APPEAL NO. 011962-S
FILED OCTOBER 10, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 26, 2001. With respect to the single issue before him, the hearing officer determined that the respondent (claimant) sustained a compensable injury on _____. In its appeal, the appellant (self-insured) argues that the hearing officer's decision should be reversed because the hearing officer proceeded with the hearing in the absence of the claimant, without following the procedure for sending a show cause letter to the claimant. In addition, the self-insured contends that the hearing officer did not have jurisdiction over the respondent (sub-claimant) because the sub-claimant did not satisfy the requirement of Section 409.009 of demonstrating that it had made a claim for reimbursement for medical services which had been refused by the self-insured. Finally, the self-insured argues that the hearing officer erred in finding that the claimant's injury was compensable, contending that the injury arose out of personal animosity and, as such, was not compensable under Section 406.032(1)(C).

DECISION

Affirmed.

The hearing officer determined that the claimant, a guard at a correctional facility, sustained a compensable injury on _____, as a result of an altercation with another guard. The hearing officer determined that a group of the claimant's coworkers, including the guard with whom the claimant had the fight, had harassed the claimant and that there "was no relationship or contact between the Claimant and any of the harassing co-workers other than at the work place during work hours." Thus, the hearing officer determined that the personal animosity exception of Section 406.032(1)(C) did not apply in this instance.

Initially, we will consider the consider the self-insured's contention that the hearing officer erred in going forward with the hearing without the claimant's having been present and without sending the show cause letter. As the hearing officer noted at the hearing, the claimant participated at the benefit review conference (BRC) prior to the hearing; however, he did not appear for the hearing and attempts to contact the claimant by the Texas Workers' Compensation Commission (Commission) ombudsman, who had been assigned to assist him at the hearing, proved unsuccessful. Specifically, the ombudsman indicated that prior to the hearing, several attempts were made to contact the claimant both by telephone and by letter and the telephone calls were unanswered and the mail sent to his last known address was returned. The hearing officer determined that the claimant had elected not to proceed with his claim, that there was no justification for sending a show cause letter to the claimant because the Commission did not have a forwarding address for the claimant, and that the hearing would go forward to resolve the issue of whether a compensable injury occurred because of the sub-claimant's claim as a medical provider.

On appeal, the self-insured contends that the presence of the claimant was essential to its ability to litigate the personal animosity defense. However, the self-insured did not object to the hearing officer's decision to proceed with the hearing and did not ask for a continuance so that an effort could be made to subpoena the claimant to secure his presence at a future hearing. Accordingly, the self-insured failed to preserve any error associated with the hearing officer's decision to hold the hearing without the claimant.

The self-insured also argues that the hearing officer did not have jurisdiction over the sub-claimant because the sub-claimant did not satisfy the requirements of Section 409.009 of demonstrating that it had made a claim for reimbursement which had been denied by the self-insured. The self-insured's argument in this regard is disingenuous, at best. Sub-claimant's Exhibit No. 1 contains a document entitled "Explanation of Benefits" in which the sub-claimant is identified as the provider and the self-insured is identified as the provider. That document lists $681.00 in charges and states that none of the charges were paid. The document lists as the reason for denial "pt involved in fight w/ another employee." We are also hard-pressed to conclude that a claim for reimbursement had not been made by the sub-claimant and denied by the self-insured where, as here, both parties participated in a BRC and were involved in the dispute-resolution process to resolve the issue of whether the claimant sustained a compensable injury. However, even if the self-insured were correct in arguing that a claim for reimbursement and its denial had not been proven in this case, we cannot agree that this failure of proof would result in a determination that the hearing officer lacked jurisdiction over the sub-claimant in this case. Rather, we believe that the failure to satisfy the requirements of Section 409.009 is more in the nature of a challenge to the status of the health care provider as a sub-claimant, which challenge the self-insured needed to raise at the hearing or risk waiver of its right to challenge that status. The self-insured did not raise the argument it now advances at the hearing and, as such, it has waived its right to pursue such a challenge.

Finally, we briefly consider the self-insured's appeal of the hearing officer's determination that the claimant sustained a compensable injury. As the hearing officer noted in his discussion, the evidence of personal animosity under Section 406.032(1)(C) was sparse. The hearing officer determined that the evidence established that the claimant sustained a compensable injury in the altercation between he and another guard and that the evidence did not establish that the self-insured was relieved of liability pursuant to Section 406.032(1)(C). The hearing officer's determinations in that regard are not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse the hearing officer's decision on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the self-insured is **STATE OFFICE OF RISK MANAGEMENT** and the name and address of its registered agent for service of process is:

STATE OFFICE OF RISK MANAGEMENT
IN CARE OF RON JOSSELET
300 WEST 15TH STREET, 6TH FLOOR
AUSTIN, TEXAS 78711.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge