

APPEAL NO. 990307

This appeal arises 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 January 13, 1999. The issues at the CCH were: (1) whether the respondent (carrier) waived the right to contest the compensability of claimant's claimed injury "to the cervical area consisting of a herniated disc at the C5-6 level"; and (2) whether the \_\_\_\_\_, compensable injury of the appellant (claimant) included or extended to "include an injury to the cervical area consisting of a herniated disc at the C5-6 level." The hearing officer determined that carrier did not waive the right to contest the compensability of the alleged neck injury and that claimant "did not sustain an injury to her cervical area on \_\_\_\_\_." Claimant appeals, contending that her injury does include her "cervical injury/condition" and that carrier waived the right to contest the compensability of a neck injury. Carrier responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm in part and reverse and remand in part.

Claimant contends the hearing officer erred in determining that claimant's compensable injury did not extend to and include a cervical injury. It was undisputed that claimant sustained a compensable injury in the form of a right upper extremity injury and claimant contends that a neck condition was later diagnosed as a cause of her symptoms. Claimant does not contend that her neck injury includes bone spurring, degenerative disc disease, or narrowing of the neural foramen, but asserts that these ordinary diseases of life were aggravated by the frequent neck turning, causing a neck injury. Carrier contended that claimant had only an ordinary disease of life with regard to her neck. On appeal, carrier asserts that claimant had only pain, which is not in itself an injury.

We first note that the issue reported out of the benefit review conference (BRC) was whether the claimant's \_\_\_\_\_, compensable included or extended "to include an injury to the cervical area *consisting of a herniated disc at the C5-6 level.*" [Emphasis added.] The issue was not stated broadly to inquire whether claimant sustained a neck injury, in general. The hearing officer did not specifically answer the issue regarding the herniated disc, but did determine that claimant "did not sustain an injury to her cervical area." We note that, at the CCH, the parties actually litigated the issue of whether claimant sustained a "general" neck injury. Therefore, we will address that issue on appeal even though it was not specifically worded in that manner at the BRC or CCH. See Texas Workers' Compensation Commission Appeal No. 950751, decided June 23, 1995.

Claimant testified that she worked as a secretary for (employer) in 1997, performing computer work about 80% of the time. She said she was required to turn her head to the right constantly while using the computer because the monitor was to the right of her keyboard. Claimant testified that she began working in July 1997 and that by November 1997, she began to feel pain in the area of her right bicep. She said she could not raise her arm She said she

told Dr. P about her arm pain in January 1998, and that she was sent for physical therapy and hot pack treatment. Claimant testified that after a few months of treatment when she did not improve, her physical therapist mentioned that her problem may be related to her neck rather than her right upper extremity. She said that she saw Dr. W, who told her that x-rays showed that there was pressure on a nerve. Claimant testified that, after MRI testing, Dr. W told her that her neck condition is work related.

In his deposition, Dr. W stated that: (1) the activity of turning her head at work did not cause the bone spurring in claimant's neck; (2) because claimant has a narrow foramen, "it started pinching the nerve more because of the turning"; (3) the turning of the head caused claimant's pain and weakness; (4) it is likely that if claimant had not had the spur, she would not have "this problem"; (5) the head turning motion caused the "hole" in the vertebral bodies to become smaller, which "over a period of time" would "pinch the nerve and make it get progressively more irritated"; (6) this described process can cause pain and weakness; and (7) in turning her head, claimant "aggravated her preexisting condition." A September 29, 1998, MRI report states that there were no findings for significant disc bulges or focal disc herniations. A November 2, 1998, myelogram report did not mention any disc herniations.

The hearing officer determined that: (1) on August 31, 1998, Dr. W reviewed claimant's x-rays of the neck, diagnosed mild degenerative changes at the C5-6 level, and ordered an MRI; (2) a September 29, 1998, MRI report stated that claimant had "neural foramen stenosis at right C4-5 and bilateral C5-6 and a congenitally small appearance to the spinal canal"; (3) Dr. W opined that the turning of the neck did not cause claimant's degenerative condition but caused pain and weakness due to claimant's degenerative condition; and (4) "claimant did not sustain an injury to her cervical area on \_\_\_\_\_." In the decision and order, the hearing officer stated:

[Dr. W] stated during his January 6, 1999, oral deposition that claimant's degenerative disease which consisted of a more narrow than normal foramen caused pinching of the nerve more because of the turning, but it was not the turning that [caused] the degenerative disease or the bone spurring. *Further, the pinching of the nerve caused by the turning would make the nerve more irritated and cause pain and weakness. Evidence of acceleration and enhancement of aggravation was not adequately developed. [Emphasis added.]*

Under the 1989 Act, the claimant has the burden of proving that she sustained a compensable injury and the extent of the injury. Texas Workers' Compensation Commission Appeal No. 950537, decided May 24, 1995. The 1989 Act defines injury, in pertinent part, as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Existence and extent of injury are fact questions for the hearing officer. Texas Workers' Compensation Commission Appeal No. 951959, decided January 3, 1996. The hearing officer is the sole judge of the weight and credibility to be given to the evidence and the relevance and materiality to assign to the evidence. Section 410.165(a). As the fact finder, the hearing officer is charged with the responsibility to resolve the conflicts in the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The

hearing officer may believe all, none, or any part of any witness's testimony and may properly decide what weight she should assign to the evidence before her. Campos, *supra*. We will not substitute our judgment for the hearing officer's where her determinations are supported by sufficient evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this case, the hearing officer weighed the evidence and determined that claimant's injury did not extend to her neck. After reviewing the evidence, as set forth above, and the hearing officer's discussion in the decision and order, we conclude that we must reverse the hearing officer's determination. There was evidence that claimant had damage or harm to the physical structure of her neck caused by the head turning at work. It appears that the hearing officer stated that the head turning did cause nerve irritation, which caused pain and weakness. A nerve injury may be a compensable injury, even if it is caused by the aggravation of an ordinary disease of life. See *generally* Texas Workers' Compensation Commission Appeal No. 94107, decided March 10, 1994. See *also* Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994. Therefore, we reverse the hearing officer's determination that claimant did not sustain a compensable neck injury and remand for findings of fact regarding whether the hearing officer believes that claimant sustained a compensable injury. In remanding, we note that findings are appropriate regarding the hearing officer's own findings rather than what the doctor opined.

Claimant next contends the hearing officer erred in determining that carrier did not waive the right to contest the compensability of the claimed neck injury. Claimant asserts that carrier had notice of a claimed neck injury on April 15, 1997, when it took claimant's oral statement, and that it did not dispute within 60 days of the date.

Claimant's oral statement was taken in April 15, 1997, but the written transcription is dated in September 1998. There is no date stamp showing when carrier received the transcribed statement. Carrier filed a Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) disputing any neck injury on September 10, 1998.

The hearing officer determined that: (1) "carrier's first medical records referring to claimant's neck were received on July 24, 1998"; (2) "carrier first filed a TWCC-21 disputing claimant's neck injury on September 10, 1998"; and (3) carrier did not waive the right to contest the "compensability of the claimed injury extending to the disc herniation of C5-6 level of the cervical area by not contesting compensability within 60 days of being notified of the injury."<sup>1</sup>

Section 409.021(c) provides that a carrier must contest compensability of an injury on or before the 60th day after it is notified of the injury. It is undisputed that the carrier's first contest of compensability of the alleged neck injury was its September 10, 1998, TWCC-21. Therefore, our discussion will focus on when the carrier first received notice of the injury, or when the 60-day period to contest began. A notice of injury, for the purposes of starting the time period for contesting compensability, must be written and must fairly inform the carrier of

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<sup>1</sup>We will construe the hearing officer's determination in this regard as a determination that carrier did not waive the right to contest any neck injury, and not merely a herniated disc.

the nature of the injury, the name of the injured employee, the identity of the employer, and the approximate date of injury, and must state "facts showing compensability." Rule 124.1(a). The writing may be from any source. Rule 124.1(a)(3). The writing may be a carrier's own internally generated document. Texas Workers' Compensation Commission Appeal No. 950546, decided May 24, 1995.

We have rejected the argument that oral notice of injury given by a claimant in an oral statement, meets the requirements of Rule 124.1(a). Texas Workers' Compensation Commission Appeal No. 950966, decided July 21, 1995. However, we have held that the transcription of a recorded statement the carrier took of an employee, when the statement contains the requisite information required in Rule 124.1(a), may constitute written notice of injury. Texas Workers' Compensation Commission Appeal No. 941398, decided December 1, 1994. However, like any other written notice, the claimant must prove when the carrier received the transcribed written statement. Texas Workers' Compensation Commission Appeal No. 962512, decided January 27, 1997.

In this case, there is nothing to show when carrier received the transcribed written statement. The statement itself is dated *after* carrier had already filed its TWCC-21, which is some indication that carrier had not received it before it disputed. We conclude that claimant did not prove that carrier had written notice of the neck injury in April 1997 when carrier took claimant's oral statement. We reject claimant's contention in that regard. In an affidavit, carrier's representative stated that carrier first received medical records regarding a neck condition on July 24, 1998. The record does not contain any written notice of a neck injury that indicates it was received by carrier prior to that date. Therefore, the hearing officer could find from the evidence that carrier timely contested the claimed neck injury and that there is no carrier waiver because carrier disputed within 60 days of July 24, 1998.

We affirm that part of the hearing officer's decision and order that determined that carrier did not waive the right to contest the compensability of the claimed neck injury. We reverse that part of the hearing officer's decision that determined that claimant did not sustain a compensable neck injury and remand the issue regarding extent of injury to the hearing officer for reconsideration.

We affirm in part and reverse and remand in part. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Judy Stephens  
Appeals Judge

CONCUR:

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Alan C. Ernst  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge