

APPEAL NO. 980093

On December 17, 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 appellant (carrier) waived the right to contest the compensability of the claimed injury to the thoracic spine/intrascapular area by not contesting compensability within 60 days of being notified of the injury; and (2) whether the compensable injury sustained by the respondent (claimant) extends to an injury to the thoracic spine and intrascapular area. The carrier requests review and reversal of the hearing officer's decision that: (1) the carrier waived the right to contest the compensability of the claimed injury to the thoracic spine/intrascapular area by not contesting compensability within 60 days of being notified of the injury on (injury date 2); and (2) the compensable injury sustained by the claimant extends to an injury to the thoracic spine and intrascapular area. The claimant requests affirmance.

DECISION

Affirmed.

The claimant testified that on (injury date 1), he and a coworker were lowering a 350-pound roller with the use of a rope when the coworker let go of his end of the rope causing the claimant be jerked against a machine. The claimant said that he felt pain in his neck, back, and shoulder the day of the accident after the accident occurred and that the back pain was between his shoulders. The claimant said that he had not previously injured his middle or upper back, but that he previously had four lumbar surgeries. The parties stipulated that the claimant sustained a compensable back injury on (injury date 1). The hearing officer states in his decision that it is undisputed that the claimant's injury includes his cervical spine and neither party challenges that statement on appeal. The Employer's First Report of Injury or Illness (TWCC-1) was received by the carrier on July 11, 1994, and it reports that the claimant injured his back on (injury date 1). (Dr. G) noted on July 14 and August 16, 1994, that the claimant had been injured at work on (injury date 1), that the claimant complained of back and arm pain, and that the claimant had a tender left parascapular area with spasm. Dr. G's reports were received by the carrier by October 1994.

Dr. G referred the claimant to (Dr. S), who wrote in November 1994 that the claimant had pain in his neck, upper scapular region, and across the suprascapular area. Dr. S reviewed a cervical MRI and diagnosed the claimant as having cervical disc herniations. The claimant changed treating doctors to Dr. S in February 1995 and Dr. S noted in that month that the claimant continued to have pain in his neck and suprascapular area. The carrier received that report in February 1995. Dr. S performed two cervical surgeries on the claimant in May 1995. In July 1995 Dr. S wrote that the claimant had pain in his

suprascapular area and interscapular area. The claimant said that in November 1995 Dr. S requested approval for a thoracic MRI and that he was told that the carrier denied the request. In December 1995 the carrier wrote the claimant advising him that it would deny a myelogram and CT scan. In a letter dated January 22, 1996, Dr. S wrote that the claimant complained of pain in his neck, suprascapular, and interscapular areas, that he had decreased sensation in the suprascapular area, that he had suggested a myelogram and CT scan to evaluate the claimant's intraspinal anatomy, and that an MRI scan could also be considered.

In a letter to the carrier dated February 6, 1996, which was received by the carrier on _____, the claimant wrote that he has pain between his shoulders, that he reported that to Dr. S in November 1994 and on later visits, that Dr. S had requested authorization for a myelogram and CT scan to see if surgery was necessary, that the testing was not authorized, that he was asking the carrier for reconsideration of the testing, and that he was enclosing Dr. S's letter of January 22, 1996. The claimant said that he did enclose with his letter Dr. S's letter of January 22nd. On March 15, 1996, the Texas Workers' Compensation Commission's (Commission) Medical Review Division (MRD) wrote to the parties advising them that it was in receipt of a request for medical dispute resolution regarding the claimant. In a decision dated April 10, 1996, the MRD wrote that the claimant had requested review of the carrier's denial of preauthorization for a myelogram and CT scan, that the carrier contended that the requested diagnostic studies were not medically necessary, and that the MRD had concluded that the requested studies are not medically necessary. The claimant said that he changed treating doctors to (Dr. A) in February or March 1996 and a hospital note dated May 3, 1996, reflects that an MRI of the claimant's thoracic spine requested by Dr. A had been canceled because it had not been approved.

Apparently the claimant appealed the decision of the MRD, because on May 9, 1996, the Commission notified the parties that pursuant to the claimant's request a contested case hearing under the Administrative Procedure Act would be held to determine whether proposed health care was medically necessary and if it should be ordered preauthorized. In an Order of Dismissal dated October 16, 1996, an Administrative Law Judge granted the claimant's motion to withdraw his request for a hearing. The claimant said that his request, apparently for a thoracic MRI, "finally went through" and that "they authorized it." A radiologist reported that an MRI of the claimant's thoracic spine done on February 14, 1997, showed "moderate size left posterolateral disc at T4-5 . . . mild disc bulges at T1-2 and T3-4." Dr. A wrote on February 27, 1997, that the thoracic MRI showed a disc herniation at T4-5 toward the left, that the claimant was still experiencing pain in the left side of his mid-spine in the region between his shoulder blades, and that the claimant needed a neurosurgical evaluation of his thoracic spine.

Dr. A referred the claimant to (Dr. C), who wrote in March 1997 that the claimant complained of pain between his shoulder blades. Dr. C reviewed the thoracic MRI and recommended a myelogram. On March 26, 1997, Dr. C wrote that the claimant had a herniated thoracic disc, that he was scheduled for diagnostic testing, and that surgery was

a possibility. In a letter to Dr. A dated April 11, 1997, the carrier notified Dr. A that it had denied the thoracic myelogram and CT scan on the basis of its physician advisor's opinion that the thoracic MRI finding is an incidental finding not related to the accident of July 5, 1994. In a letter to Dr. A dated May 13, 1997, the carrier notified Dr. A that it had denied the thoracic myelogram and CT scan on the basis of its physician advisor's opinion that the type of pain the claimant experiences is usually cervical in origin and not thoracic in origin and that it could also be musculoskeletal.

