

APPEAL NO. 991305

Following a contested case hearing (CCH) held on May 20, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issue by determining that the compensable injury the respondent (claimant) sustained on \_\_\_\_\_, includes and extends to his neck. The appellant (carrier) contends in its request for review that this determination is against the great weight of the evidence, asserting that, because it was determined at a previous CCH that his shoulder was injured on \_\_\_\_\_, claimant is either barred by the doctrine of *res judicata* from "relitigating the issue of what specific body parts were injured on \_\_\_\_\_," or should be estopped from asserting at a subsequent CCH that his neck was also injured. Claimant's response states merely his agreement with the hearing officer's determination.

DECISION

Affirmed.

The parties stipulated that the Texas Workers' Compensation Commission (Commission) has finally determined that claimant sustained a compensable right shoulder injury on \_\_\_\_\_, while in the course and scope of his employment with (employer).

Claimant testified that on \_\_\_\_\_, he injured his right shoulder and arm and his neck while using a sledgehammer in his work as a welder; that he first saw Dr. G, a chiropractor, and paid his own bills since the employer did not believe he had injured himself at work; that he changed doctors to Dr. H, whom he saw twice and who gave him medications; that he later changed doctors to Dr. S, an orthopedic surgeon, who prescribed medications and injections; and that he had shoulder surgery in August 1997 but his condition failed to improve. Claimant further testified that the carrier initially refused to authorize an MRI of his neck and had him seen by Dr. D, who agreed an MRI was needed; and that the MRI showed he had a herniated disc at C4-5. Claimant conceded having told the doctors that his neck was injured as well as his right shoulder and arm and that he mentioned his neck at a prior CCH.

Claimant's April 5, 1997, questionnaire in Dr. G's records reflects that he described the complaint as "pain in shoulder" and also stated that the pain radiated to the neck. Dr. G's April 5, 1997, notes state the location as right shoulder; a cervical spine exam form reflects that the cervical orthopedic exam was within normal limits; and an April 21, 1997, radiology report reflects imaging results of only the right shoulder.

Dr. S's records reflect that on March 15, 1997, claimant was diagnosed with internal derangement of the right shoulder; that on August 18, 1997, he underwent arthroscopic surgery on the shoulder to repair a subacromial space impingement and partial rotator cuff tear; and that claimant continued to complain of right shoulder pain on follow-up visits despite physical therapy (PT), exercises, and medication.

One of the issues at a benefit review conference (BRC) held on November 7, 1997, was whether claimant sustained a compensable injury to his right shoulder on or about \_\_\_\_\_. Following a CCH held on January 14, 1998, another hearing officer considered that injury issue and issues concerning timely notice and disability and found that on \_\_\_\_\_, while fabricating a part, claimant suffered an injury to his right shoulder. The findings, conclusions, and decision reflect that the injury referred to was specifically the right shoulder.

Dr. S wrote on April 23, 1998, that claimant complained of tenderness in not only the right shoulder but also the right cervical paravertebral musculature; that on June 18, 1998, Dr. S was trying to obtain an MRI to rule out a possible herniated cervical disc; and that claimant was sent to another doctor for a second opinion.

The carrier's Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21), dated "6/8/98," states that claimant's injury is to the right shoulder "per the [CCH] decision of 01/29/98"; that the carrier first received notice of a possible extension of the injury to the neck from a call from the treating doctor requesting approval for a cervical area MRI; and that the carrier contends that claimant did not sustain cervical injury in the course and scope of employment.

Dr. D's August 10, 1998, report states that claimant has not reached maximum medical improvement, that he needs more aggressive therapy for arm and shoulder range of motion, and that Dr. S's request for an MRI of the neck to rule out any other problems is "reasonable"; and that on August 31, 1998, a cervical spine MRI revealed a right C4-5 foraminal disc protrusion creating a narrowing of the medial right C4-5 neural foramen.

Dr. S wrote on October 1, 1998, that he saw claimant on follow-up for a herniated nucleus pulposus (HNP) at C4-5, that he has not been able to get approval for PT for the neck, and that unless the neck gets treated, the shoulder and upper extremity pain is not going to go away. Dr. S's March 23, 1999, handwritten notes states that claimant's right cervical paravertebral musculature pain is mostly related to the HNP at C4-5 "which he hurt at the same time he hurt his RT shoulder."

At a BRC held on March 24, 1999, the disputed issue was stated as follows: "Does the compensable injury sustained by the claimant extend to an injury to the neck."

Dr. S's notes of March 23 and April 9, 1999, state that, although claimant hurt his cervical spine at the same time he hurt his right shoulder, treatment for the neck has not been approved.

The hearing officer found that "[t]he condition of the claimant's neck was caused by, and/or naturally resulted from, his \_\_\_\_\_, injury." The hearing officer further found that at the prior CCH on January 14, 1998, the issue regarding the existence of a compensable injury was limited specifically to the right shoulder and that the question of the occurrence of a neck injury on \_\_\_\_\_, was not before the hearing officer who, in his Decision and

Order dated January 29, 1998, did not make any findings of fact or conclusions of law concerning the neck.

At the hearing, the carrier did not contend that claimant failed to meet his burden of proof with sufficient evidence that related his neck condition to the \_\_\_\_\_, injury. Rather, the carrier urged that, based on the doctrine of *res judicata*, the Commission should not consider the extent of injury issue (on the merits of the evidence) because the neck injury was mentioned by claimant at the earlier hearing and yet the hearing officer then found only that claimant's injury was to the right shoulder. The carrier cited the hearing officer to our decisions in Texas Workers' Compensation Commission Appeal No. 950690, decided June 15, 1995; Texas Workers' Compensation Commission Appeal No. 960022, decided February 15, 1996; and Texas Workers' Compensation Commission Appeal No. 970033, decided February 20, 1997.

In its request for review, the carrier recites the above cases, states that the facts in Appeal No. 970033 are similar to those in the case we here consider, and "readily admits all three decisions involved a general or global issue of compensability at the first [CCH] rather than an issue limited to a specific body part." The carrier goes on to contend that the doctrine of *res judicata* bars claimant from "relitigating" the issue of what specific body parts were injured on \_\_\_\_\_; that, if *res judicata* is not applied, then at the very least, claimant "should be estopped" from asserting at a subsequent CCH that his compensable injury of \_\_\_\_\_, "included his neck all along"; and that claimant had the opportunity at the previous CCH to assert that his injury extended to his neck but failed to do so. The hearing officer states in her discussion that the carrier failed to show that the doctrine of *res judicata* is applicable in this case, that is, that the carrier did not show that the neck injury issue was previously litigated and, indeed, that the evidence shows that the issue was not previously litigated.

We note that the carrier did not raise the applicability of the doctrine of *res judicata* at the BRC but rather raised it for the first time at the CCH. We agree with the hearing officer's analysis that the three cases cited by the carrier are inapposite because of the more broadly stated injury issues in the first hearings, that the issue of whether or not claimant's \_\_\_\_\_, injury extended to his neck was not litigated at the previous hearing, and that the doctrine of *res judicata* does not apply in this case. In Appeal No. 970033, the case the carrier relies on as most factually similar, an issue at the subsequent CCH was whether the compensable occupational disease injury extended to bilateral carpal tunnel syndrome (CTS), while an issue at the prior CCH was whether the employee sustained an injury in the form of an occupational disease. The hearing officer determined that the employee sustained a repetitive trauma occupational disease neck and back injury and that she had problems with her hands before her employment and has been diagnosed with CTS. The hearing officer in the earlier CCH did not specifically find that the CTS was not job related but did state in the decision and order that the employee had problems with her hands for many years and that the medical evidence and the specific job functions did not show compensable CTS aggravation. The hearing officer in the subsequent CCH apparently determined that the injury extended to and included the CTS because there was

no specific finding of fact concerning the compensability of the CTS in the earlier decision and because the medical evidence may have shown the CTS to have been related to her neck injury rather than from repetitive use of her hands. The Appeals Panel reversed that portion of the decision, citing Appeal No. 950690, *supra*, and rendered a decision that the Commission did not have jurisdiction to determine the CTS issue and that, as had already been determined, the compensable injury did not extend to include the CTS. In the case we consider, the injury in the course and scope issue at the earlier CCH was limited specifically to injury to the right shoulder and did not include, expressly or impliedly, the neck. We do not find the doctrine of *res judicata* applicable under the facts of this case. The carrier cites no authority for the application of “estoppel,” a notion raised for the first time on appeal. Finally, under our standard of appellate review, we find the evidence sufficient to support the hearing officer’s determination. In re King’s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

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Philip F. O’Neill  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Susan M. Kelley  
Appeals Judge