

APPEAL NO. 041822
FILED SEPTEMBER 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 was held on July 1, 2004. The hearing officer resolved the disputed issues by determining that the respondent/cross-appellant (claimant) sustained a compensable injury on _____; that she had disability from November 24, 2003, through February 15, 2004; that the appellant/cross-respondent (self-insured) waived the right to contest compensability to the right knee injury by not timely contesting it in accordance with Section 409.021; and that the compensable injury does not extend to the right knee diagnoses of advanced degenerative arthritis and chondromalacia. The self-insured appeals the compensability, disability, and wavier determinations. The claimant appeals the extent-of-injury determination. Both parties responded to the opposition's request for review.

DECISION

Affirmed in part; reversed and rendered in part.

Whether the claimant sustained an injury in the course and scope of her employment on _____, and whether she had disability were factual questions for the hearing officer to resolve. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (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, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). Nothing in our review of the record indicates that the hearing officer's compensability and disability determinations are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The evidence reflects that a Payment of Compensation Form "cert-21," which was dated May 22, 2003, and indicated that benefits would be paid as they accrued, was filed with the Texas Workers' Compensation Commission (Commission) on May 23, 2003. Thereafter, two Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21s) were filed with the Commission on August 11, 2003, indicating that the self-insured disputed the claimed injury. The hearing officer determined that because the self-insured failed to contest the compensability of the claim within 60 days after first receiving written notice of the injury and because there was no "showing of newly discovered evidence that would excuse a late contest of compensability," the self-insured waived the right to contest compensability of the claimant's right knee. The self-insured argues that the hearing officer erred in making this determination because the

written notice given on May 22, 2003, was to the claimant's place of employment, MD, and that under Chapter 503, the employer and the self-insured should be treated as distinct entities, with the self-insured acting in the capacity of a carrier for notice purposes. That is to say, the self-insured argues that written notice of injury to MD was not notice to the self-insured. We previously considered and rejected this argument in Texas Workers' Compensation Commission Appeal No. 992620, decided January 6, 2000.¹ Under the facts of this case, we perceive no error in the hearing officer's resolution of the waiver issue.

The claimant argues that the dispute regarding the compensability of the diagnoses of advanced degenerative arthritis and chondromalacia of the right knee should have been resolved based on the outcome of the waiver issue and is not an extent-of-injury issue as determined by the hearing officer. We agree. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)) provides that Section 409.021, regarding the initiation of benefits and carrier waiver, does not apply to "extent of injury" disputes. Notwithstanding, we have held that the rule cannot be interpreted in a way that would allow a dilatory carrier to recast the primary claimed injury issue as an "extent issue" and thereby avoid the mandates of Section 409.021. See Texas Workers' Compensation Commission Appeal No. 022454, decided November 18, 2002; Texas Workers' Compensation Commission Appeal No. 021907, decided September 16, 2002; Texas Workers' Compensation Commission Appeal No. 021569, decided August 12, 2002; and Texas Workers' Compensation Commission Appeal No. 022183, decided October 9, 2002. In Texas Workers' Compensation Appeal No. 041738-s, decided September 8, 2004, we stated:

the injury that becomes compensable by virtue of waiver is not necessarily limited by the information listed on the first written notice of injury. Rather the nature of the injury will be defined by that information that could have been reasonably discovered in the carrier's investigation prior to the expiration of the waiver period.

Based on the evidence presented in this case, the hearing officer determined that the self-insured waived the right to contest compensability of the claimant's right knee injury. The legal consequence of waiver in this case is that the self-insured may not prevail on an issue regarding extent of injury that concerns the waived injury itself. As such, the advanced degenerative arthritis and chondromalacia diagnoses of the right knee are part of the compensable right knee injury.

While not raised by either party on appeal, we distinguish this case from the recent Texas Court of Appeals decision in TIG Premier Insurance Company v. Pemberton and Texas Workers' Compensation Commission, 127 S.W.3d 270, 274 (Tex. App.-Waco 2003, pet. denied). The issue in Pemberton, *supra*, was a clear extent-of-injury case; that is to say, the complained-of condition, deep vein thrombosis (DVT), developed some time after the original injury, and the issue was whether the

¹ While a Motion for Summary Judgment was granted in this case in a District Court, there is no indication that the motion was granted on the basis that the Appeals Panel had incorrectly interpreted the provisions of Chapter 503.

DVT was causally related to the original compensable injury, and whether the carrier waived the right to dispute the compensability of the DVT. Under the circumstances of the Pemberton case, the Court of Appeals 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. In the instant case, the diagnoses of advanced degenerative arthritis and chondromalacia of the right knee were part of the right knee injury, which was waived by the self-insured. Therefore, the waiver provision of Section 409.021 applies. Pemberton.

The hearing officer's compensability, disability, and waiver determinations are affirmed. The determination that the compensable injury does not extend to advanced degenerative arthritis and chondromalacia of the right knee is reversed and a new decision rendered that the self-insured waived the right to contest the compensability of aforementioned conditions because it waived the right to contest compensability of the right knee injury.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**MANAGER
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Chris Cowan
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Edward Vilano
Appeals Judge