

APPEAL NO. 950183
FILED MARCH 22, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. • 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 19, 1994, to determine the following issues: did the appellant (carrier) waive the right to contest the compensability of the lumbar spine and shoulder area by not contesting compensability within 60 days of being notified of the injury; and did the respondent (claimant) sustain a compensable injury to her lumbar spine and shoulder in addition to the injury to her cervical and thoracic areas on _____. The hearing officer determined both these issues in the claimant's favor, and the carrier takes this appeal, contending that the evidence does not support the hearing officer's determination. The claimant responds that the hearing officer's decision is correct.

DECISION

The hearing officer's decision is affirmed in part and reversed and rendered in part.

The carrier did not dispute that the claimant, who had been employed by employer, suffered a compensable injury to her cervical and thoracic spine on _____. At the hearing the claimant's position was that she also suffered injury to her lumbar spine and shoulder as a result of this incident and that reference to such problems was contained in the medical reports.

Claimant was originally seen by Dr. F on January 13, 1992; he reported her complaints of pain in her neck and upper back, radiating into the area of the shoulder blade, after carrying heavy equipment up several flights of stairs. X-rays of the cervical and thoracic spine showed no signs of acute bony injury. Dr. F's impression was cervical sprain, and he recommended medication and physical therapy. Physical therapy notes from January 15-21 indicate claimant had tenderness upon palpation of "upper traps and paracervical," as well as sharp pain in the T2-T3 area.

Thereafter, claimant began treating with Dr. R, who ordered an MRI of the cervical spine which was found to be normal with no evidence of herniated disk. Dr. R also ordered physical therapy, which claimant underwent between January 23 and May 26, 1992. The original physical therapy report noted neck and back pain between shoulder blades. Notes from 47 subsequent visits report complaints of and therapy for cervical and thoracic pain, with a few references to the scapular border. On June 2, 1992, Dr. R prepared a Specific and Subsequent Medical Report (Form TWCC-64) releasing the claimant from treatment and to normal activities; the diagnosis was given as "muscle spasm - neck." However, on June 18th Dr. R reported that claimant had reported neck and upper back pain after swimming and on June 29, 1992, Dr. R completed another TWCC-64 which stated the

claimant continued to complain of pain in the neck and left arm, along with numbness in the left arm. He recommended further physical therapy and referred the claimant to a neurologist, Dr. K, although the evidence does not indicate whether the claimant saw this doctor.

In addition, on May 28, 1992, the carrier and claimant entered into a benefit review conference (BRC) agreement concerning the disputed issue of the claimant's failure to attend two appointments with a medical evaluation order (MEO) doctor; as a result of the agreement claimant was seen by Dr. L for a determination of her ability to return to work and whether she had reached maximum medical improvement (MMI). In a Report of Medical Evaluation (Form TWCC-69) Dr. L wrote that the claimant appeared to have had a minor cervical strain, noting that the MRI was normal and that there were no objective findings indicating a significant or persisting neck problem. He also stated that claimant appeared fully capable of returning to work "despite her subjective complaints." He found claimant to have reached MMI as of the date of the examination, June 15, 1992, with a zero percent impairment rating (IR).

On September 8, 1992, claimant returned to Dr. R; his report states she had been doing better until she stretched while hanging wallpaper and began to experience more severe pain between her shoulder blades. He diagnosed muscle spasm of the thoracic spine and recommended a CT scan of that area. On September 10th Dr. R wrote the carrier stating that the claimant continued to have pain in her back, neck, and shoulders, and requested an MRI and continued physical therapy. On September 29th the carrier denied such request, referencing Dr. R's TWCC-64 of June 2nd which stated that claimant's problems from the injury had resolved and stating that claimant's exacerbation was due to the wallpaper incident. The carrier also wrote Dr. L, enclosing Dr. R's September 10th report, and requested Dr. L's opinion as to whether the recommended treatment was related to the original injury and was reasonable and necessary, and whether Dr. L agreed or disagreed that claimant had exacerbated her work-related injury. Dr. L responded that he disagreed with Dr. R's recommendation, stating that claimant's first MRI was normal and another MRI was not reasonable or necessary. The carrier thereafter denied Dr. R's request for further treatment and the matter was processed through the Texas Workers' Compensation Commission's (Commission) medical dispute resolution process. By order dated February 3, 1993, the Commission's medical dispute resolution unit dismissed the case due to Dr. R's rendering medical care prior to obtaining preauthorization from the carrier or the Commission.

In November and December of 1992 the claimant was seen by Dr. R for muscle spasms to the thoracic and cervical spine; in January 1993 she reported pain in her neck and between her shoulder and arm. Dr. R continued to recommend that she have MRIs of the thoracic and cervical spine. On two visits in February 1993 Dr. R noted that the claimant "continued to have pain in rt shoulder - R upper back area." The diagnosis on February 15th was "muscular injury to rt shoulder, muscular injury to back;" on February

23rd the diagnosis also included fibromyalgia. Also on February 15th, Dr. R signed a TWCC-64 giving a diagnosis of muscle injury to right shoulder and referring claimant to Dr. Z. Dr. R also completed an undated TWCC-69 (received by the carrier on February 18, 1993) in which he stated, "This pt had an initial inj. on _____ c muscle inj. to neck - 6/2/92 she was released. On 6/29/92 she was evaluated again for the same problem muscle inj. to neck - ref to [Dr. K] a neurologist 7/2/92 - work hardening 7/6/92 CT T-spine 9/8/92 cont PT thruout 1/17/93 Last visit - no duty status." Dr. R also wrote that claimant had not reached MMI and that her IR (to the body parts "back" and "Rt shoulder" were undetermined.

On February 24, 1993, the carrier prepared a Form TWCC-21 (Notice of Refused/Disputed Claim) in which it stated it was disputing that muscle injury to the right shoulder arose from the original compensable injury. (The form indicates it was mailed to the claimant and to the Commission on February 24, 1993, although it was date stamped as received by the Commission on September 1, 1994.) Apparently on the same date the carrier filed a Notice of Medical Payment Dispute (Form TWCC-62) disputing that treatment (physical therapy) ordered by Dr. R related to the compensable injury. At the hearing carrier's attorney represented that its dispute related to whether there was a separate injury to the shoulder (such as a torn rotator cuff) rather than muscle spasms to the trapezius and neck areas radiating into the shoulder.

The next medical reports in evidence were emergency room reports of September 29 and October 4, 1993. The earlier report states claimant returned, complaining of pain in the neck and shoulders; MRIs of the cervical and thoracic spine were recommended, and a diagnosis of radiculopathy was given; the second report states the claimant complained of "back pain." A June 1, 1994, report states the claimant complained of pain in the neck between the shoulder blades; the diagnosis was "muscle pain."

At some point in 1994 the claimant sought to change treating doctors, to Dr. S; on July 14, 1994, the carrier filed a TWCC-21 (date stamped as received by the Commission on September 1, 1994), which stated:

Carrier dispute [sic] approved TWCC Form 53 to [Dr. S] as it appears claimant is changing doctors to seek [IR], which is in violation of statute 408.022(d) "A change of doctor may not be made to secure a new impairment rating or medical report." Claimant was certified MMI 6-15-92 with zero [IR] by designated doctor, [Dr. L]. Claimant has not sought medical treatment with prior treating physician for cervical injury since 6/92. Carrier also continued to dispute treatment for claimant's thoracic and right shoulder as well as her lumbar area which she is now alleging as being related to her _____ workers comp injury.

The carrier also filed a Notice of Medical Payment Dispute on the same grounds.

The only report in evidence from Dr. S was an October 24, 1994, letter in which he stated that the carrier had not provided the claimant with a CT scan or nerve studies. Also in evidence was the report of a discogram ordered by Dr. S which was normal for C3-C4, showed probable lateral tears/early disk degeneration at C4-C5 (with marked concordant mid-posterior low cervical/upper thoracic region pain during injection), and demonstrated a posterocentral tear at C5-C6.

The carrier appeals the following findings and conclusions of the hearing officer, contending that they find no support in the evidence:

FINDINGS OF FACT

5. Claimant's treating doctors diagnosed injuries to her lumbar spine and shoulder as early as September 1992. Claimant requested treatment of carrier for these additional injuries putting carrier on notice in September 1992.
6. Claimant is in need of further treatment and surgery because of the injury to her shoulder and lumbar spine.
7. Carrier was aware of the claims to include these additional injuries and chose to dispute claimant's lumbar and shoulder injury claims through the medical dispute resolution process as early as December 1992.
8. Carrier filed a TWCC-21 to formally dispute the claim in this hearing with the Commission in September 1994.

CONCLUSIONS OF LAW

3. Carrier waived the right to contest the compensability of the lumbar spine and shoulder area by not contesting compensability within 60 days of being notified of the injury.
4. Claimant sustained a compensable injury to her lumbar spine and shoulder in addition to the injury to her cervical and thoracic areas on _____.

The 1989 Act provides in Section 409.021(c) that if an insurance carrier does not contest compensability of an injury on or before the 60th day after the date on which the carrier is notified of the injury, the carrier waives its right to contest compensability. Rule 124.6(a) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE • 124.6(a)) provides that a notice of

refused or disputed claim must be filed on a Form TWCC-21 and in the manner prescribed by the Commission. Rule 124.6(c) states that the TWCC-21 must be filed "on or before the 60th day after the carrier received written notice of the injury."

In addition, Rule 124.1(a) provides:

Written notice of injury . . . consist of the insurance carrier's earliest receipt of:

- (1) the employer's first report of injury;
- (2) the notification provided by the Commission under subsection (c) of this section; 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.

The Appeals Panel has held that a carrier must timely contest compensability of additional injuries. Texas Workers' Compensation Commission Appeal No. 950181, decided March 20, 1995. However, we have held that the 60 days for disputing compensability should not begin to run until the carrier is "fairly informed" of the four elements specified in Rule 124.1(a)(3), *supra*. Texas Workers' Compensation Commission Appeal No. 93120, decided April 2, 1993.

According to the evidence in this case, the carrier actually filed TWCC-21s with the Commission which contested compensability of a shoulder and lumbar spine injury on September 1, 1994; the hearing officer held these to be untimely because of her finding that there existed diagnoses and request for treatment of these parts of the body which "put carrier on notice in September 1992." While it is true that the carrier in September of 1992 disputed whether additional treatment was necessary for any exacerbation of the original injury caused by the wallpaper incident, and that such dispute apparently was resolved through the medical dispute resolution process, we cannot agree that the written medical reports during that period of time evidenced an injury to a different part of the body than had previously been documented. Further, carrier's dispute at that point appeared to center over whether further diagnostic treatment was warranted due to the treating doctor's earlier opinion that her problems had resolved.

Despite the foregoing, the evidence shows that in February of 1993 Dr. R stated that claimant had right shoulder pain; on February 15th he gave as a diagnosis "muscle injury to right shoulder." We believe these reports were clearly sufficient under the applicable statute and rules to fairly inform the carrier of the possibility of a shoulder injury

arising from the compensable injury; it appears the carrier was alerted to this possibility as shortly thereafter it prepared (although apparently did not immediately file) a TWCC-21 disputing the injury using the same words ("muscle injury to right shoulder") used by Dr. R. While we disagree with the point at which the hearing officer determined that the carrier had notice of this alleged injury, we agree with her conclusion that the carrier did not timely dispute such injury, and we accordingly affirm that portion of the hearing officer's decision.

The hearing officer also determined that the claimant sustained an injury to her lumbar spine as part of the original compensable injury, and that the carrier had written notice of such injury in September of 1992 but did not timely dispute it. We have thoroughly reviewed the record in this case and find no medical report which references that part of claimant's body, even in the report of Dr. S (who, the carrier contended at the hearing, first raised the possibility of an injury to the lumbar area). At the hearing the claimant stated that she had pain in her legs and that she thought that early medical reports made reference to her lumbar area. However, these statements are belied by the extensive medical evidence spanning the first two years of her treatment which do not reference this part of her body. While occasional reports mention an injury to claimant's "back," such is only done within the context of complaints involving the cervical and thoracic spine; we do not find such references sufficient to fairly apprise the carrier of an alleged injury to the lumbar spine. Because the record contains no evidence showing written notice of a lumbar spine injury, we find erroneous the hearing officer's conclusion that the carrier waived the right to contest compensability of this injury. Further, we find the hearing officer's determination that claimant's original compensable injury included an injury to her lumbar spine against the overwhelming weight of the other evidence. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We therefore reverse that portion of the hearing officer's decision that the claimant's injury extended to her lumbar spine and that the carrier did not timely contest compensability of such injury, and we render a new decision that the claimant did not sustain an injury to her lumbar spine on _____.

The hearing officer's decision and order are affirmed in part and reversed and rendered in part, as stated hereinabove.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge