

APPEAL NO. 980078

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 9, 1997, a contested case hearing was held. She (hearing officer) determined that the appellant/cross-respondent (claimant) is not barred by an election of remedies from pursuing a workers' compensation claim, that claimant had disability from July 10, 1995, to September 27, 1996, that claimant's depression and headaches result from the compensable injury but her high blood pressure does not, and that claimant did not timely file a claim without good cause for delay but that the respondent/cross-appellant (carrier) stipulated that a compensable injury was sustained so claimant's failure to timely file the claim does not relieve carrier of liability.

Claimant asserts that the high blood pressure is compensable, that her disability extended for a longer period of time, and that her claim was filed timely or that any delay was with good cause; she attacks various findings of fact that are contrary to these positions. Carrier asserts that the stipulation as to a compensable injury was not meant to waive its ability to contest the filing of the claim, but also states that it should be found not to have stipulated that there was a compensable injury or to have waived its right to defend based on the untimely filing of the claim. Claimant replied to carrier's appeal urging affirmance on that issue.

DECISION

We affirm.

Claimant testified that she worked for (employer) on \_\_\_\_\_. She said that her back and neck were injured when she was driving her car during the workday to mail documents for employer; at a stoplight, her car was hit from behind. Claimant said she told her supervisor the next day and she was able to continue working for an extended period of time. The stated issues at the hearing were whether claimant made an election of remedies by choosing to use her health insurance for medical care resulting from the accident, whether she had disability, whether high blood pressure, depression and chronic headaches resulted from the compensable injury of \_\_\_\_\_, and whether claimant's time for filing a claim was extended by the employer's failure to notify the carrier or whether there was good cause for lat filing. Neither party appealed the determination as to election of remedies. Neither party appealed the determination that claimant's depression and headaches resulted from the compensable injury. As stated, the length of disability and determination that high blood pressure was not compensable were appealed by claimant, and claimant appealed findings contrary to issues of timely filing a claim while carrier appealed the determination that the failure to timely file a claim did not control since carrier stipulated that there was a compensable injury.

Claimant testified that she did not have high blood pressure prior to the \_\_\_\_\_, car accident. Her statement of November 3, 1995, said that while she had "borderline" high blood pressure, she had not had any problems with it before. She also said that (Dr. T) told

her not to return to work because of the high blood pressure, adding that she continued to work until May 1995 (implying that Dr. T told her not to return to work because of the high blood pressure in May 1995). Claimant also said that Dr. T told her the high blood pressure was due to the 1994 accident. Claimant's statement of November 1995 is not inconsistent with a statement provided by carrier, signed by a person named (PH), who wrote that claimant on May 17, 1995, stated that she was taken off work because "blood pressure is 190/110." On August 1, 1997, Dr. T provided a statement in which he said that claimant "had an exacerbation of hypertension following her accident." He also said that he feels there is a reasonable medical probability that the accident is "a producing cause" of the hypertension. As the hearing officer points out, Dr. T also said on July 17, 1995, that claimant has been "continuously disabled" from \_\_\_\_\_, to the present, even though claimant herself acknowledged that she worked until May 1995.

Claimant saw (Dr. J) for an extended period of time, beginning July 10, 1995. He provided comments and opinions that contributed to the unappealed findings that headaches and depression were part of the compensable injury, but he disclaimed an ability to relate the high blood pressure to the accident, saying:

I am not able to give guidance regarding the cause effect relationship of her hypertension to the motor vehicle accident that she had that condition prior to coming to see me and was on medication for it at the time of the initial evaluation. Typically hypertension is not due to trauma, but trauma and stress can exacerbate pre-existing hypertension by stress causing blood pressure to rise. [Emphasis added.]

No medical records were provided from the year 1994, a period of seven and one-half months immediately following the accident.

With claimant's acknowledgement of preexisting borderline hyperstension, and with Dr. J's comments not indicating that there was a causal connection between the high blood pressure and the 1994 accident, the hearing officer could choose to give Dr. J's opinion more weight than that of Dr. T provided in 1997 after the hearing officer had questioned Dr. T's comments relative to disability. The findings of fact relative to high blood pressure not being part of the compensable injury are sufficiently supported by the evidence.

The claimant also asserts that disability should begin on May 10, 1995, when, she testified, Dr. T took her off work. While the hearing officer correctly commented that the record does not show a written statement to that effect from Dr. T, absent Dr. T's broader assertion that claimant had disability from \_\_\_\_\_, to July 17, 1995, the claimant also said that Dr. T had acted because of her high blood pressure, not a part of the compensable injury. The hearing officer relates that she began disability based on the comments of Dr. J. Dr. J's records support a finding that he took claimant off work on July 10, 1995, as stated in his note of July 31, 1995. The hearing officer could choose July 10, 1995, as the beginning date of disability even though Dr. J in an August 6, 1996, summary

of his past notes indicated that the off work status may have begun later in 1995. In that 1996 summary Dr. J said, relative to his September 20, 1995, note, that claimant "has been off work for about a month," which would indicate that disability may have begun about mid-August 1995.

Claimant testified that she still cannot work, but the hearing officer ended disability on September 27, 1996, the last day medical records in evidence provide information as to claimant's condition that could affect disability. The hearing officer also noted that claimant's testimony as to her ability to work after September 27, 1996, from the compensable injury was not credible. While the hearing officer may base disability on the testimony of a claimant alone, the hearing officer, as sole judge of the weight and credibility of the evidence (see Section 410.165), does not have to credit claimant's testimony as to the length of disability. The determination that claimant had disability from July 10, 1995, through September 27, 1996, and the findings of fact that address that determination are sufficiently supported by the evidence.

When the hearing opened, the parties stipulated that the claimant sustained a compensable back and neck injury on \_\_\_\_\_. After a period of time, the hearing officer chose to question the carrier about the stipulation it had entered into vis-a-vis the issue of filing of a claim. The hearing officer stated that the stipulation goes to the claim issue. The carrier replied that the stipulation says that an accident occurred on the day in question that was in the course and scope of employment but that the carrier still defended on the claim filing issue. The carrier did not argue that it stipulated only that there was an accident on the day in question that caused injury; it acknowledged that claimant was in the course and scope of employment at the time. Nor did carrier request that the stipulation be withdrawn because of misinterpretation or for any other reason.

The Appeals Panel has said that even when a carrier raises an issue of filing of a claim and a claimant has not timely filed, the carrier may still show through its actions that it did not contest the claim. See Texas Workers' Compensation Commission Appeal No. 94557, decided June 21, 1994, which found that late filing of a claim did not control when the carrier had paid medical and income benefits, even though carrier contested the claim within a month after it was filed approximately two and one-half years after the injury. In addition to the facts found in Appeal No. 94557, the case of Second Injury Trust Fund v. Texas Employers Ins. Assoc., 719 S.W.2d 655 (Tex. App.-El Paso 1986, no writ) dealt with a case in which no claim was filed. An argument was made that the filing of a claim is jurisdictional. In that case the carrier had stated within a few months of a worker's death that it "accepts liability." The date of injury and death was in 1980. Some correspondence about proof of relationships ensued within a year and in 1983 certain records were tendered which led to an administrative award in 1984. The court in addressing the jurisdiction question then said:

The more sensible approach is to hold the acknowledgment of liability gave the Board jurisdiction over this claim and over the carrier.

The court affirmed.

The hearing officer indicates that she considered the stipulation that the claimant sustained a compensable injury to override the question of timely filing of a claim. Section 401.011(10) states that a compensable injury "means an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." In effect the hearing officer held that the carrier can acknowledge liability by agreement, by a verbal stipulation at a hearing, just as it can by actions in making payments of benefits. In fact, there could be some payments of benefits that might be found not to acknowledge liability, while a stipulation at a hearing, which is discussed and not withdrawn, would appear to be open to less interpretation. While carrier's agreement at the hearing as to a compensable injury contradicted its issue as to timely filing, Appeal No. 94557, *supra*, also contained that same contradiction between an issue as to late filing of a claim and its actions in paying benefits. The determination that the claimant's late filing without good cause did not relieve carrier of liability is affirmed.

Claimant argued that a one day absence in March 1995 to obtain an MRI triggered the requirement of employer to notify the carrier in writing and since it did not do so, the claimant's obligation to file a claim was tolled. The hearing officer found that the one day in March 1995 did not trigger the obligation of employer to file because Section 409.005 requires an absence of "more than one day" to require an employer's notice, which can then toll the claimant's duty under Section 409.008. The hearing officer's finding of fact that the employer did not have a duty to file a notice until July 10, 1995, more than one year after the injury, is sufficiently supported by the evidence.

Claimant also says that she had good cause for waiting to file because she did not know she was supposed to. She testified that the employer did not tell her she should file a claim within one year. There was no evidence that the employer had misrepresented that claimant did not have to file or that it had taken care of such filing. The determination that claimant did not have good cause for being late in filing a claim is sufficiently supported by the evidence.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta  
Appeals Judge

CONCUR:

Thomas A. Knapp  
Appeals Judge

Christopher L. Rhodes  
Appeals Judge