APPEAL NO. 991224

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 5, 1999, a contested case hearing was held. With respect to the issues before him, the hearing officer determined that the appellant's (claimant) compensable injury did not extend to her neck and right shoulder and that the respondent (carrier) did not waive its right to contest the compensability of the claimed injury to the neck and right shoulder by not contesting compensability within 60 days of being notified of the injury. The claimant files a request for review arguing that both of these determinations were contrary to the evidence. The carrier replies that the hearing officer properly resolved the factual dispute concerning the extent of injury and waiver issues and that we should affirm his decision.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that the carrier accepted liability for an _____, injury to the claimant's right thumb, wrist and forearm. The hearing officer's findings of fact and conclusions of law include the following:

FINDINGS OF FACT

2. On _____ Claimant had injuries to her right thumb, wrist and forearm while moving a patient at the patient's house. Claimant complained of pain in the wrist and forearm that radiated up her arm.

3. Claimant's moving a patient on _____ was an activity that furthered the business affairs of her Employer.

4. Claimant did not injure her neck and right shoulder in a[n] _____ incident while moving a patient.

5. Claimant's symptoms related to alleged cervical and shoulder problems did not appear to be from the treatment, surgery or therapy she received for the injuries to her right wrist, and are not results naturally flowing from the _____ thumb, wrist, and forearm injuries.

6. Claimant's written statement indicates on _____ she felt a pain in her right had [sic] that radiated up to the right shoulder and neck. The supervisor's written report indicated that Claimant complained of pain from the hand to the neck. Neither report was shown to have been given to the Carrier.

7. The TWCC-1 [Employer's First Report of Injury or Illness] indicates that nature of injury and part of body injured or exposed as being the right arm/hand. It appears that the Carrier received such documentation in October 1997.

8. On July 27, 1998 Claimant filled out a TWCC-41 [Employee's Notice of Injury or Occupational Disease & Claim for Compensation] indicating that her injury extended to the neck and right shoulder. The TWCC-41 was faxed to an 800 number on July 28, 1998, but there is no showing that the number is the appropriate number for the Carrier.

9. On August 11, 1998 [Dr. P] prepared a report in which he identified Claimant's cervical and shoulder disorders were related to the _____, incident at work. This report was received by the Carrier on August 25, 1998, and is the first written report received by the carrier that related facts showing compensability of the neck and shoulder.

10. The carrier filed a TWCC-21 [Payment of Compensation or Notice of Refused/Disputed Claim] on October 15, 1998 disputed [sic] compensability of the neck and shoulder. October 15, 1998 is within 60 days of August 25, 1998.

CONCLUSIONS OF LAW

3. Under the stipulated facts Carrier accepted liability for _____ injury to Claimant's right thumb, wrist, and forearm.

4. Because Claimant has not shown by a preponderance of the evidence that her _____ injury extends to her neck and right shoulder, those conditions are not part of the injury.

5. Because Carrier disputed compensability of alleged injuries to the neck and right shoulder within 60 days of first received written notice conforming to the requirements of the Commission [Texas Workers' Compensation Commission] Rules, the neck and shoulder have not become compensable by operation of waiver.

A carrier must contest compensability of an injury on or before the 60th day after it receives written notice of the injury or else it waives its right to contest compensability and is liable for payment of benefits. Section 409.021(c); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(b) (Rule 124.6(b)). The analysis to determine whether a carrier timely contested compensability is a two-step process. First, the hearing officer must determine when the carrier was notified of the injury. Within the first step lies an analysis of the sufficiency of the notice to the carrier. 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 the nature of the injury, the name of the injured employee, the identity of the employer, the approximate date of injury, and must state "facts showing compensability." Rule 124.1(a). The writing may be from any source. *Id.* A carrier must timely contest the compensability of additional injuries. Texas Workers' Compensation Commission Appeal No. 950183, decided March 22, 1995. A carrier must file a TWCC-21 to contest whether an employee's injury extends to a particular part of the employee's body. *See* TWCC Advisory 96-05, dated April 5, 1996. Written reports that consider whether a condition is work related may constitute written notice of injury under Rule 124.1, whether or not a concrete diagnosis is made. Second, the hearing officer must determine if the carrier contested compensability on or before the 60th day after it received written notice.

It was undisputed that the carrier first disputed compensability of the claimant's neck and shoulder on October 15, 1998, when it filed a TWCC-21. The claimant argues on appeal that the hearing officer erred in finding that Dr. P's August 11th report received by the carrier on August 25, 1998, was the first notice the carrier had received that the claimant's injury included an injury to her neck and shoulder. The claimant points to the TWCC-1 as providing notice. The claimant testified that she filled out the TWCC-1 and that she had pain from her hand to her neck. The hearing officer stated on the record that he did not find this language in the TWCC-1 legible and the claimant had difficulty reading it while she testified. We find this language, which is contained in the section of the TWCC-1 describing how the injury occurred, is very difficult to discern. Very easy to discern is the notation on the part of the TWCC-21 that calls for a description of the part of the body injured, where it states right arm/hand. Under these particular circumstances we do not find error as a matter of law in the hearing officer's finding that the TWCC-1 did not constitute notice to the carrier of an injury to the claimant's shoulder and neck. The claimant also argues that the TWCC-41 constituted notice that her injury included an injury to her shoulder and neck. We would agree that it would constitute notice but the hearing officer finds insufficient evidence in the record to support the claimant's contention that this document was sent to the carrier on July 28, 1998. While the hearing officer could have found this document to be a basis for notice, we do not find the great weight and preponderance of the evidence to be contrary to his finding that it was not proven that it was received by the carrier. The hearing officer did not make a specific finding regarding whether the Employee's Request to Change Treating Doctors (TWCC-53) constituted notice. However, while this document clearly mentions the claimant's neck and right shoulder, it only reflects it was received by the Commission on July 29, 1998, and there is no evidence concerning its receipt by the carrier. With the evidence in this posture, we will not overturn the decision of the hearing officer that the carrier disputed compensability of the claimant's neck and right shoulder within 60 days of first receiving written notice that the claimant's injury included an injury to her neck and right shoulder.

The claimant also disputes the determination by the hearing officer that her injury did not include an injury to her right shoulder and neck. The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the

weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

A finding of injury may be based upon the testimony of the claimant alone. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case, the hearing officer found no injury to the claimant's right shoulder and neck contrary to the testimony of the claimant and medical evidence from Dr. P. However, the carrier presented contrary medical evidence. Claimant had the burden to prove she was injured in the course and scope of her employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to meet this burden in regard to an injury to her right shoulder and neck. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The decision and order of the hearing officer are affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Alan C. Ernst
Appeals Judge