

APPEAL NO. 991459

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 15, 1999, a contested case hearing was held. With regard to the issues before him, the hearing officer determined that the compensable (right upper extremity) injury of _____ (all dates are 1997 unless otherwise stated), was a producing cause of respondent's (claimant) neck injury; that appellant (self-insured school district, referred to as self-insured or carrier) did not timely contest compensability of the neck injury; and that claimant has a 23% impairment rating (IR), amending the designated doctor's report.

The self-insured appeals the findings on all the issues, summarizing evidence that favors its position, asserting that it had not received fair notice of the claimed cervical injury until March 9, 1998, and timely disputed it on March 20, 1998, and claimant that all the IRs in evidence are flawed in one respect or another. The self-insured requests that we reverse the hearing officer's decision, render a decision in its favor on the first two issues and remand the case on the IR issue. The file does not contain a response from claimant.

DECISION

Affirmed.

Claimant had been employed by the self-insured for about 16 years as a custodian. Claimant has alleged, and self-insured accepted, a repetitive trauma right upper extremity injury which includes a torn right rotator cuff, with a date of injury of _____. Claimant described her job buffing floors, using a "roto," and other duties. Claimant contends that the _____ injury also includes an aggravation injury to her neck, which self-insured disputes. After her _____ injury, claimant had some physical therapy (PT) but continued working the remainder of the school year and had right shoulder surgery to repair the rotator cuff tear on June 3rd. Claimant testified that she continued to have arm and neck pain before and after the surgery. (The medical evidence will be summarized in succeeding paragraphs.) Nonetheless, claimant returned to work at the start of the next school year and sustained another work-related injury to her left upper extremity on September 27th. That injury is not included in the injury at issue here, being the _____ right upper extremity injury.

Claimant's treating doctor is Dr. H, who, in an Initial Medical Report (TWCC-61) of a January 30th visit, assessed "[r]ight shoulder rotator tendinitis with bursitis." Self-insured emphasizes that none of the medical or therapy reports through June mention any complaints or findings regarding the neck. The hearing officer made a finding of fact that claimant's aggravation injury of the cervical spine was not diagnosed until after claimant's rotator cuff surgery (on June 3rd). In a progress note dated July 14th, Dr. H writes:

This 57 year old female still comes in with ongoing pain in the right side of the neck, down the right shoulder, down the right arm and occasionally clear into the medial side of

the elbow and her wrist. From the very first time I saw her, she had the shoulder pain and wrist pain radiation down the arm. We eventually attributed that to the shoulder with a positive arthrogram. She has, however, gone through the shoulder on the surgery with decompression, has pretty good ROM [range of motion] now and we will need to move to the strengthening phase of that. I am advocating physical therapy. I am, however, concerned with the ongoing deep pain she has in the neck and down the arm. It falls asleep and there is numbness. Occasionally, it comes and goes. The neck paraspinal muscles are tender on the right side but neurovascular status is good in the hands.

ASSESSMENT: Possible cervical radicular syndrome. I am recommending a[n] MRI of the "C" spine. I will see her back in 3½ weeks to go over the results of that with her. In the meantime, we will start P.T. on the neck, shoulder and arm. [Emphasis added.]

There are facsimile (fax) notations at the bottom of this report indicating receipt by the self-insured on July 23rd. The hearing officer, in his Statement of the Evidence and Finding of Fact No. 5, finds that Dr. H's July 14th report was received by self-insured on July 23rd. The recommended MRI was performed on July 23rd and, although noting "some motion artifact," was essentially normal. Self-insured contends that the July 14th note and July 23rd MRI report did not give it fair notice of a cervical injury and facts showing compensability.

Dr. M (Dr. M's status is not clear), in a Report of Medical Evaluation (TWCC-69) and narrative dated January 28, 1998, certified maximum medical improvement (MMI) on January 28, 1998 (MMI is not at issue) and assessed a three percent IR based on claimant's right shoulder surgery. Dr. H, on a TWCC-69 dated March 9, 1998, certified MMI on March 6, 1998, and assessed a 33% IR, based on 14% for the neck, 10% for the right upper extremity and adding 13% impairment for the left upper extremity, combined to arrive at the 33% IR. In this report, Dr. H stated: "The injury date of 1-20-97 includes the cervical spine, right shoulder and right upper extremity." Self-insured contends that this is the first written notice it received that the cervical injury was being claimed as part of the _____ injury. Self-insured denied liability for any injury to the cervical spine by Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated March 12, 1998, and filed March 20, 1998.

Subsequently, a Dr. E, in a TWCC-69 and narrative dated March 23, 1998, assessed MMI on January 28, 1998, with a two percent IR based on right shoulder loss of ROM. Dr. H, on a TWCC-69 dated October 22, 1998, certified MMI on March 6, 1998, with a 23% IR based on 14% for the neck and 10% for the right upper extremity, using the combined values chart from the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). Subsequently, Dr. G, self-insured's independent medical examination doctor, examined claimant and, in another TWCC-69 and narrative dated February 25, 1999, certified MMI on February 24, 1999, with a 12% IR, based on seven percent impairment of the right shoulder and five percent impairment of the left shoulder, combined

for a 12% whole person IR. One or more of these assessments were disputed and Dr. B was appointed as the designated doctor. On a TWCC-69 and narrative dated March 27, 1999, Dr. B certified MMI on March 6, 1999, and assessed a 30% IR based on 14% impairment for the right upper extremity, 14% for the left upper extremity and 11% for the cervical impairment (ROM), combined using the combined values table to arrive at the 30% IR.

On the issue of whether the compensable _____ right upper extremity injury was a producing cause of claimant's cervical injury (diagnosed as "cervical syndrome"), self-insured emphasizes a lack of early complaints of neck pain, a lack of documentation prior to July, or March 1998, of any cervical complaints and the essentially normal July 23rd cervical MRI as evidence that the compensable injury was not a producing cause of the cervical injury. Claimant testified that she has neck pain but that the doctors thought it was due to the torn rotator cuff and that it was only after the rotator cuff was repaired and the neck pain was continuing that Dr. H began focusing on the neck. There was considerable testimony and disagreement about whether self-insured had denied authorization for a second MRI. The hearing officer found that claimant sustained an aggravation of preexisting cervical disc disease and that injury "was not diagnosed until after Claimant underwent surgical repair of the torn rotator cuff." The hearing officer's finding is supported in the evidence and is not so against the great weight and preponderance of the evidence as to be manifestly unjust or clearly wrong. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

On the issue of timely contest of compensability of the neck injury, 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(c) (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, the hearing officer quoted Dr. H's July 14th report which had an assessment of possible cervical radicular syndrome, how Dr. H arrived at that finding and that Dr. H ordered "PT" for that condition. The hearing officer found self-insured received that report on July 23rd and further commented how self-insured, through its adjusters, had knowledge of the cervical MRI in July. We disagree with self-insured that that report, read as a whole, does not provide facts showing compensability. The note gives a summarization of the _____ injury and expresses concern that claimant has ongoing neck pain even after the rotator cuff surgery. Self-insured's protestations that it did not receive fair written notice until March 1998 notwithstanding, we affirm the hearing officer's findings that self-insured had not timely contested compensability of the cervical injury after receiving written notice on July 23rd.

Regarding the IR, it is undisputed that the left upper extremity injury is a separate injury and not part of the _____ injury. By the same token, we have affirmed the hearing officer's determination that the compensable _____ injury was a producing cause and included the cervical injury. The hearing officer, in essence, factored out the left upper extremity rating from the designated doctor's report (of a 30% IR) to arrive at a 23% IR for the compensable injury. The hearing officer further comments that:

It is noted that this impairment is the same as that determined by [Dr. H] in considering only the cervical and right upper extremity in his [IR] of October 22, 1998, although the apportionment of the impairment for the neck and right upper extremity by [Dr. H] was different than [Dr. B's].

In this case, the impairment assigned by the designated doctor for the September left upper extremity injury was separate and distinct from the impairment assigned for the compensable right upper extremity and neck injuries and the IR could be determined from the designated doctor's report without requesting additional input from the designated doctor. Which is not to say that it would have been incorrect to go back to the designated doctor, advise him of the scope of the injury, and request an IR of only the compensable injury, which, in this case, would clearly have not included the left upper extremity. We have, in the past, affirmed a hearing officer's finding on the IR when the hearing officer, in a simple arithmetical computation, had subtracted an amount of the IR in a designated doctor's report that was assigned for an injury found not to be compensable. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995; Texas Workers' Compensation Commission Appeal No. 941732, decided January 31, 1995. However, *compare* Texas Workers' Compensation Commission Appeal No. 941550, decided January 2, 1995, where the Appeals Panel remanded to allow the hearing officer to inquire of the doctor who incorrectly gave a claimant an IR based upon bilateral rotation cuff tears; where the claimant's injury was confined to a single shoulder and he had previously received impairment income benefits for the other shoulder. In this case, self-insured simply contends that all the IRs were in some way flawed by either not rating some of the compensable injury, or including the left upper extremity.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge