APPEAL NO. 981640

A contested case hearing (CCH) was held on June 29, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) to resolve the following disputed issues:

> Is Claimant entitled to supplemental income benefits [SIBS] for the fifth compensable quarter?
>
> Does Claimant's compensable injury extend to fibromyalgia and reflex sympathetic dystrophy [RSD]?
>
> Did Carrier contest compensability of Claimant's [RSD] on or before the 60th day after receiving written notice and, if not, was Carrier's contest based on newly discovered evidence that could not have reasonably been discovered at an earlier date?

The hearing officer resolved these issues by concluding that appellant (claimant) is not entitled to SIBS for the fifth quarter; that her compensable injury does not extend to fibromyalgia; that the respondent and cross-appellant (self-insured) did not contest the compensability of claimant's RSD on or before the 60th day after receiving written notice; and that the self-insured waived its right to contest the compensability of claimant's RSD based on newly discovered evidence and, as a result, claimant's compensable injury extends to RSD.

Claimant has appealed a finding that during the filing period she had some ability to work and the conclusion that she is not entitled to SIBS for the fifth quarter. She has also appealed a finding that as of the date of the hearing she did not have fibromyalgia or RSD and the conclusion that her compensable injury does not extend to fibromyalgia. Her appeal, in essence, challenges the evidentiary sufficiency of the appealed findings and conclusions. The self-insured filed a response, urging the sufficiency of the evidence to support the appealed determinations. The self-insured has appealed the determination that it waived its right to contest the compensability of claimant's RSD based on newly discovered evidence and that as a result, claimant's compensable injury extends to RSD. The file does not contain a response from claimant to the self-insured's appeal.

DECISION

Affirmed in part; reversed and rendered in part.

The parties stipulated that claimant sustained a compensable injury on _____, with a 30% impairment rating (IR); that she commuted no portion of her

impairment income benefits; that the fifth SIBS quarter began on April 15, 1998, and will end on July 14, 1998; that during the filing period, claimant did not attempt to seek employment and earned no wages; that the self-insured first contested the compensability of claimant's claimed RSD injury on February 9, 1998; and that no later than November 30, 1996, the self-insured first received written notice of claimant's claimed RSD injury. In view of the latter two stipulations, the hearing officer correctly surmised at the CCH that the disputed issue concerning waiver of the self-insured's right to contest the compensability of the RSD centered on when the self-insured had newly discovered evidence that claimant did not have RSD.

Claimant testified that on _____, while working as a nurse, she injured her back lifting a patient; that in April 1996 she underwent sacroiliac fusion surgery and was later assigned an IR of 30% by a designated doctor; that she is a registered nurse with a two-year associate's degree; that she has a personal computer at home and made some use of it during the filing period (January 14 through April 14, 1998); and that she has a car and has driven to her doctor's office, a distance of between 40 and 50 miles. Claimant said she could not use the computer for long without her arms becoming "heavy," that she was uncomfortable driving to the city and her husband sometimes drove her, and that she was in constant pain and had to lie down a lot after activities. She acknowledged having an ability to review medical records and said she thought she could take a job reviewing medical records "in the future when [she is] better." She also said that no doctor said she could do work of any type during the filing period.

THE SIBS ISSUE

Concerning claimant's ability to work during the filing period, she underwent a functional capacity evaluation (FCE) on February 19, 1998. The examiner reported that claimant was unable to reach physical maximum in all tests secondary to pain, that claimant is significantly deconditioned and would benefit from a comprehensive exercise program, and that a job description was not available at the time of the FCE and thus it cannot be determined if claimant is able to meet critical job demands. Dr. G wrote on February 20, 1998, that claimant completed the FCE on February 19th and he attached a copy of the FCE report. Dr. G stated the above comments of the FCE examiner and then said that claimant is released to return to work with accommodations as outlined in the FCE. He further stated that specific critical job demands were not tested since claimant does not have a specific job to return to and that the essential components of a new job should be tested to verify her ability to perform more specific job functions. In another report of February 20th, Dr. G stated: "Job description unavailable at time of FCE. Therefore, unable to discern if patient is able to meet critical job demands. Refer to FCE for details."

The hearing officer stated in his discussion that the most reasonable interpretation is that it is undetermined whether claimant can return to her former job because its physical

requirements were unknown. The hearing office also noted that claimant's treating doctor, Dr. H, reported on April 2, 1998, that in August 1997 claimant began to develop other complications related to her injury and that "she is continuing to be treated for this and is currently unable to work." The hearing officer then states that the medical evidence in this case does not establish that claimant had no ability to work during the filing period.

Section 408.143 provides that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has made a good faith effort to obtain employment commensurate with his or her ability to work. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104 (Rule 130.104). Pursuant to Rule 130.102(b), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "[f]iling period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The employee has the burden of proving entitlement to SIBS for any quarter claimed. Texas Workers' Compensation Commission Appeal No. 941490, decided December 19, 1994.

The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to light duty does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*.

We are satisfied that the hearing officer's finding that claimant had some ability to work during the filing period is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. 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). The hearing officer could consider not only Dr. G's assessment following the FCE but also claimant's ability to drive, to read medical records, and to use a computer. Accordingly, the legal conclusion that claimant is not entitled to SIBS for the fifth compensable quarter is sufficiently

supported by the factual findings and the evidence.

THE EXTENT OF INJURY ISSUE

Dr. H reported on September 26, 1996, that he felt that claimant, who was status post sacroiliac fusion, had developed RSD in her left leg. Dr. H reported on January 30, 1997, that claimant is having a migratory type symptomatology from her RSD in that she initially had left leg pain which mostly resolved following the surgery, that she then developed a blood clot which led to RSD which has been treated in her left leg, and that the RSD then moved to her left arm and shoulder and now to her right arm. Dr. H reported on May 13, 1997, the following impression: "Symptomatic hardware left side, status-post SR arthrodesis, by x-ray looks like it has healed; unusual myofascial reflex dystrophy type symptomotology, which I have never seen before." Dr. H reported on January 27, 1998, that claimant apparently "has seen some RME who says that she doesn't have RSD"; that she saw Dr. R who thinks she has fibromyalgia; and that claimant's bone scan shows no evidence of acute RSD but that such scan can be normal in subacute phases of RSD.

The self-insured introduced a CorVel Corporation "Utilization Review" report, dated September 8, 1997, and signed by Ms. L, as utilization review nurse. The report summarizes claimant's records for the period "8/9/93 to 6/24/97," states that the file has been referred to a physician advisor for review, and poses several questions including the following: "Does it appear the claimant has RSD? Please explain." Ms. L's September 17, 1997, report to the client, apparently the adjusting company for the self-insured, states that :"[p]er the [physician advisor], the diagnosis of RSD was indeterminate. He suggests the claimant's pain problem was more diffuse and unusual than what is typically seen in RSD and the other reported symptoms of heaviness and aching were unusual for RSD." Attached to Ms. L's letter is the unsigned physician advisor's report which also states that Dr. D was not able to make a distinct diagnosis and that Dr. J in March 1997 stated that, neurologically, a diagnosis of RSD could not be made at that time.

Dr. G reported on January 14, 1998, the results of his physical examination of claimant and stated his impression as "chronic pain in all extremities and back" and his differential diagnoses as chronic pain syndrome, fibromyalgia, sacroiliac joint syndrome, and symptom magnification. He further stated that he strongly doubted that claimant has RSD as she does not have the clinical signs, history, or exam consistent with RSD, that her symptoms are more consistent with fibromyalgia, that there is possibly a component of symptom magnification, and that he recommends a rheumatology evaluation and a psychiatric evaluation.

Dr. W, an associate professor of medicine holding both the M.D. and Ph.D. degrees, reported that on February 12, 1998, she had reviewed claimant's records and, considering the current criteria for fibromyalgia from the American College of Rheumatology and the absence of appropriate laboratory studies, she did not believe the diagnosis of fibromyalgia

has been established. On February 25, 1998, Dr. W reported that she had reviewed laboratory studies of December 9, 1997, and that while the studies do not suggest other causes of pain and fatigue that might mimic fibromyalgia, she has not yet been provided with the physical findings of fibromyalgia and has no records dated prior to 1995. Dr.W further stated that she would have great difficulty relating a problem first described in 1996 to what began as a "back sprain" in 1993 and that a review of records from 1993 to 1995 is required to make a definite causal link of fibromyalgia to the injury, if fibromaylgia is now present. On March 17, 1998, Dr.W reported that she had reviewed additional information on claimant; that based on the accepted, published criteria of the American College of Rheumatology, she could not find criteria to diagnose fibromyalgia at any time from 1995 to the present; that no documentation of the classic tender points seen in fibromyalgia is given; that the records do not suggest fibromyalgia as a consideration before 1997; and that she cannot temporally relate fibromyalgia, if found present in 1997, to the injury of _____.

Dr. K, who performed an independent medical evaluation at the request of the Texas Workers' Compensation Commission (Commission), issued a report, dated April 13, 1998, which contains an extensive records review and physical exam and states findings of functional range of motion in all joints, nonspecific neck tenderness, and no signs or symptoms of RSD in the lower and upper extremities. Dr. K concluded that based on the examination and laboratory reports, "RSD is unlikely," that claimant's multiple trauma, bilateral breast implants, and titanium in the SI joint screws may all contribute to fibromyalgia, that postoperative inactivity and altered gait with pain, stress, and lack of sleep will all also aggravate preexisting fibromyalgia, and that, "[i]n other words, treatment of the injury in question could have been a major contributing factor."

In his discussion of the evidence, the hearing officer indicates that he reached his finding that as of the date of the hearing claimant did not have fibromyalgia or RSD based on Dr. K's and Dr. G's doubts that claimant has RSD and on Dr. W's opinion that claimant was not shown to have fibromyalgia. The hearing office is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, is to resolve the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In our view, this finding is sufficiently supported by the evidence. Cain, *supra*, and King, *supra*. Accordingly, we are satisfied that the legal conclusion that claimant's compensable injury does not extend to fibromyalgia is sufficiently supported by this finding and by the evidence.

THE WAIVER ISSUE

Section 409.021(c) provides, in part, that 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 insurance carrier waives its right to contest

compensability. Section 409.021(d) provides that an insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier. We note that the waiver issue addressed only the claimed RSD and not the claimed fibromyalgia.

The parties stipulated that the self-insured first contested the compensability of the claimed RSD on February 9, 1998. The self-insured contended that Dr. G's report of January 14, 1998, stating that he strongly doubted that claimant has RSD was newly discovered evidence which permitted the self-insured to contest the compensability of claimant's RSD. However, the hearing officer found that the self-insured first had information clearly indicating that claimant may not have RSD no later than September 17, 1997, and did not act with reasonable diligence by waiting until February 9, 1998, to contest the compensability of the RSD. In his discussion, the hearing officer indicates that he viewed the physician advisor's report as clearly indicating that the RSD diagnosis may be incorrect and that Ms. L just as clearly got that message as reflected in her correspondence to the adjusting company. Thus, stated the hearing officer, the fact that claimant may not have RSD was discovered by the self-insured's adjusting company no later than September 17, 1997, and the self-insured did not act with reasonable diligence by waiting until February 9, 1998, to contest the compensability of the claimed RSD. Again, we are satisfied that the evidence sufficiently supports the two challenged findings and that those findings and the evidence sufficiently support the two challenged conclusions. Cain, *supra*, and King, *supra*.

In addition to its argument on the evidence on this issue, which we do not find persuasive, the self-insured also posits that a recent Texas appellate court decision is precedent which is contrary to the hearing officer's determination that the self-insured is liable for RSD through waiver even though claimant does not have that condition. The self-insured cites the decision in Continental Casualty Co. v. Williamson, No. 12-97-00187-CV, 1998 WL313720 (Tex. App.-Tyler, May 28, 1998, no writ). In that decision, the court stated that the issue before it was whether an employer's failure to contest compensability, when there was no injury, creates a compensable injury as a matter of law. As the decision recited, following a CCH, the hearing officer found that on _____, the claimant did not sustain damage or harm to the physical structure of his body in the course of an incident on the staircase on the premises of his employer and concluded that the claimant sustained no injury within the course and scope of his employment on or about _____; the Commission (Appeals Panel) affirmed the hearing officer's findings of fact and conclusions of law but diverged from the conclusion that because there was a finding of no injury, the claimant was not entitled to benefits for the reason that the insurance carrier had not timely contested compensability and thus injury was established as a matter of law; and the Commission's decision was affirmed by the trial court. The appellate court reversed and rendered the trial court's judgment and expressly approved the rationale in the dissenting opinion of the Appeals Panel (Judge Potts) to the effect that although the carrier waived its right to contest compensability, there was no injury and

without an injury the question of a compensable injury is not reached. The court stated that "an injury and a compensable injury are two different animals," that while the carrier "may have waived its right to contest the compensability of an injury, it never waived its right to contest the injury itself," and that the "issue of compensability never arose because no injury was ever proven." The court then held that "if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law."

In the case we consider, the hearing officer found that claimant did not have RSD as of the date of the hearing and we have affirmed that finding. Accordingly, based on the precedent in the court's Williamson decision, we find error in the hearing officer's determination that as a result of the self-insured's waiver, claimant's injury extends to RSD. However, the hearing officer stated in his discussion that even though claimant does not have RSD, there was little dispute as to whether claimant's symptoms have been caused by the compensable injury and that it is still undecided as to what label to give those symptoms. We point out that claimant is entitled to all health care reasonably required by the nature of the injury as and when needed. Section 408.021(a). Injury is defined to mean "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. [Emphasis supplied.]"

We affirm the hearing officer's decision and order except for the determination that as a result of the self-insured's waiver of its right to contest compensability claimant's compensable injury extends to RSD. We reverse the latter determination and render a new opinion that claimant's injury does not extend to RSD as of the date of the hearing.

Philip F. O'Neill
Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge

CONCURRING OPINION:

I write separately to stress that Section 408.021 does not require that any label or particular diagnosis be used in order to obtain health care for the "effects naturally resulting from the compensable injury." I view the issue that asked whether the compensable injury extends to RSD as not reflective of what may or may not be covered by health care. The effects naturally resulting from the compensable injury will receive "health care reasonably required" regardless of the label attached. *See* Section 408.021. The hearing officer pointed out that this claimant has certain symptoms (effects) that resulted from the compensable injury. The determination that RSD was not shown, at this time, does not equate to a finding that claimant does not have certain effects naturally resulting from the compensable injury. Indeed, it is possible, if a label must be attached for some reason, that at some time in the future the effects "naturally resulting from the compensable injury" may be shown as indicative of a particular diagnosis, not necessarily excluding RSD.

Joe Sebesta
Appeals Judge