

## APPEAL NO. 950140

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 15, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The original issue at the CCH was whether the appellant\cross-respondent (carrier herein) properly and specifically contested compensability according to Section 409.022. The hearing officer, at the request of the parties, added the following issues: 1. Does the Texas Workers' Compensation Commission (Commission) have jurisdiction to make a determination on the timeliness and the sufficiency of carrier's contest of compensability in view of the fact that the Appeals Panel has already decided the claim is not compensable; 2. Has respondent/cross-appellant (claimant herein) waived his right to raise the issue of timeliness and the sufficiency of carrier's contest of compensability since the claim has been determined not compensable by the Appeals Panel. The hearing officer concluded that the Commission had jurisdiction to decide the timeliness and sufficiency of the carrier's contest of compensability and that the claimant had not waived the issue. The hearing officer also concluded that the carrier timely and sufficiently contested compensability in accordance with Section 409.022. The carrier appeals the hearing officer's determinations as to jurisdiction and waiver; the claimant appeals the determination as to the sufficiency of the carrier's contest of compensability.

### DECISION

We reverse the decision of the hearing officer and render a new decision that the claimant has waived the issue of whether the carrier's dispute was sufficient to dispute compensability.

The essential facts of the case are not in dispute. The claimant was working for (employer), on (date of injury), when, he alleged, he slipped and fell down the steps of the bus. The claimant pursued a claim for workers' compensation benefits due to his alleged injury, but carrier refused to pay benefits. The claimant went to a benefit review conference (BRC) and an earlier CCH on the issue of whether he suffered a compensable injury on (date of injury). The hearing officer at the earlier CCH ruled that the claimant failed to establish that he suffered a compensable injury. The claimant appealed that decision, and in Texas Workers' Compensation Commission Appeal No. 92041, decided March 19, 1992, the Appeals Panel affirmed the decision of the hearing officer. According to the claimant's testimony at the CCH in the present case, he then appealed the decision of the Appeals Panel to District Court in (city) County, Texas, where it was still pending at the time of the CCH in the present case.

Claimant later filed a request for another BRC on the issue of whether the carrier had properly and specifically disputed compensability of injury as required by Section 409.022. It is this request and subsequent BRC that led to the CCH now under review.

We first must consider whether the Commission has jurisdiction over the issue of whether the carrier disputed compensability. The carrier's argument seemed to hinge on its contention that we have previously ruled on the issue of compensability and that issue is now pending in the district court. However, the issue of compensability--whether the claimant suffered an injury in the course and scope of his employment--and the issue of whether the carrier timely and sufficiently disputed compensability are not one and the same issue. We have on numerous occasions determined the issue of sufficiency of a dispute of compensability under Section 409.022. Carrier fails to make any convincing argument as to why we fail to have jurisdiction to do so under the circumstances of the present case.

The carrier's argument as to waiver is more persuasive. Section 409.022 provides as follows:

- (a) An insurance carrier's notice of refusal to pay benefits under Section 409.021 must specify the grounds for the refusal.
- (b) The grounds for the refusal specified in the notice constitute the only basis for the insurance carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date.
- (c) An insurance carrier commits a violation if the insurance carrier does not have reasonable grounds for a refusal to pay benefits, as determined by the commission. A violation under this subsection is a Class B administrative violation.

We have previously held that unless the issue of timely dispute of compensability is raised at a benefit review conference (BRC) that it may not be raised later in the dispute resolution process without the consent of the parties. See Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991; Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991; Texas Workers' Compensation Commission Appeal No. 94109, decided March 8, 1994; Texas Workers' Compensation Commission Appeal No. 94425, decided May 18, 1994. The question here is somewhat different in that the claimant has raised the issue at the BRC, but in this case at a second BRC, when the issue of compensability was in issue at an earlier BRC and then taken to CCH, appealed to the Appeal Panel and appealed to the District Court. It would certainly appear incongruous to hold that an issue is waived if not raised at the initial BRC, but to find that issue may be revived in a later proceeding. More importantly, it would appear that the issue of timely contest is so closely linked to the issue of compensability that to determine the issue of compensability without determining the threshold issue of whether compensability is in issue would make orderly adjudication of a

claim virtually impossible. We understand and agree with the hearing officer that the 1989 Act contemplates an issue driven system. Even so the rationale for having such a system is so that only those issues that cannot be resolved end up in the dispute resolution process, not so that the adjudication of different issues in the same case can separately go through the Commission and courts resulting in conflicting determinations as to whether or not a claimant is entitled to benefits. Such a system would obviously be untenable.

This does not mean that there are some related issues that may not separately go through the dispute resolution process. In Texas Workers' Compensation Commission Appeal No. 950070, decided February 24, 1995, we decided that disability was still in issue, even though the claimant had earlier been denied benefits because of a bona fide offer of employment. In that case there was evidence that after the employer made the bona fide offer of employment based upon the light duty release of one treating doctor, the claimant changed to a second treating doctor who placed him on an off work status. We held in that case that in adjudicating of bona fide offer of employment that the claimant had not waived the issue of disability, because one may go in and out of disability. However in Texas Workers' Compensation Commission Appeal No. 941333, decided November 21, 1994, we held that any dispute as to the extent of injury was waived when the issue of impairment rating had been determined. The situation in the present case is obviously more similar to that in Appeal No. 941333 than in Appeal No. 950070, *supra*. We therefore hold that the issues of contest of compensability of the injury and compensability are so interlinked that to have the latter determined without raising and determining the former will constitute waiver of the former.

The issue of the sufficiency of the contest of compensability having been waived, it is not properly before us. We therefore need not address it.

We reverse the decision of the hearing officer and render an new decision that the claimant had waived the issue of whether the carrier's dispute was sufficient to dispute compensability.

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Philip F. O'Neill  
Appeals Judge