

APPEAL NO. 041719  
FILED SEPTEMBER 7, 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 June 15, 2004, with the record closing on June 16, 2004. The hearing officer determined that the appellant's (claimant) compensable injury of \_\_\_\_\_, does not extend to and include the diagnosed conditions of scoliosis, congenital anomalies, degenerative changes and/or bulges/herniations in the thoracic spine (referred to collectively as the claimed conditions); that the respondent (carrier) has not waived the right to contest compensability of the extent of the compensable injury to the thoracic spine by not timely contesting the existence of the injury in accordance with Section 409.021 and 409.022; and that the claimant is entitled to travel expenses for medical treatment. The travel expense determination has not been appealed and has become final pursuant to Section 410.169.

The claimant appeals basically on sufficiency of the evidence grounds, contending that the claimed conditions have been aggravated by the compensable injury and that the carrier is attempting to avoid the mandates of Section 409.021 by recasting the waived injury as an extent-of-injury issue. The claimant also appeals matters not at issue in this case. The carrier responds, urging affirmance and citing TIG Premier Ins. Co. v. Pemberton and Texas Workers' Compensation Commission, 127 S.W.3d 270, (Tex. App.-Waco 2003, pet denied).

DECISION

Affirmed.

In a prior CCH involving this claimant, the same hearing officer determined (among other things) that the claimant sustained a compensable injury "to his back and neck on \_\_\_\_\_," and that the carrier had waived the right to contest compensability by not timely contesting the injury in accordance with Section 409.021 and 409.022. That decision was affirmed by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 031055-s, decided June 19, 2003. That decision was not appealed to district court. It is relatively undisputed that the current claimed conditions preexisted the date of injury. The claimant is proceeding on the basis that the compensable injury aggravated, enhanced and/or accelerated the claimed conditions and that the carrier has waived the right to contest compensability of the claimed conditions. The carrier defends on the basis that the claimed conditions were not aggravated by the compensable injury and that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(e) (Rule 124.3(e)) and the Pemberton, *supra*, case provide that the waiver provisions in Section 409.021 do not apply to disputes of extent of injury cases.

## EXTENT OF INJURY

Although the claimed conditions were largely preexisting (the claimant had been diagnosed with congenital scoliosis over 20 years before) there were some records which refer to an aggravation or exacerbation of the claimed conditions by the compensable injury, and other records which indicate an increased curvature of the spine after the compensable injury. The hearing officer found that the compensable injury neither caused, nor caused “the acceleration of the disease process,” of the claimed conditions. The hearing officer’s determination on this issue is supported by the evidence.

## THE CARRIER WAIVER OF AN EXTENT OF INJURY

The claimant appealed, and the hearing officer in Appeal No. 031055-s, *supra*, found, and further commented in this decision, that the compensable injury was “to the global areas of his back and neck.” While it was determined in Appeal No 031055-s that the carrier had waived the right to dispute compensability pursuant to Section 409.021, Rule 124.3(e) provides that the waiver provision of Section 409.021 “does not apply to disputes of extent of injury.” That rule has been validated by the Waco Court of Appeals in Pemberton which held that the waiver provision of Section 409.021(c) applied only to the carrier’s initial response to a notice that an employee has been injured. The Appeals Panel has distinguished Pemberton in cases where the carrier has attempted to recast the original injury as an extent-of-injury issue. See Texas Workers' Compensation Commission Appeal No. 040918, decided June 10, 2004, and Texas Workers' Compensation Commission Appeal No. 041097, decided June 23, 2004. The hearing officer in this case specifically found that the claimed conditions are “not a recasting of the dispute of the existence of a compensable injury and is a valid contest of the extent of the claimant’s compensable injury to the neck and back.”

The claimant raises some points in his appeal to the effect that he was able to work and be active with his claimed conditions prior to the compensable injury and is unable to do so after the injury, therefore the compensable injury must have somehow aggravated or exacerbated the preexisting conditions. The claimant had the burden to prove that the compensable injury extends to and includes or aggravated the claimed conditions. (Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ)). Our review of the record reveals that the hearing officer’s determinations are supported by sufficient evidence and are not so contrary to 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). Thus, there is no basis for us to disturb the hearing officer’s determinations on appeal.

Accordingly, the hearing officer's decision and order are affirmed.

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

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

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Veronica L. Ruberto  
Appeals Judge

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Margaret L. Turner  
Appeals Judge