APPEAL NO. 941398

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §401.001 *et seq.* (1989 Act). A contested case hearing was held on September 14, 1994. The issues at the hearing, as reported out of the benefit review conference (BRC) were:

1. Did the respondent (claimant herein) sustain a compensable injury on (claimed date of injury)?

2. What is the date of injury?

3. Did the claimant report the injury to his employer on or before the 30th day after the injury, and if not, did the employer or appellant (carrier herein) have actual knowledge of the injury?

4. Did the carrier waive the right to contest compensability of the claimed injury by not contesting compensability within 60 days of having knowledge of the injury?

The hearing officer determined that the claimant suffered a compensable left shoulder injury on (date of injury), not on (claimed date of injury); that the claimant did not timely report the injury or establish a valid excuse for failing to timely report the injury; and that the carrier failed to timely contest compensability of the injury thereby waiving its right to contest compensability. The carrier was ordered to pay benefits as appropriate. The carrier appeals those portions of the decision and order which found a compensable injury on (date of injury), and which found that the carrier failed to timely dispute compensability arguing that they are against the great weight and preponderance of the evidence. The claimant filed no response to this appeal. Neither party has appealed the determination of the hearing officer that the claimant failed, without good cause or other legal excuse, to timely notify the employer of his (date of injury), injury. This finding of fact and related conclusion of law have thus become final and binding on the parties. Texas Workers' Compensation Commission Appeal No. 94588, decided June 20, 1994.

DECISION

We affirm in part and reverse and render in part.

The claimant was an assembly line worker. It was not disputed that he sustained a compensable right arm and elbow injury on Friday, (date of unrelated injury), which is unrelated to his current claim. He testified that he returned to work the following Monday, (date of injury), supposedly in a light duty position. He said the job he was assigned was not light duty and that he injured his left shoulder on (date of injury), while picking up a coil which he estimated to weigh 50 pounds. He continued working at this job through the following day and was then assigned what he considered light duty on (light duty date), in

a supply room. He lost no time or wages as a result of either his (unrelated injury date) or claimed (injury date) injury until May 18, 1994, when his employer determined that light duty was no longer available.[1]

The claimant had been seeing Dr. S for his right arm injury. According to records of Dr. S admitted into evidence, the claimant first complained to him of "discomfort" in his left shoulder on a visit on July 19, 1993. The pain apparently continued over the following month and, on (claimed date of injury), Dr. S referred the claimant to Dr. H for an "evaluation of his left shoulder/AC joint and whatever treatment you deem appropriate." According to the claimant, he was prepared to see Dr. H on (date of injury), but did not go because he received a call that morning from Ms. T, the adjuster for his right arm injury. She reportedly told him that Dr. H's office called her to approve payment of treatment of his left arm as a workers' compensation claim, but she refused saying she was only aware of a right arm injury. The claimant subsequently received treatment from Dr. H which was paid for by himself and then filed claims under his group health insurance. On September 13, 1993, Dr. H diagnosed an avulsion fracture of the distal clavicle which he attributed to an injury at work on (claimed date of injury). Dr. H was, nonetheless, somewhat puzzled because his fracture diagnosis "does not completely fit . . . [the] mechanism of injury" which he thought excluded anything "hitting . . . or landing on the shoulder."

The claimant first submitted an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on May 19, 1994. In this he stated that his left shoulder injury occurred on (claimed date of injury). He maintained this position at the benefit review conference (BRC) convened on July 5, 1994. On the day of the contested case hearing (September 14, 1994), the hearing officer permitted the claimant to amend his TWCC-41 to reflect a date of injury of (date of injury). The carrier represented that it received notice of the claimant's intent to amend the date of injury the day before the hearing. In his STATEMENT OF EVIDENCE in the decision and order, the hearing officer explained his rationale for allowing the amendment as follows:

> The (claimed date of injury) date of injury is incorrect. The Claimant made a mistake originally and the mistake was perpetuated, by other individuals, through inattention to detail . . . The Carrier was offered an opportunity to continue the hearing and declined. It is apparent from a review of the entire record that the Carrier was not surprised or prejudiced by the Claimant's amended date of injury.

It is unclear how this "mistake" as to the date of injury arose. The (claimed date of injury), date first appears in the evidence in Dr. H's medical report of September 13, 1993, the date of his first examination of the claimant, and presumably was perpetuated from this point on. The claimant's mother, who testified at the hearing, provided another version of how this date came about by saying that officials of the employer advised her and her son to use this date, which was the date Ms. T refused to approve payment to Dr. H for an

[1]Disability was not an issue in these proceedings.

office visit to treat the alleged left shoulder injury. In any event, as the hearing officer commented, there is ample evidence in the record that the carrier was not surprised by this date. The Carrier's Notice of Refused or Disputed Claim (TWCC-21), dated May 27, 1994, states the position that the injury occurred not on (claimed date of injury), but sometime between June 15 and July 15, 1993. In addition, Carrier's Exhibit No. 13 is a transcript of a phone conversation between Ms. T and the claimant which occurred on August 31, 1993. Ms. T describes the conversation as "regarding an incident that [claimant] says occurred on (date of injury)." There are extensive references in the transcript to discussions about the injury occurring within two days to two weeks of (date of injury), or "definitely during the month of June[.]"

In light of this evidence, the hearing officer stated that the "correct issue is did the Claimant sustain a compensable left shoulder injury on (date of injury)?" and proceeded to determine that he did sustain such a compensable injury on that date. In its appeal of this issue, the carrier asserts that the evidence was insufficient to support a finding of a left shoulder injury on this date pointing out the claimant's confusion about when he was injured. The carrier argues that the claimant said he was injured on (claimed injury date), then changed his mind to (injury date), but still could not identify the exact date or job he was performing at the time of the injury. The carrier also notes Dr. H's concerns that the nature of the injury (a fracture) was inconsistent with the claimant's denial of isolated trauma.

The Appeals Panel has repeatedly stated that a claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). We have also pointed out that "establishing the date of injury is an essential matter in resolving the compensability of a claim." Texas Workers' Compensation Commission Appeal No. 94713, decided July 12, 1994. This is so because numerous deadlines and consequences are determined from the date an injury occurs. The Appeals Panel has also observed that the date alleged as the date of injury does not have to be the date found by the hearing officer, but the hearing officer must consider all the evidence to determine when an injury occurred. Texas Workers' Compensation Commission Appeal No. 92022, decided March 11, 1992. Whether and, if so, when an injury occurs are questions of fact for a hearing officer to decide. The hearing officer as fact finder is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. Injury may be proven by the testimony of the claimant alone and objective medical evidence is not required to establish that particular conduct resulted in the claimed injury, except in those cases where the subject is so technical in nature that a fact finder lacks the ability from common knowledge to find a causal basis. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided on April 16, 1992.

In the case now appealed, the hearing officer found the claimant's account of how

and when he injured his left shoulder credible. Both Dr. S's and Dr. H's records provide support for the conclusion that the claimant has a shoulder injury. The hearing officer also reviewed the entire record in reaching his conclusion that the injury occurred on (date of injury). The carrier argues simply that sufficient evidence does not support the decision. We disagree. An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). Applying this standard of review, we decline to disturb the findings and conclusions of the hearing officer that the claimant sustained a compensable left shoulder injury on (date of injury).

We are significantly more troubled by the conclusion of the hearing officer that the carrier failed to timely contest compensability of this claim. We begin our discussion of this issue with the observation that at all relevant times no income (or death) benefits were owed to the claimant, *see* Rule 124.6(a), and note that Rule 124.6(d) provides, in pertinent part, that a carrier who contends that no medical benefits are due because an injury is not compensable, shall file a notice of dispute "no later than the 60th day after receipt of written notice of injury." (Emphasis added).

Section 409.021(a) provides in pertinent part that a carrier shall initiate the payment of compensation promptly and that not later than the seventh day after receiving written notice of an injury, the carrier shall either begin payment of benefits as required by the 1989 Act or notify the Texas Workers' Compensation Commission (Commission) and the employee in writing of its refusal to pay. Subsection (c) further provides that if the carrier does not contest compensability by the 60th day after it is "notified" of the injury, the carrier waives its right to contest compensability. Rule 124.1 defines the written notice of injury referenced in Section 409.021(a) to be:

1. The employer's first report of injury;

2. The notification from the Commission to the carrier when the source of the information is other than the carrier and the injury may cause eight or more days of disability or has resulted in an impairment or when a death or occupational disease is reported; or

3. Any other written document, regardless of source, which fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability.

In the case now appealed, the hearing officer found as fact that the telephone

conversation of August 31, 1993, between Ms. T and the claimant, discussed above, provided "sufficient information to constitute `notice of injury' by August 31, 1993, at the latest." Because the carrier first filed its TWCC-21 on May 27, 1994, the hearing officer concluded that the carrier failed to timely contest compensability (within 60 days of August 31, 1993) and waived its right to do so. Although in his discussion of the evidence on this issue, the hearing officer mentions the telephone conversation and the recorded transcript, it is unclear whether he considered that transcript "written notice" of the injury. Based on our review of his decision, we conclude that, since he found notice as of the date of the phone call, he did not consider the transcript as a written source of that notice on August 31, 1993.

In its appeal, the carrier argues that its obligation to contest compensability arose only upon its receipt of written notice of an injury. It contends that its first written notice of an injury was the claimant's May 19, 1994, TWCC-41, which referred to an (claimed date of injury), date of injury and that it filed its TWCC-21 disputing compensability of this injury on May 27, 1994, well within 60 days. It further argues that it did not receive written notice of a (date of injury), injury until September 13, 1994, one day before the hearing[2]. The carrier also argues that it had no earlier actual notice of either a (injury date) or (claimed date of injury) injury because the claimant lost no time at work and presented no medical bills for payment.

We conclude that, under the facts of this case, the 60-day requirement for timely disputing compensability under Section 409.021 only begins to run upon receipt of a written notice of injury to the carrier. *See* Texas Workers' Compensation Commission Appeal No. 94798, decided July 26, 1994, and Texas Workers' Compensation Commission Appeal No. 93120, decided April 2, 1993. As provided in Rule 124.1, that written notice may take many forms, including medical reports and doctor's bills, *see e.g*. Texas Workers' Compensation Commission Appeal No. 94884, decided August 22, 1994; Texas Workers' Compensation Commission Appeal No. 94851, decided August 15, 1994; and Texas Workers' Compensation Commission Appeal No. 94192, decided March 31, 1994. We thus look to the record in this case to determine if there exist any writings prior to a 60-day window which ended on May 27, 1994, which would constitute notice of an injury on (date of injury). Dr. H's records solely refer to an injury of (claimed date of injury). Dr. S reports left shoulder "discomfort" on July 19, 1993, but does not tie this to any work-related injury until June 15, 1994, in a letter to Ms. T. Similarly, transcripts of telephone conversations between Ms. T and a union official and with the claimant's supervisor on September 1, 1993, provide only sketchy details as to an alleged injury on (date of injury), and we are unwilling to conclude that they constitute the kind of notice of an injury required by Rules 124.1 and 124.6(d).

We are thus left with the transcript of the August 31, 1993, phone conversation between the claimant and Ms. T as possible adequate written notice of a (date of injury),

[2]Though not an issue at the hearing, the carrier attached a TWCC-21 to its appeal which disputes the amended notice of injury on September 15, 1994.

injury. Applying the standards of adequacy of notice set out above and described in Appeal No. 93120, *supra*, we affirm the hearing officer's finding that the phone conversation contained "sufficient information" to constitute a notice of injury. The transcript itself is obviously a writing. However, there was no evidence produced as to when this transcript, or "written notice," was received by the carrier. The transcript itself bears no stamps or indications of receipt by the carrier. Because the claimant sought to establish this transcript as the written notice of injury which made the carrier's contest of compensability untimely, he had the burden of proving when written notice was received by the carrier. Texas Workers' Compensation Commission Appeal No. 941098, decided September 29, 1994. Having failed to establish when the carrier received written notice of the claimant's (date of injury), injury, the claimant did not meet his burden of proving that the carrier's dispute of compensability was untimely.

For the above reason, we reverse that portion of the decision and order which determines that the carrier failed to timely contest compensability and render a decision that the carrier did timely contest compensability and that the carrier is relieved of liability for compensation for the claimant's left shoulder injury of (date of injury). The remaining portions of the decision and order are affirmed.

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Alan C. Ernst
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I do not consider a transcript generated by the carrier of a telephone call it made to indicate that the carrier "received written notice of the injury" as specified in Rule 124.6. I concur in the result.

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Joe Sebesta
Appeals Judge