

APPEAL NO. 980272  
FILED MARCH 27, 1998

On December 30, 1997, a contested case hearing (CCH) was held in (City), Texas, with (hearing officer) presiding as the hearing officer. 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 compensable injury sustained by the appellant (claimant) extends to an injury to the thoracic and lumbar spine; and (2) whether the respondent, (carrier), waived the right to contest the compensability of the claimant's injury to the thoracic and lumbar spine by not contesting compensability within 60 days of being notified of the injury. The claimant requests review and reversal of the hearing officer's decision that she did not injure her thoracic and lumbar spine on \_\_\_\_\_, and that the carrier did not waive the right to contest compensability of the claimed injury to the thoracic and lumbar spine. The carrier responds that the evidence supports the hearing officer's decision and that the claimant's request for appeal was not timely filed.

DECISION

Affirmed.

Section 410.202(a) allows 15 days from the date of receipt of the hearing officer's decision to file a request for appeal. The Texas Workers' Compensation Commission (Commission) mailed the hearing officer's decision to the claimant on January 20, 1998. The claimant is deemed to have received the hearing officer's decision on Monday, January 26, 1998. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 102.5(h) and 102.3(a) (Rules 102.5(h) and 102.3(a)). Rule 143.3(c) provides that a request for appeal shall be presumed to be timely filed if it is: (1) mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and (2) received by the Commission not later than the 20th day after the date of receipt of the hearing officer's decision. The 15th day after January 26, 1998, was Tuesday, February 10, 1998. The claimant's request for appeal is postmarked February 9, 1998, and was received by the Commission on February 11, 1998. The claimant's request for appeal was timely filed.

The claimant testified that on (alleged date of injury), she felt pain in her neck, right shoulder, and right elbow when she lifted a barrel of cookies onto a conveyor belt at work and that she felt pressure in her lower and middle back at that time. At one point in her testimony she testified that she felt immediate pain in her lumbar and thoracic areas when she was injured. Although the claimant testified to being injured on (alleged date of injury), the parties stipulated that the carrier accepted liability for an injury to the claimant of \_\_\_\_\_. Some medical reports reflect a date of injury of (alleged date of injury) and others a date of \_\_\_\_\_. For purposes of this appeal, we take the parties' stipulation regarding the carrier's acceptance of liability for an injury of \_\_\_\_\_, to reflect that the injury occurred on \_\_\_\_\_, and we

will treat references in documents and medical reports in evidence to a work injury of (alleged date of injury), to be the injury of \_\_\_\_\_. It appears from the hearing officer's findings of fact that that is what he did. We note that the emergency medical services (EMS) report reflects that the claimant received medical treatment at work on \_\_\_\_\_, and that the benefit review conference report states a date of injury of \_\_\_\_\_. The parties stipulated that the carrier was the workers' compensation carrier for the employer on \_\_\_\_\_; however medical reports and other documents mention the name of another carrier. No explanation was given for this discrepancy. The parties and the hearing officer treated both carriers as the same entity and for purposes of this appeal we do the same.

The claimant said that she went to Dr. B on August 29, 1996, and complained to him about pain in her neck, shoulder, thoracic, and lumbar areas, but that she asked for pain relief in her shoulder and neck because those were the areas most injured. She said that Dr. B gave her medications and that she underwent physical therapy for two weeks. She said that her thoracic and lumbar areas got worse and that is one reason that she changed treating doctors to Dr. S. She said that she told Dr. S she had pain in her neck, lower back, right shoulder, elbow, and hand. She also said that Dr. S took x-rays and requested MRI scans of the "four parts" that she complained about. She said that the MRIs were done on November 25, 1996. The claimant said that Dr. S referred her to a chiropractor for treatment of her cervical, thoracic and lumbar spine, and her shoulders, and that she first saw the chiropractor on January 15, 1997. The claimant said that she had right shoulder surgery on February 17, 1997. She said that she had a back injury in 1992 for which she was off work for a year.

An EMS report dated \_\_\_\_\_, states that the claimant complained of pain in her upper right arm, right shoulder, and neck on that day after feeding cookies from a barrel onto the line. The claimant's written report of injury to the employer dated September 9, 1996, states that on (alleged date of injury), she was feeding cookies from a barrel onto a machine when she had pain in her right arm that went into her right shoulder and neck. The Employer's First Report of Injury (TWCC-1) states a date of injury of \_\_\_\_\_, and states that the claimant felt pain in her right elbow going up into her right shoulder and neck area. In an Initial Medical Report (TWCC-61) dated September 5, 1996, Dr. B reported that the claimant had tenderness in her right shoulder. In another report dated September 5, 1996, Dr. B reported that the claimant had been under his care since August 29, 1996, for a right shoulder strain. On September 23, 1996, Dr. B again noted that the claimant was under his care for a right shoulder strain. There is no mention of low, mid, or upper back complaints in the EMS report, the claimant's written notice of injury to the employer, the TWCC-1, or Dr. B's reports.

In an Employee's Request to Change Treating Doctors (TWCC-53) dated October 23, 1996, the claimant wrote that she had injured her right shoulder, arm, elbow, and neck, without mention of her back, and requested approval to change treating doctors from Dr. B to Dr. S, stating that she was not improving and that she

needed an orthopedic surgeon. The request was approved by the Commission on October 29, 1996. In a TWCC-61 dated November 15, 1996, which indicated a date of visit of November 6, 1996, Dr. S diagnosed the claimant as having cervical disc displacement, cervical/cerviothoracic sprain, and lumbar disc displacement, and noted that he had had x-rays taken of the claimant's neck, lower spine, and shoulder. The TWCC-61 refers to an attachment for the history, clinical findings, and treatment plan. Attached to the TWCC-61 is Dr. S's report of November 6, 1996, in which Dr. S noted that the claimant complained of pain in her cervical, thoracic, and lumbar spine, and right shoulder and elbow; that the claimant reported to him that she sustained an injury to her neck, upper back, and shoulder lifting heavy cookie containers; and that the claimant had had a prior back injury in 1992, which seemed to have been aggravated by the claimant's current injury. In the November 6th report, Dr. S diagnosed the claimant as having an acute cervical, lumbar, and thoracic sprain, a contusion of the shoulder, and cervical radiculopathy of the right shoulder. Dr. S recommended physical therapy, and MRIs of the cervical, thoracic, and lumbar areas, and of the shoulder.

On December 2, 1996, Dr. S prescribed physical therapy for treatment of the claimant's cervical area and right shoulder. According to physical therapy notes in evidence, the claimant underwent physical therapy for treatment of her cervical area and right shoulder from December 5, 1996, to January 10, 1997. The physical therapy notes record the claimant's complaints of cervical and right shoulder pain without mention of any complaints about her low, mid, or upper back. Dr. W reported on November 25, 1996, that an MRI of the claimant's lumbar spine done that day showed desiccation of the L5-S1 disc with an annular tear and disc herniation, and desiccation of the L4-5 disc with an annular bulge. In an office note dated December 9, 1996, Dr. S noted that he saw the claimant on that day for follow-up of her neck, upper back, and lower back, and diagnosed the claimant as having bulging cervical and lumbar discs, a herniated lumbar disc, and shoulder impingement. Dr. S's office note of December 23, 1996, noted that the claimant is a candidate for a CT scan of her low back and shoulder surgery. Dr. S noted on January 8, 1996, that he had discussed with MO, a case manager for the carrier, that the claimant needed shoulder surgery and that he was treating the claimant's back and neck conservatively.

The claimant saw Dr. N at the carrier's request on November 26, 1996, and he reported on December 12, 1996, that the claimant had reached maximum medical improvement on November 26, 1996, with a zero percent impairment rating. Dr. N noted that he did not have the claimant's MRI reports. Dr. N noted that the claimant told him that she had had a low back injury in 1992 and a left shoulder injury in 1993. Dr. N also noted that the claimant's medical records referenced a lumbar sprain in 1995.

As to the current injury, Dr. N reported that the claimant told him that she injured her neck, right shoulder, right elbow, and right arm lifting cookies from a barrel unto a conveyor belt, and that the claimant complained of pain in her right shoulder, right elbow, and right side of her neck, and of numbness in her index and long fingers of her right hand. There is no mention in Dr. N's report about low, mid, or upper back pain from the current injury. In a report dated January 15, 1997, Dr. S diagnosed the

claimant as having cervical disc displacement, cervical/thoracic sprain, and lumbar disc displacement, and in an office note dated January 13, 1997, attached to that report Dr. S wrote that the claimant was to be evaluated by Dr. K. Only the last two pages of Dr. K's three page report are in evidence. Dr. K's stated an impression of a strain of the shoulder joint and cervical radiculopathy.

On January 17, 1997, the claimant filed with the Commission an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) in which she noted the body parts affected as cervical, right elbow, upper back, thoracic, right shoulder, lower back, and lumbar spine. Dr. S wrote on April 2, 1997, that the claimant's lumbar CT scan showed a large herniated disc at L4-5 and L5-S1, that the claimant's thoracic CT scan showed bulging discs from T7 to L1, that the claimant's cervical MRI showed changes, that the claimant sustained injuries to her entire spine as a result of her injury on (alleged date of injury), and that in his opinion the claimant's injuries on (alleged date of injury), involve her cervical, thoracic, and lumbar spine as well as her right shoulder and elbow, and that the claimant is in need of treatment for her thoracic and lumbar spine.

The first issue at the CCH was whether the compensable injury sustained by the claimant extends to an injury to the thoracic and lumbar spine. The hearing officer found that the claimant did not injure her thoracic and lumbar spine in her on-the-job activities on \_\_\_\_\_. The claimant had the burden to prove the extent of her compensable injury. Texas Workers' Compensation Commission Appeal No. 960733, decided May 24, 1996. Although Dr. S opines that the claimant's injury involved her entire spine, there was no mention in the reports of injury or in the medical records of complaints about the low, mid, or upper back, until the claimant saw Dr. S in November 1996. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact the hearing officer resolves conflicts in the evidence, including the medical evidence, and may believe all, part, or none of the testimony of any witness. While the claimant may well have injuries to her lumbar and thoracic spine, the hearing officer was not compelled to find from all of the evidence presented that those injuries occurred at work as claimed by the claimant. We conclude that the hearing officer's finding and decision on the extent of injury 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 v. Bain, 709 S.W.2d 175 (Tex. 1986).

The second issue at the CCH was whether the carrier waived its right to contest the compensability of the claimant's injury to the thoracic and lumbar spine 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. Rule 124.6(c) provides 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. 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. Texas Workers' Compensation Commission Appeal No. 941096, decided September 27, 1994.

Dr. S's subsequent report of January 15, 1997, is date stamped as having been received by the carrier on January 29, 1997. The hearing officer found that on January 15, 1997, Dr. S filed a subsequent report that was received by the carrier on January 29, 1997, and that on January 29, 1997, the carrier received its first written notice that claimant alleged a lumbar injury as part of the injury of \_\_\_\_\_. In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated February 14, 1997, which is date stamped as having been received by the Commission on February 14, 1997, the carrier (the one the parties stipulated was the carrier for the employer on \_\_\_\_\_) disputed the compensability of the claimant's lumbar and thoracic spine. The hearing officer found that on February 14, 1997, the carrier filed a TWCC-21 with the Commission disputing liability for injuries to the claimant's thoracic and lumbar spine, and that February 14, 1997, was within 60 days of January 29, 1997, the day the carrier first received written notice of an alleged thoracic and lumbar injury. The hearing officer concluded that the carrier contested compensability of the thoracic and lumbar spine injuries within 60 days after it first received written notice alleging them to be part of the injury and that the carrier had not waived its right to contest compensability.

The claimant asserts that Dr. S's TWCC-61 dated November 15, 1996, with the attached report from Dr. S dated November 6, 1996, was the carrier's first written notice that her compensable injury included her thoracic and lumbar spine and that the carrier was notified of the injury to her thoracic and lumbar spine on November 6, 1996. There is a partial stamp on Dr. S's TWCC-61 which is almost entirely illegible, but which may indicate a Commission field office stamp; however, no date received is visible on the stamp. Someone hand wrote on Dr. S's TWCC-61 "12-6-96 by TWCC" but no one testified as to who wrote that date or when it was written on the TWCC-61. No date-received stamp by the carrier can be identified on Dr. S's TWCC-61. On the attached report of November 6, 1996, there are two partially visible stamps. The stamp that is right-side up may indicate the name of a Commission field office, but the date of receipt is not visible. The stamp that is upside down indicates receipt by someone on December 6, 1996, but the name of the receiving party is not visible.

Even if the Commission received Dr. S's TWCC-61 and report of November 6, 1996, on December 6, 1996, which is uncertain, there is evidence in the record that the carrier may not have received those reports until June 1997. Although there is a letter from Dr. S's office, apparently to the carrier, dated November 5, 1997, which states that Dr. S's office mailed the TWCC-61, original bill, and progress notes to the carrier on November 14, 1996, the claimant testified that Dr. S's bill for his initial services was the only bill from Dr. S that was not paid and there is a claim form in evidence from Dr. S dated June 16, 1997, for services provided on November 6, 1996, along with an

attachment stating that the bill for the services of November 6th was refiled with the carrier on June 16, 1997. The claimant also mentions a letter to the carrier from MO, the carrier's case manager, dated November 25, 1996, which is date stamped as having been received by the carrier on December 2, 1996. In this letter MO states that the claimant's injury is to the right elbow, shoulder, and neck; that Dr. S had ordered an MRI of the neck, shoulder, and lumbar spine; and that a reasonable course of action would be to question the relatedness of any care to the lumbar spine to the original injury. We do not believe that the hearing officer was compelled to find that MO's letter related facts showing compensability of the thoracic or lumbar spine. See Rule 124.1(a). We conclude that the hearing officer's findings and decision in favor of the carrier on the issue of the carrier's waiver of its right to contest compensability of the claimant's injury to the thoracic and lumbar spine 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.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Judy L. Stephens  
Appeals Judge