

APPEAL NO. 040984
FILED JUNE 14, 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 April 2, 2004. With respect to the issues before him, the hearing officer determined that the respondent's (claimant) compensable injury of _____, includes herniations at L2-3, L3-4, and L4-5, but does not include a herniation at L1-2; that Dr. T was not qualified to be the designated doctor in this case; and that no other certification of maximum medical improvement (MMI) and impairment rating (IR) can be adopted in this case. In its appeal, the appellant (carrier) asserts error in each adverse determination. In his response to the carrier's appeal, the claimant urges affirmance. The claimant did not appeal the determination that his compensable injury does not include any pathology at L1-2.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

Initially, we consider the hearing officer's determination that the claimant's compensable injury of _____, includes herniations at L2-3, L3-4, and L4-5. The carrier first argues that the hearing officer erred in reaching the issue of whether the claimant's compensable injury extended to a herniation at L4-5 because only the issue of whether the claimant had herniations at L1-2, L2-3, and L3-4 were before him. We would agree that the stated issue at the hearing did not include L4-5; however, that does not end the inquiry here and indeed, it appears disingenuous, at best, for the carrier to argue that the L4-5 disc level was not at issue. In the benefit review conference report, the benefit review officer lists the disputed issue as "[d]oes the compensable injury include herniated nucleus pulposus (HNP) L1-2, L2-3, L4-5 and/or degenerative disc disease." Thus, it looks like the omission of the L4-5 disc from the disputed issue at the hearing was merely an omission. In addition, the carrier filed a document entitled "Carrier's Arguments" in which it recognized that the question of whether the claimant had herniation at L4-5 was at issue. Finally, in its argument at the hearing, the carrier repeatedly referenced the L4-5 disc and, although, it argued for the hearing officer to reach the opposite conclusion, the carrier, nonetheless, acknowledged that the issue of whether the claimant's compensable injury extended to a herniation at L4-5 was before the hearing officer.

Turning to the merits of the extent issue, we note that there was sharply conflicting evidence on the question of whether the claimant had herniations at L2-3, L3-4, and L4-5 and whether they resulted from his compensable injury of _____. That issue presented a question 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 trier of fact, the hearing officer resolves the

conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer was acting within his province as the fact finder in giving more weight to the evidence tending to demonstrate that the claimant had herniations at L2-3, L3-4, and L4-5 that were causally related to his on-the-job lifting injury. Nothing in our review of the record reveals that the challenged determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). This is true even though another fact finder may well have drawn different inferences from the evidence and reached a different result. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Next, we consider the issue of whether Dr. T was properly appointed as the designated doctor in accordance with Section 408.0041 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5 (Rule 130.5). The hearing officer determined that Dr. T was not properly appointed by the Texas Workers' Compensation Commission (Commission) to serve as the designated doctor under Texas Workers' Compensation Commission Appeal No. 030737-s, decided May 14, 2003, because the procedures used by the doctor treating the claimant were not within the scope of practice of Dr. T. The hearing officer's decision was consistent with the interpretation given to Section 408.0041 and Rule 130.5 in Appeal No. 030737-s; however, in Texas Workers' Compensation Commission Appeal No. 040633-s, decided May 7, 2004, we retreated from our decision in Appeal No. 030737-s based upon Commission Advisory No. 2004-03, decided April 19, 2004, where the Executive Director stated that the "phrase 'scope of practice' as it is commonly used is synonymous with a doctor's licensure." Under the advisory, because Dr. T is a medical doctor, he satisfies the requirement of having the same licensure as the doctor treating the claimant and he was, therefore, properly appointed as the designated doctor. Accordingly, the hearing officer's determination that Dr. T was not properly appointed as the designated doctor is reversed and a new decision rendered that Dr. T was properly appointed to serve as the designated doctor in this case.

Even though we have reversed the determination that Dr. T was not properly appointed as the designated doctor in this instance, we cannot adopt Dr. T's certification of MMI and IR in light of the resolution of the extent-of-injury issue. As noted above, the hearing officer found, and we affirmed, that the claimant had herniations at L2-3, L3-4, and L4-5, as a result of his compensable injury. In his narrative report and in his responses to Deposition on Written Questions, Dr. T consistently opines that the claimant "has no evidence on diagnostic study, physical exam, or by history of any pathological condition or injury to the lumbar spine as a result of the event that occurred in the workplace _____." His opinion in that regard is not consistent with the hearing officer's determination that the claimant has herniated discs at three lumbar levels. Thus, we remand the MMI and IR issues to the hearing officer to ask Dr. T to determine the claimant's MMI date and IR with the understanding that the injury includes herniations at L2-3, L3-4, and L4-5. Dr. T should be advised that he is to

accept as a given that the claimant has those herniations and to certify MMI and assign an IR based upon that understanding. If Dr. T cannot or will not do so, then it will become necessary to appoint a second designated doctor.

The hearing officer's determination that the claimant's injury includes herniated discs at L2-3, L3-4, and L4-5 is affirmed. The determination that Dr. T was not properly appointed to serve as the designated doctor in this case is reversed and a new decision rendered that Dr. T was properly appointed to serve as the designated doctor. The MMI and IR issues are remanded for the hearing officer to ask Dr. T to reconsider MMI and IR based upon the injury as found herein.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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

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

Elaine M. Chaney
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Edward Vilano
Appeals Judge