

APPEAL NO. 990332

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 14, 1999. The issues at the CCH were whether the respondent's (claimant) compensable injury extended to the cervical spine and whether the appellant (carrier) contested compensability on or before the 60th day after being fairly informed of the injury. The hearing officer determined that the claimant's compensable injury extended to and affects his cervical spine and that the carrier did not contest compensability on or before the 60th day after being fairly informed that the cervical injury was part of the injury sustained on _____. The carrier appeals both issues urging points of error that the findings and conclusions are legally insufficient and/or factually insufficient. No response has been filed.

DECISION

Affirmed in part, reversed and rendered in part.

Claimant was injured in the course and scope of his employment when carrying a heavy metal plate with another worker who dropped his end. Claimant states that he felt something "pop" in his chest and lower back, that he reported the matter, and that he was sent to a doctor. He states he was hurting in his shoulders, low back, mid back, and legs. He also testified that he subsequently had ongoing headaches. X-rays were taken, he was treated with pain medication, and returned to light-duty work which he stated he was not able to do. He continued under treatment, continued to have pain, and listed body parts injured as chest, back, and shoulders, in his report of injury in October 1993. He requested a change in treating doctor to Dr. H in December 1993, and in a report dated January 25, 1994, a copy of which the carrier received, Dr. H states the chief complaint as "neck pain, shoulder pain, back pain, bilateral leg pain" and states the claimant describes neck and shoulder pain. In this report, Dr. H notes motor/sensory/reflex changes at L5-S1 and suggests that a lumbar MRI report interpretation he received is "sophomoric." He indicates that among the diagnostic tests he planned included "cervicolumbar myelogram with CT." In any event, over the ensuing months the claimant continued treating with Dr. H, principally for his lumbar spine, and which included injections and ultimately low back surgery in May 1995 and surgery in 1997 to remove hardware. The claimant acknowledges and the voluminous medical records support that he did not have any medical treatment for his neck between the date of injury (_____) and January 1996, when a cervical MRI was requested by Dr. H stating that the claimant continues to have neck and shoulder pain. Dr. H also notes that because the low back problems were the more pronounced at the time he began treating the claimant, he focused his attention on that problem first in a "first things first" approach. Dr. H relates the cervical problems to the claimant's _____ injury. The carrier denied compensability of any neck injury on January 23, 1996. The

claimant subsequently had a cervical MRI and CT scan in March 1996 which led to cervical surgery performed by a Dr. M in November 1996.

The carrier offered the telephonic testimony of Dr. B, who testified that although he did not examine the claimant, he reviewed all the medical records. He opined that he thought the claimant had some sort of soft tissue back injury, that he did not think either of the surgeries the claimant underwent was indicated, that he did not believe that a cervical injury was a part of the claimant's injury of _____, and that shoulder pain would not mean any injury was sustained to the cervical spine. Dr. B subsequently acknowledged that he did not have Dr. H's January 25, 1994, report when he made his evaluation but observed that it did not have a diagnosis. He stated it would change his mind insofar as it did document back and upper extremity pain, but that the 1996 medical records were the first documentation regarding a cervical injury. He stated that just because a person has pain does not mean he has structural deficiencies and that if there was a cervical injury one would expect treatment before two and one-half years. He acknowledged that headaches could be a result of a cervical injury.

The hearing officer determined that the claimant's compensable injury of _____ extended to his cervical area. The extent of a compensable injury is generally a factual matter for the hearing officer's determination. Texas Workers' Compensation Commission Appeal No. 980177, decided March 13, 1998. Here, the claimant testified that as a result of the incident of _____, he had pain to various parts of his body, including his neck and shoulders. However, there is medical evidence to support the inference that initially, the major problem and treatment centered around his lower back for which he eventually had surgery in May 1995. He continued to have pain and headaches and continued receiving medical treatment. When he continued to complain of neck and shoulder pain, Dr. H sought authorization for a cervical MRI/CT scan sometime around January 1996 which led to the subsequent cervical surgery. Dr. H related the cervical condition to the compensable injury of _____. Clearly, Dr. B does not agree and offers contrary expert evidence. However, with the evidence in this state of conflict, it was for the hearing officer to resolve the matter and arrive at factual findings. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Texas Workers' Compensation Commission Appeal No. 980623, decided May 8, 1998. Compare Texas Workers' Compensation Commission Appeal No. 982566, decided December 16, 1998. We find there was evidence from which the hearing officer could infer the compensable injury extended to the cervical area. And, from our review of all the evidence of record, we cannot conclude that the hearing officer's determination on this issue was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

Regarding the issue of whether the carrier was placed fairly on notice of an injury to the cervical area by the report of Dr. H dated January 25, 1995, this also is basically a factual issue for the hearing officer's resolution from the evidence before him. However, the Appeals Panel has addressed this issue on a number of occasions and set forth certain parameters. As we stated in Appeal No. 980623, *supra*, citing Appeal No. 980177, *supra*, for a carrier to be fairly informed, "it is not required that it go on a treasure hunt through a reef of medical records to find some reference to possible other symptoms or pain and thereby be held to be on notice that such pain reflects specific injuries outside those specifically diagnosed and subsequently treated over a lengthy period of time." Here, there was no diagnosis or treatment of a cervical injury from the date of the incident in _____, until the request for the diagnostic tests in January 1996. During this time, there is no treatment for any cervical condition but there is, including surgery, for the lower back. Indeed, although the January 25, 1994, report from Dr. H mentions complaints of neck among other pains and mentions a plan including a cervicolumbar myelogram, nothing further relates to treatment of, diagnostic tests for, or other activity concerning the cervical area until Dr. H's January 1996 request. The carrier timely contested compensability of the cervical area on January 23, 1996. Under these facts, and applying our prior decision, we do not believe the evidence supports a finding or conclusion that the carrier was placed fairly on notice of a claimed cervical injury from the January 1994 report of Dr. H. Concluding that determination was so against the great weight and preponderance of the evidence as to be clearly wrong and unjust under these circumstances, we reverse that finding and conclusion and render a new finding and conclusion that the carrier was not placed fairly on notice of a cervical injury on January 25, 1994. Texas Workers' Compensation Commission Appeal No. 981579, decided August 24, 1998; Appeal No. 982566, *supra*; Appeal No. 980623, *supra*.

We affirm the Decision and Order insofar as it determines that the compensable injury of _____, extends to and affects claimant's cervical spine and orders that claimant is entitled to benefits for the injury to the cervical spine.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

Given Dr. Hinckley's description of the mechanism of injury and the manner in which he mentioned the neck pain, I concur in the decision regarding carrier waiver.

Judy L. Stephens
Appeals Judge