APPEAL NO. 991317

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 25, 1999, a contested case hearing was held. With regard to the issues before him, the hearing officer determined that the appellant's (claimant) compensable right shoulder injury of _____ (all dates are 1998 unless otherwise stated), did not extend to the cervical spine and that respondent (carrier) had timely contested compensability of the cervical injury.

Claimant appeals, contending that the decision is against the great weight of the evidence, pointing to certain reports of Dr. F, claimant's treating doctor, Dr. B, and claimant's testimony. Claimant further contends that carrier failed in its burden to prove a sole cause. Claimant also contends that carrier had notice of the claimed cervical injury in a report dated April 10th from Dr. F and did not dispute the injury until September 14th. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Carrier responds generally that the decision is supported by the evidence and urges affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

Initially, we observe that this case involved substantially conflicting evidence from which one could draw different inferences, and both parties agreed that credibility was a key factor.

Claimant was employed as an administrative assistant by the employer and was attending a mandatory meeting (perhaps on organizational effectiveness) where participation in the activities was required. While participating in one of these "jousting" activities on _____, claimant fell from a platform onto an air or helium-filled surface. Claimant testified that she fell about 10 or 12 feet on her right side, that she felt immediate neck and shoulder pain, that the pain was about an eight on a 10-point scale and that she took some of someone else's prescription anti-inflammatory medication to ease the pain. Claimant nonetheless continued working and first sought medical attention from Dr. G, apparently claimant's primary care physician, on March 17th. Although claimant testified that she either told Dr. G about her neck pain, or pointed to her neck, a handwritten Initial Medical Report (TWCC-61) dated March 17th only notes "Fell on shoulder at work while jousting." Dr. G diagnosed a shoulder sprain and prescribed medication. Carrier has accepted liability for a right shoulder injury. Claimant next saw Dr. F, apparently on referral from Dr. G, on April 10th. Carrier offered into evidence handwritten progress notes, dated April 10th, June 9th, June 19th and July 31st from Dr. F. The April 10th note indicates a

complaint of "® shoulder--ROM [range of motion] --minimal tingling ® forearm--denies neck problems--constant aching." Claimant's job duties were noted as "constant use of office equipment--computer." Claimant testified that she told Dr. F about her neck pain and that

initially she was paying Dr. G and Dr. F under her group health policy (election of remedies is not an issue). Dr. F also diagnosed a shoulder sprain. The June 9th notes focus entirely on the right shoulder, forearm and hand. The June 19th notes talk about the right shoulder and that claimant was there "to discuss results of MRI." The July 31st note suggests surgery for the right shoulder (which claimant eventually had), mentions "limited ROM right shoulder" and pain and numbness in the right hand. None of the reports mention or reference a neck or cervical injury. Both parties offer into evidence typed "Workers' Compensation Reports" for the same four visits referenced in the progress notes. On the typed April 10th report, Dr. F indicates claimant "presents with right shoulder and neck pain," decreased cervical ROM and that sensory, reflex and motor testing "were normal." The June 9th typed Workers' Compensation Report has an impression of "rule out cervical disk disease." The June 19th report indicates the MRI "shows positive cervical disk disease, cervical facet arthritis, and mild impingement with AC arthritis." The July 31st report has an impression "Cervical stenosis with numbness" and that claimant was being referred to Dr. B for evaluation of her cervical stenosis. Nothing on these typed reports indicates that they were sent to the carrier at that time. Claimant appears to assume that because the reports are in evidence, the carrier received a copy on or about the date that they are dated. Carrier suggests that the typed reports were prepared after the fact to bolster claimant's contention of a neck injury.

Claimant was seen by Dr. B and in a report dated August 24th, Dr. B recounted the jousting incident, referenced an MRI, noted claimant has "continued to remain at work" and recommended both shoulder surgery and "an anterior cervical discectomy and fusion at C5-C6," with the shoulder surgery to be done first. Carrier represents this report is the first written notice it received of an alleged neck injury. In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated September 9th, carrier states it received first written notice of injury (apparently the shoulder injury for which it accepted liability) on July 6th and denied liability for any "cervical condition." Exactly when the TWCC-21 was filed is not clear but claimant agrees that it appears to have been filed on September 14th.

Subsequently, in a "To Whom It May Concern" note dated October 26th, Dr. F states "[i]n my opinion, the injury sustained on _____ of the shoulder and neck are related." Dr. F repeated that opinion in a report dated January 6, 1999, referencing the work injury "in which she suffered a fall injuring and forcibly flexing her neck to the side." In another report dated February 23, 1999, to claimant's attorney, Dr. F states:

> Yes, in all reasonable medical probability her cervical injury is related to her work-related injury. And as for the second question, in my opinion, this is an acute exacerbation of a pre-existing condition.

