

APPEAL NO. 041593
FILED AUGUST 23, 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 June 3, 2004. The hearing officer determined that the _____, compensable injury of respondent (claimant) extends to include the herniated discs at L4-5 and L5-S1, that claimant had disability from November 21, 2003, through the date of the hearing, and that the Texas Workers' Compensation Commission (Commission) has jurisdiction to determine the compensability of the herniated discs at L4-5 and L5-S1. Appellant (carrier) appealed these determinations on sufficiency grounds and also contends that the hearing officer misapplied the law regarding *res judicata*. The file does not contain a response from claimant.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that the Commission had jurisdiction to determine the compensability of the herniated discs at L4-5 and L5-S1. Carrier asserted that this issue had been raised at a prior hearing in sequence number 01 regarding the _____, injury (the prior hearing), and that the hearing officer's determinations had been affirmed by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 032738, decided December 8, 2003. At the prior hearing, the hearing officer considered this issue: "Does [c]laimant's compensable injury of _____, include or extend to include an injury to the cervical, thoracic, and lumbar spine . . ." In a decision and order signed September 22, 2003, the hearing officer determined that the _____, injury "includes or extends to include a right upper arm strain and a lower back strain. Claimant's compensable injury . . . does not include or extend to include any injury to the cervical spine, thoracic spine, head injury syndrome, right knee injury, right shoulder injury, right wrist injury, or lesion to the right buttock." Claimant testified at the prior hearing and complained that doctors did not "check his back" and do diagnostic testing to see if something was wrong. The medical records show that Dr. M had been recommending a lumbar MRI for many months before an MRI was finally done. The October 2003 MRI report showing disc herniations at L4-5 and L5-S1 was not performed until after the prior hearing.

The doctrine of *res judicata*, generally speaking, prevents the relitigation of a claim or cause of action that has been finally adjudicated as well as related matters that, with the use of due diligence, should have been litigated in the prior suit. Texas Workers' Compensation Commission Appeal No. 030055, decided February 26, 2003. It has been found applicable by the Appeals Panel to the dispute resolution process. See Texas Workers' Compensation Commission Appeal No. 951111, decided August 23, 1995. We agree that the hearing officer did not err in determining that the

Commission had jurisdiction to decide the issue regarding extent of injury in this case. Claimant could not have raised the issue of whether the injury extended to disc herniations because, at the time of the August 21, 2003, prior hearing, the lumbar MRI had not yet been performed. In the decision and order after the prior hearing, the hearing officer made a determination that claimant sustained a lower back strain. This did not preclude later litigation of whether the injury was more serious than a lower back strain, once diagnostic testing had been done. If the lumbar MRI evidence had been available at the time of the prior hearing and the hearing officer had limited the injury to a lower back strain only, then *res judicata* might have barred relitigation of whether the injury extended to disc herniations. See Texas Workers' Compensation Commission Appeal No. 031317, decided June 25, 2003. However, because the evidence was not available at the time of the prior hearing, we conclude that the hearing officer did not err.

Carrier notes that claimant has appealed the Appeals Panel's decision in Appeal No. 032738, *supra*, to the district court. During judicial review of an Appeals Panel decision on any disputed issue relating to a workers' compensation claim, the Commission retains jurisdiction of all other issues related to the claim. Section 410.207. The Appeals Panel did not make a decision regarding whether the _____, injury extends to include disc herniations at L4-5 and L5-S1 because that issue was not before the Appeals Panel in Appeal No. 032738. We conclude that the Commission retained jurisdiction of the issue of extent to the disc herniations at L4-5 and L5-S1.

We have reviewed the complained-of determinations regarding extent of injury and conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determinations are supported by the record and 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.

According to information provided by carrier, the true corporate name of the insurance carrier is **ROYAL INDEMNITY COMPANY** 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.**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge