

APPEAL NO. 971404

On May 20, 1997, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether the respondent (carrier) contested compensability on or before the 60th day after being notified of the left shoulder injury; and (2) whether the appellant's (claimant) "compensable injury to his back, neck and right upper extremity extends to include his left shoulder." The claimant requests review of the hearing officer's decision that the carrier contested compensability of the left shoulder on or before the 60th day "after being notified," and that the claimant's _____, compensable injury which he sustained to his back, neck, and right upper extremity does not extend to his left shoulder. The carrier requests affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury to his back, neck, and right upper extremity on _____. The claimant said that he had prior injuries for which he had undergone lumbar surgeries. The claimant testified that on _____, he was using the right arm of his chair at work to raise himself up when the right arm gave way and he fell over to the right side. He said he caught his left leg and left hand under his desk which prevented him from falling completely out of the chair. DM, stated in a recorded statement that he saw the incident of _____ and that the arm of the claimant's chair dropped about an inch and a half and that that caused the claimant to lean to the side. DM said that the claimant immediately complained that he felt a pop in his back and that the claimant told him that he thought he had reinjured his back. In a recorded statement taken on September 22, 1995, the claimant said he had injured his back, neck, and right arm on _____, and that he could not think of any other injuries at that time. Dr. M had been treating the claimant for a prior back injury and the claimant went to him on _____, and reported that he fell to the right when the arm of his chair broke. On that day, Dr. M diagnosed the claimant as having a right arm strain and a lumbar strain. Dr. M continued to treat the claimant for his injury of _____. Dr. CA examined the claimant at the carrier's request and he wrote on October 13, 1995, that the claimant had a neck and back strain. Dr. CA performed range of motion (ROM) testing on the claimant's shoulders, but he did not report any injury to the shoulders. He only noted after stating the results of shoulder ROM testing that "this is from splinting." Dr. M referred the claimant to Dr. A, who, on November 1, 1995, diagnosed the claimant as having right cervical radicular syndrome and dorsal and lumbosacral syndrome since his injury of _____.

The claimant said that he did not complain about left shoulder pain until he underwent a functional capacity evaluation (FCE). The FCE report is dated November 2, 1995, and in it the therapist noted a lumbar injury of November 1992 and that the claimant reported pain in his left upper extremity greater than in his right upper extremity. The carrier received this report on November 17, 1995. The claimant contends that the FCE

report gave the carrier notice of a left shoulder injury; however, that report does not even mention an injury of _____, nor does it relate the claimant's left upper extremity complaints to an injury of _____.

Dr. C, an orthopedic surgeon, noted in a report dated December 19, 1995, that he is the designated doctor to determine maximum medical improvement (MMI) and impairment rating (IR). His report noted a date of injury of _____. Dr. C reported that the claimant said that he had had bilateral shoulder pain since his injury of _____. Prior to Dr. C's examination, Dr. M's reports did not mention bilateral shoulder pain. Dr. C diagnosed the claimant as having a lumbar sprain and "occupational cervicobrachial disorder with underlying impingement, bilateral shoulders." Dr. C reported that the claimant was not at MMI and that he should have treatment for his shoulders.

LF testified that she is the adjustor handling the claimant's claim of _____, for the carrier; that she first became aware that the claimant was complaining of a left shoulder problem when she received Dr. C's report of December 19, 1995, on December 26, 1995 (Dr. C's report is date stamped as having been received by LF on December 26, 1995); that she filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), to "dispute the shoulders"; that she also filed a request for a benefit review conference (BRC); that a BRC was held on March 4, 1996, "over the extent of claimant's injuries"; that at that BRC she learned that the Employer's First Report of Injury (TWCC-1) listed the right shoulder as part of the injury; that as a result of finding out about the right shoulder being listed on the TWCC-1 she agreed to withdraw the dispute of the right shoulder; and that she filed a TWCC-21 on March 4, 1996, which only disputed the left shoulder.

The carrier's TWCC-21 dated December 27, 1995, which is date stamped as having been received by the Texas Workers' Compensation Commission (Commission) on January 30, 1996, states that:

Carrier is disputing designated doctor's report [Dr. C] because the designated doctor failed to certify MMI based on his evaluation of a part of the body which was not included in the compensable injury. Claimant has never received treatment for his shoulders or alleged any injury to his shoulders.

January 30, 1996, the day the Commission received the TWCC-21, is within 60 days of December 26, 1995, the day the carrier received Dr. C's report of December 19, 1995. The carrier's BRC request, which was received by the Commission on January 30, 1996, states essentially the same thing as the TWCC-21 of December 27, 1995.

Dr. M wrote on January 30, 1996, that shoulder x-rays requested by Dr. C had been done, that right shoulder x-rays showed irregularity, that left shoulder x-rays showed no significant changes, that clinically the claimant has bilateral impingement, and that he was going to refer the claimant to Dr. CO for evaluation of both shoulders. Dr. M wrote on April 2, 1996, that, according to the claimant, the claimant had had bilateral shoulder problems

since his injury. In a report dated April 3, 1996, Dr. CO, an orthopedic surgeon, recorded in the history section of his report that the claimant had back, neck, and bilateral shoulder pain when injured on _____. Dr. CO reviewed x-rays and diagnosed the claimant as having bilateral shoulder impingement, bilateral acromioclavicular joint arthritis, chronic lumbar spine problems, and cervical degenerative disease.

At the carrier's request, Dr. B, an orthopedic surgeon, examined the claimant on May 8, 1996, and reviewed medical reports. Dr. B diagnosed the claimant as having bilateral shoulder impingement and wrote that the claimant's shoulder complaints are not related to his injury of _____. Dr. H reviewed medical records at the carrier's request and he wrote on May 17, 1996, that the claimant's injury of _____, was a mild sprain of the neck and back superimposed on a preexisting laminectomy syndrome with epidural fibrosis. Dr. C reexamined the claimant on June 7, 1996, and he wrote that the claimant was not at MMI; that the claimant has bilateral shoulder impingement; that the claimant developed his symptoms after falling from a chair on _____; and that both he and Dr. CO concurred that "the mechanism of injury as described can cause the impingement as this gentleman has developed." He noted that he and Dr. CO were shoulder specialists and that Dr. B was not.

Dr. CO performed right shoulder surgery on the claimant on August 20, 1996, for right shoulder impingement syndrome with joint arthritis. In a letter to the carrier dated September 13, 1996, Dr. CO wrote that he and Dr. C were of the opinion that the claimant's shoulder pathology and pain are directly related to his work injury. On September 18, 1996, Dr. C noted that the claimant needs left shoulder surgery.

The claimant had the burden to prove the extent of his compensable injury. Texas Workers' Compensation Commission Appeal No. 960733, decided May 24, 1996. With respect to the issue of whether the claimant's compensable injury to his back, neck, and right upper extremity "extends to include his left shoulder," the hearing officer found that "the _____, injury claimant sustained to his back, neck, and right upper extremity in the course and scope of his employment does not extend to his left shoulder" and she concluded that the compensable injury of _____, does not extend to the claimant's left shoulder. There was conflicting evidence as to whether the claimant sustained a compensable injury to his left shoulder on _____. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that sufficient evidence supports the hearing officer's finding that the claimant's compensable injury of _____, does not extend to his left shoulder and that that finding is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The 60-day contest of compensability provision is set forth in Section 409.021(c). See also Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c) (Rule 124.6(c)). With respect to the issue of whether the carrier contested compensability on or before the 60th

day after being notified of the left shoulder injury, the hearing officer found that on December 26, 1995 (the date the carrier received Dr. C's first report), the carrier had written notice of the claimant's left shoulder injury, that on January 30, 1996, the carrier filed a TWCC-21 with the Commission (the hearing officer recited in this finding what the TWCC-21 stated), and that the carrier did contest an injury to the claimant's left shoulder. The hearing officer concluded that the carrier contested compensability of the left shoulder injury on or before the 60th day "after being notified." The claimant contends that the FCE report of November 2, 1995, gave notice of the left shoulder injury. As previously noted, the FCE report does not mention an injury of _____, nor does it relate the claimant's left upper extremity complaints to an injury of that date.

The claimant also contends that if the carrier was given notice of the left shoulder injury when it received Dr. C's report on December 26, 1995, then the TWCC-21 received by the Commission on January 30, 1996, is insufficient to dispute compensability of the claimed left shoulder injury. Generally, the sufficiency of the dispute is for the hearing officer to determine as the finder of fact. We believe that the hearing officer could reasonably conclude from the language used in the TWCC-21 received by the Commission on January 30, 1996, that the carrier was disputing compensability of the claimant's shoulders. As testified to by LF, the carrier subsequently withdrew its dispute of the right shoulder but continued to dispute the left shoulder. We conclude that the hearing officer's findings and conclusion on the timely contest of compensability issue are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Christopher L. Rhodes
Appeals Judge