APPEAL NO. 011436
FILED AUGUST 1, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On April 12 and May 24, 2001, contested case hearings (CCH) was held. Two of the issues were resolved at the mutual request of the parties. With respect to the remaining issue, the hearing officer determined that the appellant's (claimant) injury to the cervical and thoracic regions of his spine is not a result of his compensable injury of _____. The claimant appealed and the respondent (carrier) responded.

DECISION

Affirmed.

The claimant offers, for the first time on appeal, certain documents attached to his request for review. We do not normally consider evidence offered for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 962174, decided December 12, 1996. We will not consider the documents not offered into evidence at the CCH.

The claimant also contends, for the first time, that the carrier did not contest the compensability of the claimant's injury within 60 days after the date the insurance company was notified of the injury. First, Section 410.151(b) provides that an issue not raised at a benefit review conference (BRC) may not be considered at the CCH unless the parties consent or the Texas Workers' Compensation Commission determines that good cause existed for not raising the issue at the BRC. *And see* Texas Workers' Compensation Commission Appeal No. 94364, decided May 10, 1994. In addition, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)), effective March 13, 2000, provides, in part, that Section 409.021 and subsection (a) of Rule 124.3 "do not apply to disputes of extent of injury." *See* Texas Workers' Compensation Commission Appeal No. 000784, decided May 30, 2000. Consequently, the hearing officer did not err in not finding carrier waiver, nor will we consider this issue for the first time on appeal.

The claimant also contends that the hearing officer erred because he wrongfully excluded from the evidence the claimant's offer of the Employer's First Report of Injury or Illness (TWCC-1). The claimant seeks to use the TWCC-1 offered into evidence as proof that the "claimant reported that he suffered back and neck pain." Section 409.005(f) provides that the TWCC-1 may not be considered to be an admission by or evidence against an employer or carrier where the facts are in dispute. Whether the claimant sustained an injury to his neck and back was at the very crux of the dispute. Consequently, the hearing officer did not err in excluding the TWCC-1 and we decline to consider the TWCC-1 as evidence that the claimant sustained the injury as alleged.

With respect to the hearing officer's factual determinations, there is sufficient evidence in the record to support the hearing officer's determination that the claimant's compensable injury of _____, did not extend to and include the cervical and thoracic regions of his spine. The claimant had the burden to prove that he sustained damage or harm to the physical structure of the body, which arose out of and in the course and scope of his employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. There was conflicting evidence presented with regard to this issue. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves 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)). We cannot conclude that the hearing officer's determination was 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 (Tex. 1986).

Nor do we find merit in the claimant's assertions that his attorney was unprepared and that he was unable to protect his own legal rights due to diminished mental capacity caused by withdrawal from medication. The claimant chose to proceed to hearing with the counsel he had retained. There is no evidence in the record that when the claimant made this choice that he had diminished mental capacity.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Panel

Thomas A. Knapp
Appeals Judge