On May 20, 1997, Dr. A wrote that "the headaches that he's [claimant] having and his pain from his mid thoracic spine which is related to a thoracic HNP is probably due to his original on-the-job injury." On May 23, 1997, Dr. C again wrote that he was recommending a myelogram and CT scan of the claimant's thoracic spine. In a letter dated June 4, 1997, the MRD noted that Dr. C was the requestor and that it had received a request for medical dispute resolution in regard to the claimant. On June 23, 1997, Dr. A wrote that the claimant was having chronic headaches and that "I believe this is due to the pain he's had from his thoracic spine as well as his continued neck pathology from his original on-the-job injury." In an MRD General Dispute Resolution Findings and Dismissal document dated July 1, 1997, the MRD wrote that the services requested by Dr. C to be reviewed by MRD (thoracic myelogram and CT scan) are being contested for compensability by the carrier, that the MRD does not have jurisdiction in medical disputes that contain compensability issues, that compensability issues are settled in the Commission field office nearest to the claimant's home, that either party could request a benefit review conference (BRC) to resolve the compensability issue, and that the case was dismissed. On October 22, 1997, Dr. C wrote that "a thoracic disc problem at the T4-5 level is in fact located between the two shoulder blades and could certainly be a possible explanation for any type of mid back, mid thoracic or intrascapular pain." A BRC on the waiver of the right to contest compensability and extent of injury issues was held on October 27, 1997.

One issue at the CCH was whether the compensable injury sustained by the claimant extends to an injury to the thoracic spine and intrascapular area. The claimant had the burden to prove the extent of his compensable injury. Texas Workers' Compensation Commission Appeal No. 960733, decided May 24, 1996. We note that the parties stipulated that the claimant sustained a compensable "back injury" on (injury date 1). The hearing officer found that the claimant's "thoracic spine problems are a result of the incident which gave rise to claimant's cervical injury and are part of the compensable injury sustained by claimant on (injury date 1)," and he concluded that "the compensable injury sustained by the claimant extends to an injury to the thoracic spine and intrascapular area." The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). The claimant's testimony and the reports of his doctors provide sufficient evidence to support the hearing officer's finding and conclusion on the extent of injury issue. We conclude that the hearing officer's decision on the extent of injury issue 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 other issue at the CCH was whether the carrier waived the right to contest the compensability of the claimed injury to the thoracic/intrascapular area by not contesting compensability within 60 days of being notified of the injury. Section 409.021(c) provides in part that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c) (Rule 124.6(c)) provides in part that if a carrier disputes compensability after payment of benefits has begun, the carrier shall file a notice of refused or disputed claim on or before the 60th day after the carrier received written notice of the injury or death. Rule 124.1(a) provides that written notice of injury as used in Section 409.021 consists 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 Rule 124.1); or (3) if no first report of injury has previously been filed by the employer, any other notification 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 124.6(d) provides that payment, or denial of payment, of a medical bill shall be made in accordance with Sec. 4.68 of the Act (now Section 408.027), and not under this section; however, a carrier that contends that no medical benefits are due because an injury is not compensable under the Act shall file a notice of refused or disputed claim set forth in this section no later than the 60th day after receipt of written notice of injury. We have held that additional or follow-on injuries must be timely contested by the carrier within 60 days of written notice of the additional or follow-on injuries. See Texas Workers' Compensation Commission Appeal No. 941096, decided September 27, 1994.

The hearing officer found that "[c]arrier received written notice that claimant was alleging that his thoracic spine problems, referred to by claimant as constant pain between his shoulder blades, was part of the compensable injury on (injury date 2)," that "[t]he only dispute by carrier concerning claimant's thoracic spine problem between _____, and the date of the [BRC] in this matter on October 27, 1997, was carrier's denial of an MRI and the parties' dispute over whether such treatment was reasonable and necessary," and that "[c]arrier's refusal to authorize an MRI does not constitute a dispute of the compensability of claimant's thoracic problems." The hearing officer concluded that "[c]arrier waived the right to contest the compensability of the claimed injury to the thoracic spine/intrascapular area by not contesting compensability within 60 days of being notified of the injury on (injury date 2)."

We note that the parties stipulated that the claimant sustained a compensable back injury on (injury date 1); that the employer's first report of injury, which the carrier received on July 11, 1994, reports that the claimant sustained a back injury at work on (injury date 1); that there is no evidence that the carrier ever filed a Notice of Refused or Disputed Claim (TWCC-21) with the Commission contesting the compensability of the claimant's claimed injury; and that the carrier acknowledged at the CCH that it had not filed a TWCC-

21 with the Commission contesting the compensability of an injury to the claimant's thoracic spine. In addition, we note that the evidence reflects that by (injury date 2), the carrier had received Dr. G's reports, Dr. S's report of January 22, 1996, and the claimant's letter of February 6, 1996. The carrier's denial of diagnostic testing of the claimant's thoracic spine and the resulting MRD proceedings on whether such testing was reasonable and necessary do not serve as a contest of the compensability of the claimant's claimed injury to his thoracic spine. Texas Workers' Compensation Commission Appeal No. 960785, decided June 4, 1996; Texas Workers' Compensation Commission Appeal No. 950214, decided March 29, 1995; and Texas Workers' Compensation Commission Appeal No. 951930, decided December 27, 1995. In order to contest the compensability of the claimant's injury, the carrier was required to file a TWCC-21. Texas Workers' Compensation Commission Appeal No. 960496, decided April 24, 1996; Texas Workers' Compensation Commission Appeal No. 950709, decided June 20, 1995. We conclude that the hearing officer's decision on the waiver of the right to contest compensability issue is supported by sufficient evidence and is 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:

Alan C. Ernst
Appeals Judge

Christopher L. Rhodes
Appeals Judge