APPEAL NO. 050005
FILED FEBRUARY 16, 2005

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 December 7, 2004. The hearing officer resolved the disputed issues by deciding that the _____, compensable injury does extend to and include disc protrusion at L5-S1 but not disc herniation; that the appellant (self-insured) waived the diagnosis in accordance with Sections 409.021 and 409.022; and that the respondent (claimant) has had disability from the compensable injury from August 10, 2004, through the date of the CCH. The self-insured appealed, arguing that the hearing officer's decision that the compensable injury extended to include disc protrusion at L5-S1 was an abuse of discretion and contends that the determination went beyond the certified issue and added an issue over the objection of the self-insured. The self-insured additionally disputes the disability and waiver determinations. The appeal file did not contain a response from the claimant.

DECISION

Affirmed in part and reversed and rendered in part.

The waiver issue to be decided at the CCH was worded as follows: "Has the [self-insured] waived the right to contest compensability of the L5-S1 disc condition by not timely contesting the diagnosis in accordance with Texas Labor Code Sections 409.021 and 409.022?" The hearing officer found that the self-insured had notice of the injury as of _____, and that a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing the lumbar disc problems was not filed until June 10, 2004. The hearing officer concluded that the self-insured waived the diagnosis in accordance with Sections 409.021 and 409.022. Section 409.021(a), effective for a claim for workers' compensation benefits based on a compensable injury that occurred on or after September 1, 2003, provides that not later than the 15th day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall begin the payment of benefits or notify the Texas Workers' Compensation Commission (Commission) in writing of its refusal to pay. However, Section 409.021(a-1) provides that an insurance carrier's failure to comply with the time frame specified above does not waive the carrier's (self-insured in this case) right to contest the compensability of the injury but rather is an administrative violation. If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the carrier waives its right to contest compensability. Section 409.021(c). In the instant case, the self-insured filed a TWCC-21 disputing the claimant's lumbar conditions within 49 days of receiving notice of an injury. Therefore, the hearing officer's decision that the self-insured waived the diagnosis in accordance with Sections 409.021 and 409.022 is reversed and a new decision is rendered that the self-insured did not waive the right to contest compensability of the L5-S1 disc condition.

The self-insured contends that the hearing officer correctly determined that the compensable injury does not extend to the L5-S1 herniation but then went beyond her authority in deciding that the compensable injury does include aggravation of the disc protrusion at L5-S1. The self-insured argues that the extent-of-injury issue to be determined at the CCH was by its terms limited to the L5-S1 herniation. We have previously held that the 1989 Act created an "issue-driven" system of adjudication that generally restricts a hearing officer to resolve the issue before the hearing officer and not to exceed the scope of that issue. *See* Texas Workers' Compensation Commission Appeal No. 990164, decided March 15, 1999; Texas Workers' Compensation Commission Appeal No. 990229, decided March 19, 1999. Section 410.151(b) of the 1989 Act provides that an issue not raised at the benefit review conference may not be considered at the CCH unless the parties consent to the additional issue or the hearing officer finds good cause for adding the issue.

Although the self-insured correctly points out that it objected at the CCH to the litigation of injury to any other level of the spine or any other diagnosis, there is documentary evidence in the record that was admitted without objection, which supports the determination of the hearing officer. Further, what was actually in dispute was the claimant's disc condition at L5-S1 and the hearing officer determined that condition was a protrusion. We perceive no error. In addition, since disability was also an issue, the hearing officer did not err in determining the nature of the compensable injury in order to be able to determine whether the claimant was unable to obtain and retain employment because of the compensable injury. *See* Texas Workers' Compensation Commission Appeal No. 031790, decided August 28, 2003.

The self-insured contends that the claimant's compensable injury was limited to a tailbone contusion so the disability determination must be reversed and rendered. We have affirmed the determination that the compensable injury extends to disc protrusion at L5-S1. Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The hearing officer found that the claimant had disability from August 10, 2004, through the date of the CCH. The question of disability presented a question of fact for the hearing officer to resolve. The hearing officer, as the finder of fact is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the fact finder, the hearing officer was charged with the responsibility of resolving the conflicts and inconsistencies in the evidence and deciding what facts the evidence had established. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer was acting within her province as the fact finder in resolving the conflicts and inconsistencies in the evidence and finding the stated period of disability. Nothing in our review of the record reveals that the determination that the claimant had disability from August 10, 2004, through the date of the CCH, is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, no sound basis exists for us to disturb that determination on appeal.

We affirm the hearing officer's determination that the compensable injury of _____, extends to include disc protrusion at L5-S1 but not disc herniation and that the claimant has had disability from August 10, 2004, through the date of the CCH. We reverse the hearing officer's determination that the self-insured waived the diagnosis in accordance with Sections 409.021 and 409.022 and render a new decision that the self-insured has not waived the right to contest compensability of the L5-S1 disc condition.

The true corporate name of the insurance carrier is **a governmental entity that self-insures, either individually or collectively through the TEXAS ASSOCIATION OF SCHOOL BOARDS RISK MANAGEMENT FUND** and the name and address of its registered agent for service of process is

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge