

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

**CORPORATION SERVICE
800 BRAZOS, SUITE 330, ONE COMMODORE PLAZA
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Chris Cowan
Appeals Judge