Claimant was examined by Dr. S, a neurologist and carrier's independent medical examination doctor, who, in a report dated December 31st, reviewed claimant's history, had an impression of "Bilateral upper extremity numbness," was of the opinion that the fall did not directly cause the C5-6 abnormalities and commented on the cervical condition:

> For the cervical spine, I believe the findings are not work related unless the insurance company is willing to take responsibility for making an asymptomatic preexisting abnormality a now symptomatic problem.

In a comprehensive report dated February 22, 1999, Dr. B states:

> This woman does not have a herniated disk; she has cervical disk disease which is degenerative in nature. This is all a semantic issue. The ultimate issue to be resolved is whether this woman's symptoms which are currently in capacitating [sic] to her date from the time of the accident. If it can be clearly established that she have no other symptoms of treatment for neck problems or radicular problems going into her arm, then I think it is clearly apparent that the injury is the precipitating cause and should be considered responsible for aggravating a degenerative disk situation which was previously asymptomatic. However, the burden of proof would be to demonstrate that there is no prior history of treatment for neck problems before the injury noted in the Office Olympics. I have no record of this and assuming that there is no history to the contrary, it is my opinion that the problems she presents with are the result of a traumatic injury in terms of causality for symptomatology and subsequent treatment of that symptomatology. I am relying on [claimant's] history of an on-the-job injury on _____ with regard to this. Assuming there is no indication to the contrary, my opinion would be that the injury at the Office Olympics is responsible.

The hearing officer, in his Statement of the Evidence, summarizes the various reports, comments that Dr. B's August 24th report "alerted the carrier to claimant's neck problems (injury)," but that carrier "waited until September 14, 1998, to file its TWCC-21." The hearing officer goes on to note that Dr. S's report of _____ is the "first mention of Claimant's landing on her neck." The hearing officer found:

FINDING OF FACT

> 4. Claimant's neck problem (injury) is a result of substantial spondylotic changes and degenerative disc disease at C5-C6 with stenosis and some cord flattening rather than the fall she sustained on _____.

The hearing officer neither discussed nor made findings on claimant's theory of the compensable fall causing an aggravation to a preexisting degenerative condition.

First, addressing the issue, and the hearing officer's findings, that carrier timely contested compensability of the original condition, claimant argues that Dr. F's report (presumably the typed report) "of 4-10-98 properly notified the Carrier of a cervical injury . . . ." As previously noted there is no indication that that report (and/or other early reports of Dr. F) was sent to carrier. The only notation on those reports (through the July

31st report) is that a copy was sent to Dr. G. 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. In this case, there is no evidence that carrier received Dr. F's April through June reports and the hearing officer made an affirmative finding that the "first sufficient written notice regarding claimant's neck problem (injury)" was Dr. B's August 24th report and that carrier timely contested compensability on September 14th. The hearing officer's findings on this issue are supported by the evidence and we affirm the hearing officer's decision on that issue.

The hearing officer further found that claimant's "neck problem (injury)" was not directly caused by the compensable _____ fall. That finding is also supported by the evidence, most notably Dr. B's comprehensive report of February 22, 1999. We also affirm that limited finding.

Of concern to us, and the reason for our remand, is the hearing officer's failure to either discuss or make findings on claimant's aggravation theory. Dr. B, in his February 22, 1999, report, makes quite clear, and is largely unrebutted even by Dr. S's report, that "if it can be clearly established that [claimant] [has] no other symptoms . . . then I think it is clearly apparent that the injury is the precipitating cause and should be considered responsible for aggravating a degenerative disk situation which was previously asymptomatic." We are cognizant of carrier's claim that claimant has not been forthcoming about her prior medical history but neither, we note, has carrier resorted to subpoenaing Dr. G's medical records of treatment prior to _____. It is well-established that an aggravation of a preexisting injury or condition may constitute a new injury and that doctrine explicitly applies to the 1989 Act. Further, an injury may have more than one producing cause. Texas Workers' Compensation Commission Appeal No. 960622, decided May 13, 1996; Texas Workers' Compensation Commission Appeal No. 990401, decided April 14, 1999, and cases cited therein. Accordingly, we remand for the hearing officer to make specific findings regarding whether the compensable fall of _____ may have

aggravated a previously asymptomatic cervical condition. The hearing officer, at his discretion, may hold a hearing on remand on this very specific ground.

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

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Judy L. Stephens
Appeals Judge