APPEAL NO. 92706

This case returns for our consideration having been reversed and remanded for additional findings of fact and conclusions of law, as appropriate, and for reconsideration not inconsistent with our earlier opinion, concerning whether respondent (carrier) timely contested the compensability of the cervical injury asserted by appellant (claimant) to be related to his injury of (month date), (different year). Texas Workers' Compensation Commission Appeal No. 92437, decided September 28, 1992. The hearing officer's decision upon remand states that the parties announced their agreement to submit the record from the contested case hearing held in (city), Texas, on July 17, 1992, as the record on remand without additional evidence. The hearing officer closed the record on December 2, 1992, and on that date signed a "Decision and Order on Remand" which adopted the record of the earlier hearing, and which contained two additional factual findings and one additional legal conclusion to the effect that carrier did timely contest the compensability of the cervical injury. We view the hearing officer's adoption of the July 17, 1992 hearing record as inclusive of his findings and conclusions in his Decision and Order signed on July 22, 1992. Both decisions contained the order that claimant is not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act) for a claimed injury to the cervical area. Claimant has timely requested our review of the hearing officer's determination upon remand that carrier timely contested the compensability of claimant's cervical injury. Claimant also reurges his earlier request for review of the hearing officer's determinations, made after the July 17, 1992 hearing, that while claimant did sustain a compensable injury to his lumbar spine on (date of injury 1), he did not then sustain a compensable injury to his cervical spine; and, therefore, that the hearing officer need not determine whether claimant had reached maximum medical improvement (MMI) as to his cervical injury. Carrier timely filed a "supplemental response" which referred to carrier's earlier response and which essentially asserted the sufficiency of the evidence to support the challenged findings and conclusions. Our earlier decision refrained from weighing the sufficiency of the evidence pending the return of this case after remand.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions of the hearing officer, we affirm.

Our earlier decision (Appeal No. 92437, *supra*) contained a detailed summary of the evidence. In brief, the evidence showed that claimant hurt himself on (date of injury 2), while pushing on a bar to tighten cables. He sought medical treatment from (Dr. G) on (date of injury 1), complaining of back pain. (The hearing officer consistently, and inexplicably, referred to the date of injury as (date of injury 1), but that discrepancy is not an issue on appeal.) He had had a lumbar laminectomy in 1977 or 1978 following a fall from a horse. On (date), (Dr. G) diagnosed a herniated lumbar disc. That diagnosis, however, was changed by (Dr. M), an orthopedic surgeon, whom claimant saw in February and March 1991, to low back pain "probably musculoligamentous in origin," after a myelogram and CT

scan revealed no abnormalities. On February 8, 1991, claimant was called by carrier's adjustor who was investigating his accident of (date of injury 2) and he advised carrier the specific body part injured was his lower back. He said that when pushing up on one of the "walking boomers," he felt a pain go through his back, told a coworker he thought he strained his back, and on the following Monday told the coworker he had to go see a doctor for his back. The following exchange took place concerning the specific body part injured:

Q.When you, when you had your accident on, on Friday, the (date), what part of your body did you hurt?
A.The lower part of my back.

Q.Okay. Ah, help me out, let's use, use your, your belt line as a point of reference for me. Is the pain at that level, above or below?
A.About, about my belt line and a little above.

Q.Okay, belt line?
A.Yeah, and a little below.

Q.And a little below/ (sic)
A.Yes mam.

Q.Okay.
A.In that general area.

Claimant's March 1, 1991 Employee's Notice of Injury or Occupational Disease described the parts of his body affected by his (date of injury 2) injury as his "head, neck, shoulders, back, arms, legs, hands, feet, and entire body in general." In describing, on that form, how the accident happened, claimant's notice said he was tightening a walking boomer and felt a sharp pain in his back. Before the word "back, the word "neck" was crossed out.

The records of (Dr. G) and (M) whom claimant saw in (month) and February 1991, refer only to back pain radiating down the left leg. On February 21, 1991, (Dr. M) diagnosed left sciatic pain with a history of an L5-S1 fusion in 1977, and changed this diagnosis on March 1, 1991, to "low back pain, probably musculoligamentous in origin." (Dr. M) retained this diagnosis on March 28, 1991. The records of (Drs. P) and (V), with whom claimant later treated in the spring and summer of 1991, contained histories of low back pain radiating down the left leg. Claimant saw (Dr. R), a neurologist, on October 7, 1991, for evaluation of his low back pain. (Dr. R's) exam found claimant's neck to be "supple," his impression was that claimant may have a ruptured disc in his back, and he ordered an MRI and isotope bone scan. On October 11, 1991, claimant signed a second notice of injury form which again described the parts of his body affected as his "back, legs, neck, shoulder, body in general." (Dr. R's) letter report of October 18, 1991, to (Dr. M) stated he had reviewed the MRI scan and isotope bone scan and they appeared normal. He did note a focal mild narrowing to the lower normal limit at the C5-6 level but no evidence of trauma. (Dr. R)

recommended claimant be evaluated by (Dr. V). (Dr. R) also wrote the carrier on December 4, 1991, stating that no surgical lesion was found. (Dr. V's) records of claimant's December 1991 and February 1992 visits noted no new medical problems, and his impression in February 1992 was that claimant had a 12% impairment for lumbar disc disease. The parties agreed at the benefit review conference to (Dr. V's) 12% impairment rating for claimant's lower lumbar injury.

On April 10, 1992 claimant saw (Dr. P) in the emergency room of a hospital. The record of that visit stated claimant complained of back pain, and neck pain for one week. On April 27, 1992, (Dr. P) wrote carrier advising he saw claimant in the emergency room on April 10th "with persistent neck and lumbar pain for about year (sic)" following a on-the-job injury. (Dr. P) said his review of an April 10, 1992 MRI revealed spondylosis and a disc herniation at C5-6 which (Dr. P) said was the probable source of claimant's pain. The carrier's Notice of Refused/Disputed Claim (TWCC-21), is dated May 11, 1992, and was received by the Texas Workers' Compensation Commission on May 18, 1992. It stated on its face that carrier's first written notice of injury was received on "02/04/91," and the reason for disputing the claimed neck injury was:

No mention of neck or cervical problems until ten months after date of the initial injury.
Examination by employee's physician of choice on February 14, 1992 did not indicate any cervical problems. For these reasons, carrier is refusing treatment to the cervical spine.

The carrier contended that (Dr. P) April 27, 1992 letter was its first notice of a neck injury resulting from the (month year) accident, and thus its contest of the compensability of the claimed neck injury was made on or before the 60th day after the date it was notified of the injury and therefore timely pursuant to Article 8308-5.21. While the date and information on the TWCC-21 is certainly evidence relevant to the fact question as to when carrier received notice that claimant was claiming a job-related neck injury, we do not regard it as an admission that carrier received the notice required by Article 8308-5.21 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1 (Rule 124.1) in view of carrier's stance at both the hearing and on appeal. *Compare* Texas Workers' Compensation Commission Appeal No. 92022, decided March 11, 1992. Further, we note that claimant has not contended that the date and language on the TWCC-21 constituted an admission that carrier received notice of the neck injury on February 4, 1991.

At the contested case hearing, the carrier contended, as it does on appeal, that its May 11, 1992 contest of the compensability of claimant's neck injury was timely in that its first notice of a neck injury from the (month year) accident was (Dr. P) April 27, 1992 letter. Claimant urged at the hearing and maintains on appeal that carrier had notice of claimant's neck injury from not only his first notice of injury of March 1, 1991, but also from (Dr. R's) October 1991 report and claimant's second notice of injury.

We find the evidence sufficient to support the hearing officer's conclusion that the

carrier timely contested the compensability of claimant's claim for a cervical injury resulting from his (month year) accident. *Compare* Texas Workers' Compensation Commission Appeal No. 92359, decided September 9, 1992, and cases cited therein. There is sufficient evidence to support the findings that carrier was not notified that claimant asserted a specific cervical injury resulting from his (date of injury 2) injury until it received (Dr. P) letter of April 27, 1992, and that carrier contested the compensability of the cervical injury on May 18, 1992, a period within 60 days. The record did not establish which medical records were provided to carrier, although carrier was not disputing the back injury and was presumably paying medical benefits for such. (Dr. R's) letters to (Dr. M) of October 7 and 18, 1991 reflect copies were sent to the carrier, and (Dr. R's) letter of December 4, 1991 was addressed to the carrier. The records of (Dr. G), claimant's first treating doctor, contain notations apparently referencing his fees, claimant's employer, and "W/C." The substance of (Dr. R's) letters, set forth above, do not compel the conclusion that they contain notice of a cervical injury resulting from claimant's (date of injury 2) accident. Also, the hearing officer could view claimant's descriptions, in his two injury notices, of the injured parts of his body as describing injuries to numerous parts of his body and indeed to his entire body as those notices state. The hearing officer could further consider that on February 8, 1991, claimant told the carrier in an interview that the specific area of his body injured was his lower back.

In our view, the evidence sufficiently supports, as well, the hearing officer's findings, that while claimant did sustain an injury to the lumbar area of his back on (date of injury 1) (sic), (year), he did not then sustain an injury to the cervical area of his back. The hearing officer could have believed that the apparent absence of complaints of and treatment for pain in the neck region from the date of the accident to April 1992, including a lack of indication of trauma to that region of the spine in October 1992, indicated that the cervical herniation developed at some later date. The issues before the hearing officer were issues of fact to be determined by the hearing officer as the trier of fact. Article 8308-6.34(e) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of its weight and credibility. The evidence was in conflict respecting whether claimant injured his neck in addition to his back when he had his job-related accident on (date of injury 2). The evidence was also in conflict as to whether the carrier had notice of a job-related neck injury before receiving (Dr. P) April 27, 1992 letter. As the trier of fact, it was for the hearing officer 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).

We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ.). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings' Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge