APPEAL NO. 990754

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 March 15, 1999. She determined that the appellant's (claimant) compensable injury of _____, did not include her cervical spine and that the respondent (carrier) did not waive the right to contest the compensability of a cervical spine injury. The claimant appeals these determinations, contending that they are contrary to the evidence. The carrier replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant worked as a ticket agent for an airline. She testified that on _____, while checking a piece of baggage and throwing it on the bag belt, she sustained an injury to her "back." She construed the word "back" to include her lumbar, thoracic, and cervical spine. The carrier has accepted at least a lumbar injury and a dispute in this case is whether the compensable injury also included the cervical spine. The question is complicated by the existence of a (prior date of injury), compensable injury and a possible stroke in 1997 which produced some right-sided paralysis.

The claimant testified that she had pain from her low back to her neck as a result of the _____, incident, but primarily in the low back. In a visit of December 22, 1995, to the employer's clinic, she is reported as having complained of pain between the shoulder blades. Later visits refer to the "back" without further specificity. She was referred for physical therapy through the spring of 1996. The diagnosis on the therapist's notes is described as a "back sprain" or a "cx sprain" with complaints of back and "cx pain." Much time was spent at the CCH debating the meaning of the abbreviation "cx." In a letter of February 5, 1999, the physical therapist wrote that "cx" meant "cervical." An MRI of the cervical spine on May 29, 1997, showed, among other things, a bulging annulus fibrosus at C5-6 with moderate effacement of the anterior thecal sac.[1]

On September 6, 1996, the Texas Workers' Compensation Commission (Commission) approved the claimant's request to change treating doctors to Dr. E. In his initial evaluation of December 30, 1996, Dr. E records a complaint of stiffness from the low back to the neck and relates this to the _____, lifting incident at work. On a continuation sheet, his assessment included "[a]cute recurrent sprain/strain of the . . . cervicodorsal areas with somatic dysfunction." There is no indication on the continuation sheet that it was received by the carrier, but the initial pages with the reference to neck stiffness appear to carry an indication of receipt in the form of a perforation date stamp and

[1]The claimant testified that sometime in 1997 she had what was thought to be a stroke. This was apparently the motivation for the MRI.

"received January 23, 1997 Key Office 566" stamp. Several other documents of Dr. E, containing essentially the same complaint, diagnosis, and receipt stamps for the period through June 1997, were also in evidence. *See* Claimant's Exhibit No. 2. Other medical evidence includes a patient questionnaire, dated April 26, 1998, for use by Dr. N, which reflects complaints of lower back pain and neck stiffness. His diagnosis was limited to the lumbar spine. This was at least in part based on a referral by Dr. N to Dr. S, who examined the claimant on June 3, 1996, and noted suppleness with no masses or tenderness in the neck. His diagnoses were also limited to the lumbar spine.

Also in evidence was a report[2] completed by Dr. B on October 3, 1996. Dr. B was apparently the designated doctor appointed by the Commission for the _____, injury. Dr. B considered the injury to be "primarily" to the low back, but she noted complaints of neck pain. Her impressions, presumably of what the compensable injury was, were limited to a lumbar strain, the shoulders, and left knee. She, nonetheless, measured a loss of cervical range of motion of 12%, but gave no rating for a specific disorder of the cervical spine. She did not, however, carry this 12% into her whole body impairment rating. When asked why, she said in a letter of January 21, 1998, that she did not do so because "no reports were available to document impairment under Specific Disorders of the Spine" and there were no references to "ongoing cervical or neck pain or treatment" with the exception of some references to muscle tightness and spasm. Based on a letter of April 9, 1997, from Dr. B to the claimant, it may be assumed that she did not consider a cervical spine injury to be part of the _____, injury.

The hearing officer made the following findings of fact which have been appealed by the claimant:

FINDINGS OF FACT

5. Claimant sustained an injury to her neck in 1991.

6. Claimant was not treated for a neck problem with any regularity during the time period shortly following the date of her compensable injury.

7. There is no record in evidence that provides notice to the Carrier of the inclusion of the neck in the claimed injury sufficient to require the Carrier to dispute same.

With regard to the extent-of-injury question, the hearing officer commented in her decision and order that the medical records "indicate that Claimant sustained an injury to her neck in 1991" and that she "sometimes" complained of neck pain, but was not treated for a neck "problem with any regularity during the time period shortly following the accident . . . ." She

[2]This report bears the same indicia of receipt as the records of Dr. E.

then quoted extensively from Dr. B's letter of January 21, 1998. The claimant appeals Finding of Fact No. 5 on the basis that the medical records of the 1991 injury do not mention the neck and denies telling Dr. B that her neck was part of the 1991 injury.

The claimant had the burden of proving that she injured her cervical spine on _____. Whether she did so was a question of fact that could be proved by the testimony of the claimant alone, if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Finding of Fact No. 5 is problematic because it seems to resolve something not in issue, that is, whether the claimant sustained a neck injury in 1991. It further can be read as now forcing a neck injury component into the 1991 injury, something we believe was not intended. For purposes of this opinion, we construe Finding of Fact No. 5 as being no more than a finding that the claimant has a cervical injury, but did not sustain a compensable cervical or neck injury on _____. The evidence, particularly the records of Dr. E and the physical therapist, reflect consistent complaints of neck pain. Whether these complaints lacked sufficient regularity to convince the hearing officer that the claimant sustained a neck injury in 1995 was largely a matter of the hearing officer's evaluation of the credibility and persuasiveness of this evidence. She obviously found Dr. B's opinion, based on her examination of the claimant and her review of the medical records, more persuasive on the question of a cervical injury than the claimant's testimony and the other records. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and 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). Applying this standard of review to the record of this case, we conclude that, with the burden of proof on the claimant, the opinion of Dr. B, found credible by the hearing officer, was sufficient to support the finding that the claimant did not sustain a neck or cervical spine injury on _____. For these reasons, we affirm that determination.

With regard to the issue of timely dispute by the carrier, we do not believe that Finding of Fact No. 7 adequately resolves the question. Section 409.021 generally requires a carrier to dispute the compensability of an injury within 60 days of notice. We have held that the 60 days is triggered by receipt of written notice. Texas Workers' Compensation Commission Appeal No. 952232, decided February 8, 1996. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(3) provides essentially that notice can be any writing "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." The summary statement in Finding of Fact No. 7 gives no clue as to how the hearing officer evaluated the various reports of Dr. E in Claimant's Exhibit No. 2 or the reports and letters of Dr. B in Carrier's Exhibit No. 1. These documents reference the claimant, the cervical spine, and a date of injury of _____. Most, if not all, appear to reflect receipt by the carrier. There was no Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in evidence, so, arguably, one could conclude that the cervical spine was not disputed by the carrier until the benefit review conference. Because the hearing officer

provides no analysis or indication of why she considered all of this evidence inadequate as a written notice of a claimed cervical spine injury, we reverse Finding of Fact No. 7 and remand the issue of carrier waiver for further consideration and express findings of fact as to why any of the documents in Claimant's Exhibit No. 2 or Carrier's Exhibit No. 1 do or do not constitute adequate notice as defined in Rule 124.1(a)(3) in light of the content in and markings on the documents. If any such document is found to be adequate written notice of a cervical injury, further findings of when the document was received by the carrier should be made. Additional evidence explaining any markings on the documents may be taken. Texas Workers' Compensation Commission Appeal No. 941636, decided January 23, 1995.

One final matter requires comment. The carrier suggested at the CCH that it never disputed the compensability of a cervical injury and took the position, in reliance on Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) that, because there was no cervical injury, there was no obligation to dispute one and the lack of a dispute could not create a cervical injury. This appears also to be its position on appeal. In Williamson, the court stated that a carrier's failure to contest compensability, when there was no injury, does not create a compensable injury as a matter of law. The case now under consideration is clearly distinguishable from Williamson in light of Finding of Fact No. 5, which the carrier has not appealed and which, in our opinion, establishes the existence of a cervical injury without further indicating the cause of the cervical injury. *See* Texas Workers' Compensation Commission Appeal No. 981770, decided September 21, 1998.

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 Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge