APPEAL NO. 011247-S
FILED AUGUST 29, 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 (CCH) was held on June 5, 2001. The record closed on June 18, 2001. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, in the nature of human immunodeficiency virus (HIV), as a result of a needle stick occurring on _____; and that the claimant had disability from April 27, 2000, through June 27, 2000, and from July 10, 2000, through July 24, 2000. The appellant (carrier) filed a request for review of the hearing officer's determinations on compensability and disability. The claimant urges affirmance.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant sustained a compensable injury on _____, in the nature of HIV, as a result of a needle stick occurring on _____. Section 401.011(10) defines a compensable injury as an injury that arises out of and in the course and scope of employment for which compensation is payable.

The parties stipulated at the CCH that on _____, the claimant was stuck by a needle while drawing blood from a patient who was HIV positive. The hearing officer determined from the claimant's testimony and the medical reports in evidence that the claimant established the causal connection between her HIV infection and her workplace by expert medical evidence to a reasonable medical probability. The Appeals Panel has held that reasonable medical probability is not the equivalent of proof beyond the shadow of a doubt or 100% certainty, and that causation is generally a matter of inference from a given state of facts. Texas Workers' Compensation Commission Appeal No. 992641, decided January 7, 2000; Texas Workers' Compensation Commission Appeal No. 971608, decided September 30, 1997 (Unpublished); Texas Workers' Compensation Commission Appeal No. 951601, decided November 13, 1995.

The hearing officer did not err in determining that the claimant had disability from April 27, 2000, through June 27, 2000, and from July 10, 2000, through July 24, 2000. Section 401.011(16) provides that disability means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally

true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the evidence for that of the hearing officer.

The carrier also asserts on appeal that the claimant was barred from workers' compensation benefits due to failure to comply with the statutory requirements of TEX. HEALTH & SAFETY CODE ANN. § 81.050(j), which provides:

> For the purpose of qualifying for workers' compensation or any other similar benefits of compensation, an employee who claims a possible work-related exposure to a reportable disease, including HIV infection, must provide the employer with a sworn affidavit of the date and circumstances of the exposure and document that, no later than the 10th day after the date of the exposure, the employee had a test result that indicated an absence of the reportable disease, including HIV infection.

We first note that the carrier is incorrect in asserting that the claimant is subject to the requirements of Section 81.050(j). Section 81.050 is entitled "Mandatory Testing of Persons Suspected of Exposing Certain Other Persons to Reportable Diseases, Including HIV Infection." By its terms, it applies to four categories of employees who may request a health authority to order testing of another person who may have exposed the employee to a reportable disease. The four categories are: a law enforcement officer; a fire fighter; an emergency service employee or paramedic; or a correctional officer. Section 81.050 goes on to provide in subsection (k) that the person who may have been exposed to a reportable disease may not be required to be tested. Subsection (j), set forth above, deals with workers' compensation benefits for the four types of employees listed in subsection (b). It thus does not appear that this statute would apply to this claimant, a phlebotomist working for a private lab. The only other statutory provision we have found which ties testing for a reportable disease to qualification for workers' compensation benefits applies to state employees. TEX. HEALTH & SAFETY CODE ANN. § 85.116(c). This claimant is not a state employee. There are two rules which relate to this topic. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 122.3 (Rule 122.3) specifically relates to emergency responders and Rule 122.4 relates to state employees. We see nothing in the statutes or the rules which imposes a requirement on this claimant to comply with Section 81.050(j).

Even if Section 81.050(j) applied in this case, the hearing officer determined that the carrier did not raise the issue of failure to comply with Section 81.050(j) timely, pursuant to Section 409.021(c), which provides that "[i]f 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."

The hearing officer determined from the Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) that the carrier disputed compensability and disability issues, and did not dispute the failure to comply with Section 81.050(j). We agree. The issue of noncompliance was not raised at the benefit review conference (BRC) held on July 28, 2000. Under Section 410.151(b), an issue that was not raised at a BRC may not be considered unless the parties consent or the Texas Workers' Compensation Commission (Commission) determines good cause existed for not raising the issue at the BRC. *See, also,* Section 409.022(b). We also do not agree with the carrier's assertion that the issue was tried by consent. At the start of the CCH, the parties specifically agreed that there were two issues to be decided. The first issue was subsequently refined and reworded, but it still did not encompass a dispute over noncompliance with Section 81.050(j). The carrier refers in its appeal to a "Brief of Relevant Law" which was sent to the claimant "and which included Carrier's argument that Claimant had failed to comply with [Section] 81.050(j)." (Carrier's Request for Review, page 21.) The "Brief of Relevant Law" was not offered or admitted as an exhibit at the CCH. Further, we note that the "Brief of Relevant Law" would not qualify as a written response to the unresolved dispute identified in the benefit review officer's report, as it does not appear to have been sent to the Commission within 20 days of receiving the BRC report. The carrier went on to argue that the claimant was well aware of the issue of compliance with Section 81.050, and both addressed it in opening statement and in direct examination of the claimant at the CCH. We note that it takes more than has been shown in this record for an issue to be tried by consent. *See*, *e.g*., Texas Workers' Compensation Commission Appeal No. 952103, decided January 25, 1996, and Texas Workers' Compensation Commission Appeal No. 951305, decided September 21, 1995.

As to the carrier's argument that Section 81.050(j) is an extent-of-injury issue (which is never waived), we disagree with that characterization. Noncompliance with Section 81.050(j) is in the nature of an additional requirement imposed upon a claimant before the claimant can qualify for workers' compensation. As such, the hearing officer did not err in characterizing the carrier's assertion of noncompliance as a defense to liability of the carrier, a defense which the hearing officer found to be waived by failure to assert it as a defense on its TWCC-21 filed with the Commission. The hearing officer also did not err in concluding that the carrier failed to establish the existence of newly discovered evidence, which would excuse the failure to assert the defense. As to the carrier's further argument that the claimant waived the issue of whether the carrier's dispute was sufficient to include Section 81.050 because that argument was not raised by the claimant at the BRC or the CCH, we again note that there were two issues before this CCH, and this was not one of them. The claimant, of course, would only raise the issue in response to the carrier properly raising the Section 81.050 defense, which the hearing officer found the carrier failed to do. The hearing officer did not decide that issue and we may not address it for the first time on appeal.

The decision and order of the hearing officer are affirmed.

Michael B. McShane
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge