

APPEAL NO. 042316
FILED NOVEMBER 12, 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 commenced on June 28, 2004, and then continued on August 23, 2004. The hearing officer decided that the appellant's (claimant herein) compensable injury of (date of injury), did not extend to include the claimant's right knee condition after (alleged date of injury no. 1); that the claimant's compensable injury of (date of injury), does not extend to include the claimant's right knee injury after (alleged date of injury no. 2); and that the claimant's compensable injury of (date of injury), does not extend to and include right orbital cellulitis and seizures and/or posttraumatic headaches. The claimant appeals, requesting we reverse these determinations. There is no response to the claimant's request for review from the respondent (carrier herein) in the appeal file.

DECISION

We affirm in part and we reverse and render in part.

The claimant was injured on (date of injury), when he fell approximately 15 feet off a truck. It was undisputed that the claimant suffered multiple injuries in his fall. The parties stipulated that the claimant's compensable injury includes a concussion, a contusion to the forehead, injury to the cervical spine, loss of an upper bridge, and an anterior cruciate ligament tear, a lateral meniscus tear, a condral fracture and a medial femoral condyle of the right knee. The claimant underwent knee surgery in 1993, 1994, and 1996. The carrier paid for all of these surgeries. The claimant also underwent extensive treatment for his head injuries and his cervical injury. On October 20, 1995, Dr. S, M.D., the designated doctor, certified on a Report of Medical Evaluation (TWCC-69) that the claimant has a 29% impairment rating (IR) as a result of his compensable injury. Dr. S's IR combined three components. In regard to the claimant's head injury, Dr. S assessed 10% whole person impairment for complex integrated cerebral function deficits. Dr. S assessed 11% whole body impairment for the claimant's cervical spine injury. Finally, Dr. S assessed 11% whole body impairment for the claimant's right knee injury. Dr. S then combined these impairments to arrive with the 29% IR for the compensable injury. Both parties stated at the CCH that neither party ever disputed Dr. S's IR certification. Both parties also stated at the CCH that all temporary income benefits, impairment income benefits and supplemental income benefits (SIBs) due in this case had been paid.

In 2003 the claimant was diagnosed with right orbital cellulitis. The claimant's doctors initially related this condition to the compensable injury of (date of injury), and the claimant underwent surgery for this condition. Later, upon receiving additional medical information concerning the claimant's medical history from the carrier, some doctors changed their opinions concerning the relatedness of the right orbital cellulitis to the compensable injury. At this point the carrier apparently decided to dispute the

extent of the claimant's injury regarding the right orbital cellulitis as well as the right knee and seizures and/or posttraumatic headaches.

Initially there was a great deal of confusion as how to frame the disputed issue at the CCH in regard to the right knee. The carrier's contention that the compensable injury does not include the right knee is based upon its contention that the claimant suffered intervening right knee injuries. The carrier contends that the claimant injured his right knee on or about (alleged date of injury no. 1), when he stepped over a dishwasher and again on (alleged date of injury no. 2), when he felt his knee pop when he squatted. The claimant argued that neither of these events constituted intervening injuries.

The disputed issues really do not specify the nature of what additional right knee injury the claimant was alleged to have suffered on (alleged date of injury no. 1), and (alleged date of injury no. 2). Nor is this clear from the voluminous medical records in evidence. Also, there is really no issue or evidence whether the alleged intervening injuries were the sole cause of the claimant's right knee condition. See Texas Workers' Compensation Commission Appeal No. 93226, decided May 13, 1993; Texas Workers' Compensation Commission Appeal No. 93864, decided November 10, 1993.

Part of the problem with grappling with any of the extent issues before the hearing officer is that they are not in the context of any income benefit dispute. All income benefits that will ever be paid in this case have clearly been paid and, thus, what this case is really about is determining future medical benefits. In essentially ending the claimant's right knee injury in 1994 by finding claimant's compensable right knee injury had resolved by May 23, 1994, the hearing officer seems to be limiting the claimant's right to lifetime medical benefits for the compensable injury which are provided under Section 408.021. Absent a finding of sole cause, this finding is legally incorrect. Nor does it appear to be supported by the evidence.

However, our basis for reversing the decision of the hearing officer's decision regarding the claimant's right knee injury is Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 130.102(g) (Rule 130.102(g)) and Texas Workers' Compensation Commission Appeal No. 040150-s, decided March 8, 2004. In Appeal No. 040150-s we held that pursuant to Rule 130.102(g) a carrier waived the right to dispute the extent of an injury where: (1) the carrier contends that the compensable injury does not extend to a condition or body part; (2) an IR includes impairment for that condition or body part; and (3) the IR has not been challenged before the first quarter SIBs period expired. These three conditions clearly apply in the present case. We therefore reverse the decision of the hearing officer that the claimant's compensable injury does not include an injury to his right knee after (alleged date of injury no. 1), and after (alleged date of injury no. 2), and render a decision that the claimant's compensable injury continues to include an injury to his right knee. We order the carrier to pay for reasonable and necessary medical treatment for the claimant's compensable right knee injury for the claimant's lifetime as provided by the 1989 Act.

We note that the attempt to cut off medical treatment to the claimant's right knee is particularly egregious in this particular case where the Commission-selected designated doctor clearly stated in his report that the claimant will probably need a total knee replacement as a result of his injury in 20 to 30 years. We would observe that any attempt to cut off lifetime open medical benefits under the guise of disputing the extent of injury is inherently suspect.

As far as the hearing officer's determination that the claimant's injury does not include seizures and posttraumatic headaches, we note that the designated doctor diagnosed traumatic brain injury with residuals and assessed a 10% whole body impairment for complex integrated cerebral function deficits. In discussing the claimant's head injury the designated doctor discusses the claimant's headaches and seizures. The designated doctor specifically notes that the claimant will require further medical treatment for his headaches. In light of the evidence in this case, we find that the hearing officer's determination that the claimant's injury does not include seizures and posttraumatic headaches is against the great weight and preponderance of the evidence and we reverse this determination and render a new decision that the claimant's compensable injury does include seizures and posttraumatic headaches.

Finally, we address the hearing officer's determination that the claimant's injury does not extend to include right orbital cellulitis. This was a condition that was not diagnosed until 2003 and is obviously not discussed in the designated doctor's 1995 report. We have held previously that the extent of injury is a question of fact for the hearing officer. See *Texas Workers' Compensation Commission Appeal No. 93613*, decided August 24, 1993. 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). The trier of fact may believe all, part, or none of the testimony of any witness. *Taylor v. Lewis*, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); *Aetna Insurance Co. v. English*, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. *National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto*, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). In the present case, there was simply conflicting evidence as to whether or not the claimant's compensable injury extended to include right orbital cellulitis, and it was the province of the hearing officer to resolve these conflicts. Applying the above standard of review, we find that the hearing officer's decision that

the claimant's compensable injury did not extend to include right orbital cellulitis was sufficiently supported by the evidence in the record. We, therefore, affirm this determination.

In summary, we reverse the hearing officer's extent-of-injury determinations concerning the right knee, posttraumatic headaches and seizures and render a new decision that the claimant's compensable injury of (date of injury), extends to include the claimant's right knee, posttraumatic headaches and seizures. We affirm the hearing officer's determination that the claimant's compensable injury does not extend to include right orbital cellulitis.

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 STREET
DALLAS, TEXAS 75201.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

CONCUR IN THE RESULT:

Robert W. Potts
Appeals Judge