APPEAL NO. 960725

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 (CCH) was held on March 21, 1996. He determined that the appellant (carrier herein) did not timely contest the compensability of the respondent's (claimant herein) claimed back injury and that the compensable injury sustained by the claimant on _____, extended to her back. The carrier appeals, arguing that the issue of timely dispute of compensability was improperly considered by the hearing officer and that his decision is otherwise against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence and should be affirmed.

DECISION

Affirmed in part and reversed and rendered in part.

We address first the contention that the hearing officer improperly considered the issue of whether the carrier timely controverted the claimed back injury. The report of the benefit review conference (BRC) states that a disputed issue was: "Did the carrier contest compensability on or before the 60th day after being notified of the injury to the back?" Also contained in the BRC report are both the carrier's and claimant's positions and the evidence considered on this issue. The carrier objected at the CCH to consideration of this issue on the grounds that it was "not discussed" at the BRC and "not listed" as an issue. The carrier's attorney admitted that the carrier made no response to the BRC report, *see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(b)(2) (Rule 142.7(b)(2)), because he felt no need to, preferring instead to raise the matter at the CCH. The hearing officer noted on the record the failure of the carrier to raise this objection in a response to the BRC report and refused to exclude the issue from resolution at the CCH. In his decision and order, he refers to the disputed issue<u>s</u> as being mediated at the BRC, but otherwise does not address the carrier's objection.

The carrier on appeal asserts that "it was error for the [CCH] officer to include the issue that was objected to without making an inquiry as to whether or not the issue had been raised and discussed at the benefit review conference." From our review of the record of the CCH, we find that the hearing officer sufficiently inquired of both parties whether this issue was raised at the CCH and find no merit in claimant's appeal. To the extent that the hearing officer premised his resolution of this issue on the carrier's failure to respond to the BRC report with its objection, we agree with the carrier that such a response was not essential to preserving its position at the CCH. We will, however, uphold a decision of a hearing officer on any legal theory reasonably supported by the evidence. Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. In this case, we find the evidence sufficient to support the finding, at least implied by the hearing officer, that the issue of timely controversion was discussed at the BRC and was properly before him as an unresolved issue.

The claimant worked as a secretary. She testified that on _____, as she was getting up from her desk, she struck her left foot. The carrier does not dispute a left foot injury. The claimant contended, variously and alternatively, that she also injured her lower back, either when she twisted as she struck her foot or as a result of using crutches prescribed to treat her compensable foot injury.

Section 409.021(c) and Rule 124.6(c) provide, in relevant part, that a carrier shall file a notice of refused or disputed claim by the 60th day after receiving written notice of the injury. *See also* Texas Workers' Compensation Commission Appeal No. 94611, decided June 24, 1994. Written notice can consist of certain official forms and "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." Rule 124.1(a)(3). Whether a written notice fairly informs a carrier of a claimed compensable injury to trigger the 60-day dispute requirement is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93120, decided April 2, 1993.

The carrier concedes that it first disputed the compensability of a back injury on November 17, 1995, when it completed and filed a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21). The hearing officer made findings of fact that the carrier received written notice of a claimed back injury numerous times between May and August 1995. The notices included a handwritten narrative statement of the claimant signed by her on May 22, 1995, and date stamped as received by the carrier on June 6, 1995. In the statement, the claimant described the incident of _____, and states that she was told to stay off the foot pending an orthopedic evaluation, that her employer bought her crutches to use and that "I have pain in my back and left knee from using the crutches." On June 1, 1995, the claimant completed a Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) which was date stamped as received by the carrier on June 6, 1995, and in which the claimant described how she was injured ("getting up from desk & hit my foot on metal desk"); the nature of the injury ("left foot, legs, knees, back from crutches"); and the parts of the body affected ("left foot, legs, knees, back from crutches"). A July 31, 1995, report of Dr. P, a carrier selected medical examination doctor, date stamped as received by the carrier on August 3, 1995, stated that the claimant is experiencing pain "about her lower back that she ascribes to the necessity of walking on the crutches for protection of her left foot." In addition, the Initial Medical Report (TWCC-61) of Dr. L, the claimant's initial treating doctor, which was date stamped as received by the carrier on June 26, 1995, states a diagnosis of a fracture of a bone of the left foot and prescribes crutches. The carrier argues that none of these documents are adequate written notice of an injury because they constitute not allegations of an injury, but allegations of pain which "is insufficient to establish an injury." Citing case law, it takes the position that because pain does not equate to an injury, an allegation of pain cannot constitute written notice of an injury. It asserts that it first received written notice of a claimed back injury no earlier than September 25, 1995, the date a report of an

MRI of the claimant's lumbar spine was prepared.[1] This report showed herniation at L5-S1 and facet degeneration at L4-5 and L5-S1.

We would agree with the carrier to the extent that the 1989 Act defines an injury as "damage or harm to the physical structure of the body," Section 401.011(26), and that pain in itself is not a compensable injury, but may reflect a compensable injury that is the source of the pain. *See* Texas Workers' Compensation Commission Appeal No. 93812, decided October 22, 1993. From this, however, we are unwilling to conclude that a written statement of pain to a part of the body, together with other facts addressing the circumstances surrounding how the pain arose, renders the statement ineffective as written notice of an injury as a matter of law. In any event, in this case, the claimant's TWCC-41 expressly lists the back as part of the claimed "injury" and "affected" body part. The purpose of the written notice is to give the carrier the opportunity to promptly investigate a claimed injury and reach an informed conclusion as to its compensability, not to establish a compensable injury in fact or the precise mechanism of that injury. Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993. We are satisfied that, at a minimum, the TWCC-41 in this case provided the carrier written notice on June 6, 1995 of a claimed back injury on _____. The carrier's approval throughout August 1995 of physical therapy for the claimant's back leads us to believe that the carrier also reached this same conclusion that the claimant was asserting a compensable low back injury. We therefore conclude that there was sufficient evidence to support the determination of the hearing officer that the carrier did not timely contest the compensability of the low back injury.

The hearing officer also determined that the claimant's foot injury was a producing cause of her back injury.[2] A subsequent injury is also compensable if it was caused by the proper and necessary treatment of the original compensable injury. Texas Workers' Compensation Commission Appeal No. 93725, decided September 28, 1993. Whether such medical treatment is the cause of a subsequent injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94067, decided February 28, 1994, and Texas Workers' Compensation Commission Appeal No.

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[1]The carrier's TWCC-21, on its face, states that the first written notice of the injury was May 5, 1995, more than six months before the TWCC-21 was prepared. Thus, the TWCC-21 itself could arguably be prima facie evidence of an untimely dispute. Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993.

[2]In his discussion of the evidence, the hearing officer points out that the claimant met her burden of proving a compensable back injury on either the theory that she injured her back at the same time she injured her foot or the theory that the back injury was caused by medical care, i.e., use of crutches, rendered for the foot injury. His findings of fact and conclusions of law, however, are limited to the theory that the foot injury was a producing cause of the back injury by virtue of the claimant's use of crutches. We consider that to be the basis of his opinion, not that the claimant injured her back by twisting it at the same time she injured her foot.

93672, decided September 16, 1993. The carrier appeals this determination, citing Texas Workers' Compensation Commission Appeal No. 941303, decided November 10, 1994, and arguing that medical evidence was required to establish that use of the crutches caused the claimant's lumbar herniation and that there was no medical evidence supporting this theory of causation. Appeal No. 941303 reversed a hearing officer's finding that the compensable injury extended to the back. In doing so, the Appeals Panel held that expert medical evidence was essential, not because this was an extent of injury case, but because three years had elapsed between the date of injury and an annotation in a medical record of low back pain when all previous medical records did not discuss back pain. It found expert evidence was necessary because this was a case of "attenuated causation." Also quoted in this case was Texas Workers' Compensation Commission Appeal No. 92340, decided September 3, 1992, that a claimant's testimony alone "could not provide the necessary linkage that a debilitating back injury resulted merely from prolonged sitting in a chair at [claimant's] job.'"

The case we now consider is not one of attenuated causation in the sense that the back pain and claimed back injury arose years after the underlying foot injury. We nonetheless believe that the causal connection, if any, between use of crutches, even if the use be considered improper or contrary to standard medical advice, and a subsequent lumbar herniation is not within common knowledge or experience. For this reason, any such connection must be established by expert evidence to a reasonable medical probability. *See* Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); and Appeal No. 92340, *supra*.[3] As the carrier points out, there was substantial medical evidence, including the opinion of Dr. LZ, an orthopedist to whom Dr. L referred the claimant, that her back condition was not caused by the use of crutches. Other medical evidence only restates the claimant's view of causation or provides no more than a chronological analysis that the back pain came after the use of crutches. It has been noted that facts derived from a claimant set out in the history portion of a medical report do not prove the injury in fact occurred as described. *See* Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). Similarly, a simple chronology of injury following an accident does not equate to proof of a cause and effect relationship between the two. *See* Texas Workers' Compensation Commission Appeal No. 92331, decided August 28, 1992. Because there was no expert evidence in this case that the claimant's use of crutches caused her lumbar herniation, we reverse the decision of the hearing officer that the compensable injury extended to the back and render a decision that the claimant's back problems are not part of her compensable injury. The carrier remains liable for benefits for the back injury based on its

[3]Carrier's assertion that there was no evidence in the record that crutches were prescribed or medically necessary is patently erroneous. Dr. L described in a letter of July 13, 1995, the claimant's course of treatment and stated she was "instructed to remain on crutches." As noted above, Dr. L's TWCC-61 included a prescription for crutches.

failure to timely contest the compensability of this injury. *See* Texas Workers' Compensation Commission Appeal No. 94326, decided May 2, 1994.

We affirm that part of the decision and order of the hearing officer which determined that the carrier did not timely contest the compensability of the claimed back injury. We reverse that part of the decision and order which determined that the compensable injury of _____, extended to a back injury and render a decision that it did not.

Alan C. Ernst
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge