APPEAL NO. 981110

Following a contested case hearing (CCH) held in (city), Texas, on April 30, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, (hearing officer), resolved the disputed issue by finding that the respondent's (claimant) treating doctor, (Dr. B), concluded that claimant's bulging disc condition at L3-4 is related to the original lifting accident on (date of injury), and by concluding that claimant's lumbar disc condition at L3-4 is related to the original lifting accident on (date of injury). The appellant (carrier) appeals the hearing officer's determination contending that the medical evidence of causation is insufficient and pointing to the length of time that passed from claimant's original injury to her new complaints of back pain and to the fact that in the meantime she delivered and cared for three babies. The file does not contain a response from claimant.

DECISION

Affirmed.

Claimant testified that on (date of injury), while lifting a heavy basket of raw chicken at the restaurant where she was employed, she injured her low back; that she was treated conservatively by Dr. B for a bulging disc at L4-5; that in 1993 Dr. B discussed both cortisone shots in her back and surgery and that she declined these procedures due to her fear of them; that she was married in December 1992; that she quit her job in May 1993 because she could not stand for long periods and because she was pregnant; that she delivered her babies in November 1993, December 1995, and August 1997; that she cared for her babies with the help of her husband, supplemented by help from her mother and sister; that she did not lift her children after they were old enough to walk; that she had low back pain ever since the injury and could not sit or stand for long periods; that during her pregnancies she alleviated her pain with aspirin and Down's pills; that at other times she alleviated her pain with medication prescribed by Dr. B; and that she returned to Dr. B in January 1998 and he advised her that testing revealed a bulging disc at L3-4 and that it was related to her original injury.

Dr. B's records indicate that on October 13, 1992, he diagnosed lumbar sprain/strain; that an MRI report of October 26, 1992, revealed a disc bulge at L4-5; that on October 29, 1992, he added the diagnosis of spondylosis; that on November 11, 1992, he released claimant for work with various restrictions; that he saw her on follow-up on October 8, 1993, at which time she was near full term with her pregnancy; that on October 12, 1993, he signed a Report of Medical Evaluation (TWCC-69) certifying that she reached maximum medical improvement on October 8, 1993, with a five percent impairment rating; that on February 7, 1994, he saw her on follow-up, reporting that, without any history of trauma, she started having pain again as bad as it ever was, that her left leg wanted to give way, and that he prescribed Flexeril and Lodine; and that on January 7, 1998, he saw claimant on follow-up, reporting that claimant has had three children, that the pain has never gone away, that they had at some time discussed cortisone shots and surgery, that she has been trying to live with her pain, that her right leg gives way, and that an MRI was ordered and conservative treatment continued. The

MRI report of January 13, 1998, revealed a disc bulge at L3-4, with indentation of the thecal sac but no displacement of the nerve roots, which was not present on the October 26, 1992, study, and the disc bulge at L4-5.

On January 30, 1998, Dr. B wrote that he reviewed both MRI reports, that claimant has not had a new injury either by history or by physical exam or by MRI, and that the different findings on the recent MRI are, in his opinion, "an aggravation or worsening of the original injury." Dr. B wrote on February 13, 1998, that in his opinion, the first bulging disc was from a lifting accident; that the second bulging disc is still from a lifting accident; that it could have been damaged; that the pathophysiologic possibility is that the second disc's bulging could have been caused by damage at the time of the injury, but did not show the bulging until later; that the second possibility is that the first disc was damaged and since the biomechanics were abnormal, that affected the disc above it and it started bulging later; and that "medically, both bulging discs were related to the original lifting accident." Dr. B wrote on March 18, 1998, that he cannot come up with another explanation and stands by the explanation in his previous letter. Dr. B further stated: "it is just fact that if something happens to one disc, the disc above or below is at risk. It is just a medical fact. I believe it is related, but I cannot prove it."

The carrier offered the peer review report of (Dr. C) stating the opinion that claimant's current back problems were not related to her original injury. The hearing officer, finding no good cause for the carrier's untimely exchange of this exhibit, sustained claimant's objection to the admission of this report. That ruling has not been appealed.

The carrier's Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) dated "2/3/97" states as follows:

> [The carrier] denies all future benefits for the above claim. [Claimant] has sustained additional injury to her back according to MRI of the lumbar spine dated 1/13/98.

Claimant had the burden to prove by a preponderance of the evidence that her low back injury of (date of injury), extended to the lumbar disc bulge at the L3-4 level. The hearing officer refused to add an issue concerning whether claimant continued to suffer effects from the injury of (date of injury), entitling her to medical benefits and that ruling is not appealed. The issue presented the hearing officer with a question of fact to resolve and it is the hearing officer who is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and who, as the trier of fact, is to resolve the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual determination of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it so in this case.

Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Assuming that expert evidence of causation was required, given the length of time between the original injury and the diagnosis of the bulging disc at L3-4 and the occurrence of three pregnancies in the interim, the hearing officer could consider not only claimant's testimony concerning the mechanics of the lifting accident on (date of injury), and the persistent low back pain thereafter but also the opinion of Dr. B notwithstanding his use of the word "possibility." It is not required that experts use "magic words" in expressing opinions on causation as it is the substance of the opinions that is determinative. Stodghill v. Texas Employers Insurance Association, 582 S.W.2d 102 (Tex. 1979). Further, the Texas Supreme Court has said that a doctor is not required to use the usual expression that there is a "reasonable probability" of causal connection between the original injury and the present condition; that the doctor may state the opinion even more positively, namely, that the original injury did cause the present physical condition; and that a medical expert is not required to explain or even understand the precise biochemistry or mechanism by which the initial trauma affects the health or organs of the injured party. Western Casualty and Surety Company v. Gonzales, 518 S.W.2d 524, 526-527 (Tex. 1975). We are satisfied that Dr. B's opinions provided sufficient evidence of causation to support the hearing officer's determination.

Jurisdiction was not raised on appeal, and we discuss jurisdiction only because of the dissenting opinion. "Compensability" is not defined in the 1989 Act Commission rules. Compensable injury is defined as an "injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). Section 401.011(12) states that "Course and scope of employment means an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer." "Compensation means payment of a benefit." Section 401.011(11). Benefit is defined as a "medical benefit, an income benefit, a death benefit, or a burial benefit based on a compensable injury." Section 401.011(5). In many cases in which there is a compensable injury, it is clear what the injury is. In cases such as the one before us, there is a dispute as to whether the injury includes a specific area or part of the body. Under those circumstances, the benefit dispute resolution system is used to determine whether the injury includes a specific area or part of the body, i.e., the disc at L3-4. If there is a dispute on the extent of the injury, such dispute should be resolved before a medical dispute as to reasonable and necessary medical care is resolved.

In Texas Workers' Compensation Commission Appeal No. 960262, decided March 25, 1992, the Appeals Panel remanded the case for the hearing officer to clarify the issues and the findings where both the problem issue and the problem conclusion were framed in terms of whether the employee's "condition" or "effect" naturally resulted from the

compensable injury thus entitling the employee to reasonable and necessary medical care. Our decision stated that questions of whether medical treatment for an injury is reasonable and necessary are placed by Section 413.031 in a separate and parallel adjudicative process – the medical dispute resolution process; that the matters concerning whether the employee's "condition" or "effect" naturally result from the injury are matters within the hearing officer's jurisdiction but that the entitlement to medical care is not; and that we were unable to discern whether the hearing officer exceeded his jurisdiction. Our decision further stated that the Appeals Panel is required to determine its own jurisdiction and to take notice of want of jurisdiction when disclosed by the record, whether or not appealed; that "the primary purpose" of benefit determinations through the dispute resolution process (benefit review conference, CCH, Appeals Panel decision, and judicial review), as distinguished from the medical dispute process, "is to determine entitlement to income benefits"; and that "[i]f certain matters are in controversy, such as compensability, sole cause, or extent of injury, a decision in the dispute resolution process may affect a claimant's entitlement to medical benefits."

In Texas Workers' Compensation Commission Appeal No. 960935, decided June 28, 1996, the Appeals Panel struck certain of the hearing officer's findings concerning the employee's "current" condition made in the decision on remand because the hearing officer could not determine the employee's entitlement to medical care and the findings did not relate to any other issue the hearing officer could properly determine.

In Texas Workers' Compensation Commission Appeal No. 960781, decided May 31, 1996, the hearing officer determined that the disputed issue as to whether the employee's condition was causally related to a compensable injury of (date of injury in Appeal No. 960781), was a request for spinal surgery and that he had no jurisdiction to resolve such dispute. The Appeals Panel referred to several spinal surgery cases, noted that none of them indicated that an issue of compensability that reaches the CCH should not be considered and determined, and remanded for the hearing officer to determine the issue noting that jurisdiction does exist to resolve the disputed issue as to whether the employee's condition was causally related to a particular compensable injury.

In Texas Workers' Compensation Commission Appeal No. 980256, decided March 20, 1998, where the hearing officer's decision was affirmed in part and reversed and rendered in part, the Appeals Panel noted that one of the issues was whether the employee's compensable injury of (date of injury in Appeal No. 980256), was a producing cause of her current neck and bilateral shoulder condition. The hearing officer found, in part, that the effects of the (date of injury in Appeal No. 980256), aggravation injury were resolved by December 4, 1994. The Appeals Panel struck that portion of the finding because it purported to determine that the carrier was no longer liable for medical benefits for that injury, a matter beyond the jurisdiction of the hearing officer.

In Texas Workers' Compensation Commission Appeal No. 980213, decided March 23, 1998, the hearing officer determined, in part, that the employee's compensable injury of (date of injury in Appeal No. 980213), is a producing cause for the total replacement of his knees. The carrier had filed a dispute over the knee replacements with the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission) but had not obtained a determination. The Appeals Panel reversed and rendered, citing Texas Workers' Compensation Commission Appeal No. 971871, decided October 29, 1997, and Texas Workers' Compensation Commission Appeal No. 971967, decided November 10, 1997, for the proposition that a hearing officer does not have jurisdiction over whether medical treatment is reasonable and necessary. However, our decision noted that "[o]n numerous occasions, the Appeals Panel has affirmed a determination of a hearing officer that a compensable injury is a producing cause of an injury to a body part, a condition that a claimant had, or disability," but that the use of "a producing cause" with a surgical service does not confer jurisdiction on a hearing officer when it does not exist and that the hearing officer did not have jurisdiction to decide that a compensable injury is a producing cause for the total knee replacements.

In Texas Workers' Compensation Commission Appeal No. 981017, decided July 1, 1998, the hearing officer determined that the employee's (date of injury in Appeal No. 981017), compensable low back injury is not a producing cause of her current lower back and left leg pain and on appeal the Appeals Panel reversed and rendered. The evidence indicated that the employee also sustained a compensable cervical spine injury in February 1993, that in May 1997 she sought treatment for her low back and left leg symptoms which were worse, and that the carrier thereafter filed a TWCC-21 denying medical treatment after 1992 and stating that the current treating doctor indicated that claimant's problems were of unknown etiology and that there is no causal relationship between the employee's current condition and the original injury. The carrier had also filed a similarly worded dispute with the MRD. The Appeals Panel decision stated that a review of the TWCC-21 and the Notice of Medical Payment Dispute (TWCC-62) filed by the carrier demonstrated that the only dispute the carrier was pursuing was the employee's entitlement to medical treatment for the (date of injury in Appeal No. 981017), compensable injury. In reversing and rendering a decision that it was the MRD, not the Commission's Hearings Division, that had jurisdiction over the dispute, the Appeals Panel said that the only existing question was whether medical treatment was "reasonably necessary" to treat the undisputed compensable low back injury and indicated that compensability was not at issue.

In Texas Workers' Compensation Commission Appeal No. 981083, decided July 6, 1998, the Appeals Panel reversed a hearing officer's decision that the employee did not sustain a new injury on (new date of injury in Appeal No. 981083), but continued to suffer the effects of his compensable injury of (original date of injury in Appeal No. 981083), stating that the hearing officer did not have jurisdiction to determine the issue and citing our decision in Appeal No. 980256, *supra*. The Appeals Panel felt that the

issue involved simply a matter of reasonable and necessary medical treatment, that there were no income benefit issues before the hearing officer, and that to the extent the decision was intended to apply to future income benefits, the Appeals Panel has said that we will not issue advisory decisions on future benefits.

In Texas Workers' Compensation Commission Appeal No. 981084 (Unpublished), decided July 6, 1998, the hearing officer determined, among other things, that the employee's 1991 carpal tunnel syndrome injury is "a producing cause" of the trigger finger and cervical injuries and the carrier appealed. The Appeals Panel affirmed and distinguished the decision in Appeal No. 981017, *supra*, stating that "some new conditions are being claimed and this case is not as obviously a denial of additional medical treatment."

We distinguish the case we consider from those cited above (excepting Appeal No. 981084, Unpublished) on the basis that the evidence in this case indicates that what is at issue is whether claimant's condition at the L3-4 level is compensable thus entitling her to any benefits, medical and/or income, under the 1989 Act and not merely an issue of whether she remains entitled to medical care for her compensable injury or whether the medical care she seeks is reasonable and necessary. The carrier's TWCC-21 is quite explicit. The compensability of a claimed injury, be it the original injury or a follow-on injury, is a threshold determination which must precede the determination of entitlement to benefits under the 1989 Act and such issue is properly resolved by the dispute resolution process in the Commission's Hearings Division.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION

I dissent. The hearing officer and the Appeals Panel lack jurisdiction in this matter.

A contested case hearing and an appeal to the Appeals Panel are "benefit proceeding." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 140.1 (Rule 140.1). A

benefit proceeding is "[a] proceeding pursuant to [Chapter 410 of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act)], conducted by a presiding officer to resolve one or more benefit disputes." Rule 140.1. A benefit dispute is "[a] disputed issue arising under the [1989 Act] in a workers' compensation claim regarding compensability or eligibility for, or the amount of, income or death benefits." *Id.*

The issue before the hearing officer was: "Is the Claimant's lumbar central disc bulge at L3/L4 a result of the compensable injury sustained on (date of injury)?" It is not an issue for Appeals Panel consideration because it is not a dispute regarding the compensability or eligibility for, or the amount of, income or death benefits. There is no dispute before the hearing officer "regarding compensability or eligibility for, or the amount of, income or death benefits." If the claimant was unable to obtain and retain employment at her preinjury wage because of her L3/L4 bulging disc, resolution of whether the bulge is a result of her (date of injury), compensable injury may be important. *See* Section 401.011(16). If her L3/L4 bulging disc was an "anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent," then whether the bulge is a result of her (date of injury), compensable injury would also be important. *See* Section 401.011(23). However, neither disability nor impairment are issues before the hearing officer in the claim herein. The issue herein reflects a medical dispute, and is beyond the jurisdiction of the Texas Workers' Compensation Commission's Division of Hearings and Review, and of the Appeals Panel, which falls under the Division of Hearings and Review. Rule 140.1.

The determination of "health care reasonably required by the nature of the injury" is adjudicated by the Texas Workers' Compensation Commission's Medical Review Division. Sections 408.021(a) and 413.031(a); Rule 133.305; *see also* Texas Workers' Compensation Commission Appeal No. 971653, decided October 2, 1997; Texas Workers' Compensation Commission Appeal No. 951258, decided September 13, 1995. Our decision should not affect neither the claimant's right to lifetime medical benefits nor any party's right to medical dispute resolution by the Medical Review Division and at the State Officer of Administrative Hearings. Section 408.021(a); Texas Workers' Compensation Commission Appeal No. 92649, decided January 6, 1993; *see also* Section 413.031; Rule 133.305; and TEX. GOV. CODE ANN. § 2001 *et seq*.

I would reverse and render a new decision that the hearing officer and the Appeals Panel lack jurisdiction to hear this matter. Texas Workers' Compensation Commission Appeal No. 981017, decided July 1, 1998; Texas Workers' Compensation Commission Appeal No. 981083, decided July 6, 1998.

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Christopher L. Rhodes
Appeals Judge