

APPEAL NO. 990573

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 4, 1999, a hearing was held. He determined that the respondent's (claimant) compensable injury of _____, included claimant's neck and that the appellant (carrier) did not timely dispute written notice of a neck injury. Carrier asserts that it disputed compensability of the neck prior to the time the hearing officer determined that written notification was provided; it also states that the determination of a compensable neck injury is against the great weight and preponderance of the evidence, citing certain medical evidence. Claimant replied that the decision should be affirmed.

DECISION

We affirm the decision that the compensable injury includes claimant's neck, but reverse a determination that states the carrier waived its right to contest compensability of the neck injury.

Claimant worked for (employer), on _____, when, he testified, he lifted a door and "hurt" his "neck, shoulder, and arm." He later specified on cross-examination that when he grabbed the door and pulled it from a stack of doors, he "caught my arm." He said he told every doctor he saw that he hurt his arm, shoulder, and neck. He agreed that he has had x-rays of the right shoulder, had surgery to the right shoulder, and does not remember any testing of the neck. He provided a statement in question-and-answer form on May 14, 1997, in which he mentioned the right shoulder but did not mention the neck; when he was asked if there was anything else he wanted "to add regarding the incident that we have not covered," claimant said nothing about his neck.

Claimant's neck was not the subject of any doctor's report until a (health center) report, titled "Shoulder Evaluation" at its top, said, in crowded writing entered beside the word, "Objective," "patient complains of pain in shoulder and neck with shoulder shrugs and horizontal (illegible)." The assessment in this report made no mention of the neck or cervical spine. This report was dated April 10, 1997.

Claimant appears to have first been seen by Dr. H on August 5, 1997. Dr. H's report of September 30, 1997, contains a reference to claimant's pain in the shoulder and "cervical area," but also contains Dr. H's comment that his examination "revealed lesions and pain to palpation in the cervical area, especially the C4 area." He added that a cervical MRI should be done to "rule out cervical disc dysfunction." (This report contains no indication of when it was received by carrier.)

Carrier accurately states on appeal that Dr. E in his October 1997 and August 1998 reports did not mention any cervical injury. Similarly, Dr. B in October 1997 did not note any cervical injury and assigned a two percent impairment rating based on the upper extremity only. In addition, Dr. T treated claimant from March 24, 1997, to July 28, 1997,

including performing surgery on the right shoulder in May 1997, and he did not mention a cervical injury.

In addition to the September 1997 report of Dr. H referred to above, Dr. H also provided a report one year later on September 8, 1998, in which he said that in his opinion "the injury was in the cervical area, however, because of the surgery performed, it was necessary to evaluate . . . shoulder damage." On November 2, 1998, Dr. H stated that claimant has "cervical disc dysfunction which . . . in all medical probability, occurred at the same time he injured his shoulder in an on-job injury."

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. He also may weigh and determine the credibility of medical evidence. See Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997. As such he could give weight to Dr. H's medical opinion that claimant's cervical spine was injured on _____, even though medical records say nothing of such an injury for at least three months after the injury, and claimant himself did not report such an injury in his statement provided in May 1997. The hearing officer could also give weight to Dr. H's opinion even though Dr. B and Dr. E did not note any cervical injury when they evaluated claimant several months, or over one year, after the injury to the shoulder. The determination that claimant compensably injured his cervical spine on _____, is sufficiently supported by the evidence.

The hearing officer determined that carrier did not timely dispute the first written notice of injury to the neck or cervical spine. This determination was based in part on a finding of fact that said "carrier first received written notice of claimant's alleged neck injury and its relationship to claimant's compensable injury, on 9-21-98." (That date is not a clerical error; the referenced report was dated September 8, 1998, and is marked as received on September 21, 1998.) The carrier did not appeal that finding of fact and claimant's response to the carrier's appeal is not timely to constitute an appeal. The hearing officer's Statement of Evidence shows that he did not accept the claimant's assertion of the April 10, 1997, (health center) report as constituting notice. There is no sound basis to disregard this finding of fact; it, along with a stipulation that the carrier first disputed claimant's neck injury on December 19, 1997 (the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) which disputes the neck is dated as received by the Texas Workers' Compensation Commission on December 19, 1997), does not show that carrier waived its right to dispute compensability of the neck injury. The findings of fact do not support the determination of waiver, and that determination is reversed. A new "decision," found at the conclusion of the hearing officer's opinion, is rendered to state, "Carrier did not waive its right to contest compensability of the claimed neck injury. The compensable injury of _____, extends to and includes claimant's neck."

As rewritten above, the decision and order are sufficiently supported by the evidence and are affirmed. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge