

APPEAL NO. 991883

Following a contested case hearing (CCH) held on August 3, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent's (claimant) original compensable injury of _____, extended to and affected his lower back, bilateral hips, and right shoulder, and that the appellant (carrier) waived its right to contest the compensability of claimant's lower back, bilateral hip, and right shoulder injuries. The carrier has requested our review of these determinations, asserting they are against the great weight of the evidence. The file does not contain a response from claimant.

DECISION

Affirmed.

The parties stipulated that claimant worked for the employer. Although the hearing officer's decision states that the parties stipulated that claimant sustained a compensable repetitive trauma injury on _____, the record reflects that the parties stipulated that claimant sustained a compensable injury to his neck and left shoulder on _____.

There was no dispute, however, that claimant's injuries were from repetitious trauma and not from a single, discrete accident. According to a Decision and Order signed by this hearing officer on July 8, 1998, following a CCH held on June 29, 1998, these parties then stipulated that if claimant sustained a compensable injury, the correct date of injury is _____. The remaining disputed issues in that hearing were whether claimant sustained "a compensable occupational disease, repetitive trauma injury, while working for the Employer"; timely notice of injury; and disability. In that decision, the hearing officer stated in his discussion of the evidence the following: "The Claimant contends that he has sustained an injury to both shoulders, his neck and other parts of his body. The Claimant's work-related activities were sufficient to constitute 'repetitious physically traumatic activities' and caused or aggravated the Claimant's musculoskeletal injuries including the injury to his left shoulder and neck." The hearing officer found, among other things, that claimant worked for the employer for approximately 13 years performing heavy manual labor; that he was exposed to "repetitious physically traumatic activities" in his workplace; and that his "work-related activities caused or aggravated his musculoskeletal problems including his left shoulder and neck injuries." Acting on the carrier's request for review, the Appeals Panel affirmed the hearing officer's findings and conclusions on the injury and other disputed issues. Texas Workers' Compensation Commission Appeal No. 981724 (Unpublished), decided September 10, 1998. Incidentally, we note that the copy of both the decision and order and the Appeals Panel decision introduced into evidence by the carrier and admitted by the hearing officer contained only every other page of the documents.

At the CCH on August 3, 1999, the carrier contended that the earlier decision of the hearing officer was *res judicata* as to the additional injuries contended for by claimant because evidence was presented at the earlier CCH on more of his physical condition than just his neck and left shoulder. The hearing officer stated his disagreement with this assertion for the reason that there was no extent of injury issue at the earlier CCH. However, we note that the disputed injury issue in the earlier CCH was broad and not specific as to the body parts allegedly injured and did not specifically reference the neck and left shoulder. In the decision and order now before us, the hearing officer states as follows: "Language in the previous decision indicates that the injury did affect the Claimant's neck and left shoulder; however, it was intended to clarify only, and not exclude other possible injuries. There was no extent issue presented, during the previous hearing, and any comments concerning the extent of injury were nothing more than dicta." Despite the hearing officer's disclaimer, the hearing officer's Finding of Fact No. 4 in the earlier decision that "[t]he Claimant's work-related activities caused or aggravated his musculoskeletal problems including his left shoulder and neck injuries" is certainly couched broadly enough to have included more than the neck and left shoulder. However, because the carrier did not make the evidence admitted in the first CCH a matter of record in the CCH we now consider, much less specify what portions of that evidence tended to establish that claimant was also then asserting injury to his right shoulder, low back, and bilateral hips, we are unable to know the extent to which evidence of these claimed additional injuries was then before the hearing officer. Accordingly, we cannot determine that the hearing officer's decision in that case is *res judicata* as to the additional claimed injuries and find the carrier's assertion of error without merit. *Compare* Texas Workers' Compensation Commission Appeal No. 960022, decided February 15, 1996, citing Texas Workers' Compensation Commission Appeal No. 950690, decided June 15, 1995.

Claimant testified that in a previous decision and order, he was found to have sustained a repetitive trauma injury to his left shoulder and neck on _____. Asked directly by the hearing officer why he did not seek to include the right shoulder in the earlier hearing, claimant responded, "I didn't know what I was doing." Asked why, if the date of injury is _____, he did not complain of it before February 1999, claimant responded that he had been complaining about his right shoulder for four to six months, that he has had low back trouble for a long time with his back hurting after getting off work, and that he has been told that he has bone spurs and pinched nerves in his right shoulder and both hips. Claimant also stated that his additional injuries were "slow coming on" and indicated that he became more aware of the pain from additional injured body parts including his right shoulder, mid and low back, and both hips following initiation of treatment for his left shoulder and neck, and that the doctor told him that as pain is relieved in one area of his body, pain from other injured body parts will become more pronounced. Claimant's assistant stated in closing argument that she asked claimant why he was now trying to get the additional body parts covered and he responded that the doctors want to operate on bone spurs in his right shoulder and mid and low back. This statement is not evidence.

Claimant testified that he is 48 years of age and has worked for the employer for 13 years. The April 27, 1999, report of Dr. H, a designated doctor who assigned an

impairment rating for claimant's left upper extremity and neck injuries, states that claimant was a drop forge operator who worked in a foundry performing very heavy work in a high temperature environment. Claimant said that his work included standing on concrete and operating different size steam hammers making steel parts in dies; that the parts weighed from one to 150 pounds; and that this work required twisting, turning, pulling, and heavy lifting on a daily basis. He also said he has been told he has degenerative arthritis and also bone spurs and pinched nerves in his back and hips and that the doctors want to perform surgery.

Dr. S wrote a referral report to Dr. W on August 28, 1997, stating that claimant is a 46-year-old man who relates he is left handed and whose "chief complaints are those in the neck, back, and shoulders [emphasis supplied]"; that claimant's "left shoulder bothers him more than the right"; that claimant stated that his symptoms began on (alleged date of injury), and that he has had pain for a number of years; and that claimant has been "a heater man" for the same company for 13 years and has been off work for several weeks without pay. Dr. S stated the impression as left shoulder impingement syndrome and probable cervical spine degenerative disc disease. This letter bears a stamp reflecting that it was received by the carrier on February 2, 1998.

Dr. R reported on September 11, 1997, that he assumed claimant's medical care in September 1997; that claimant has coronary artery disease, significant musculoskeletal disease with cervical spondylosis, subacromial bursitis, and a lot of low back and neck pain; that claimant is disabled from performing the substantial duties of his occupation because of these problems; that the cardiac problems are not work related; and that the musculoskeletal problems "probably are work-related," are related to claimant's size and "continued wear and tear of the joints," and that these should be considered an ongoing degenerative condition related [to] the activities of life, especially exertion related to work." Dr. R further stated that "it is medically dangerous for him to be functioning in the heated environment of the foundry where he has been laboring," and that he needs to avoid "a lot of heavy lifting as he is now." The stamp on this letter reflects that it was received by the carrier on February 2, 1998.

Dr. T wrote a referral report to Dr. Ry on November 7, 1997, stating that claimant was referred to him to evaluate for "disability"; that claimant was seen on August 28, 1997, by Dr. S complaining of several months of cervical and shoulder pain and was thought to have a left shoulder impingement syndrome; that claimant complains of neck and right shoulder pain and of bilateral hip pain; that claimant reports he has significant arthritis; and that claimant also reports left hand numbness present since an ulnar osteotomy six years earlier. Dr. T then stated that he assigned claimant impairment ratings for his right shoulder, right hip, and left hip, which he regarded as temporary since claimant had not received adequate treatment for his shoulder and hip pain. Dr. T further stated that claimant has multiple medical and musculoskeletal issues; that since (alleged date of injury), claimant "has been experiencing difficulty with his neck and right shoulder"; that he has also been experiencing "bilateral hip pain which he believes is related to his arthritis"; and that claimant "has a positive impingement sign in the right upper extremity." The stamp

on this letter reflects that it was received by the carrier on February 2, 1998. The hearing officer regarded the combination of these three documents, all received by the carrier on February 2, 1998, as constituting sufficient notice of claimant's alleged right shoulder, lower back, and bilateral hip injuries pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(3) (Rule 124.1(a)(3)).

Dr. Ws reported on December 28, 1998, that he conducted an independent medical evaluation of claimant; that his diagnosis is apparent left shoulder impingement syndrome, status post surgery, and cervical spine pain syndrome without objective abnormalities; and that "[t]he other complaints of right shoulder pain, low back and hip pain are not related to the injury that he described to me."

Dr. G reported on "01/26/98" that claimant has a long, complicated history of multiple problems from his cervical spine to his lumbar spine; that claimant apparently has degenerative arthritis of his hips and of his shoulders; that claimant was referred by Dr. T for evaluation of his left shoulder; and that claimant complains of pain in his left shoulder and a popping in the base of his neck. Dr. G reported on "02/02/98" that the left shoulder injection he gave claimant on January 26th provided some relief for only three to four days and that claimant is still having a lot pain. Dr. G further stated that claimant also "complains of both shoulders, both hips, and his back and neck [emphasis supplied]" and that "it is difficult to discern exactly what is going on." Dr. G's Operative report of "04/02/98" reflects that he performed surgery on claimant's left shoulder for impingement syndrome. Dr. G wrote on "01/14/99" that he had not seen claimant since May 28, 1998; that claimant is apparently caught between the private health insurance company and the workers' compensation carrier and is now being sent to him to decide whether claimant's new pain, his right shoulder, is related to the workers' compensation problems from last year, and that he "cannot address the WC question of whether his current right shoulder pain is related to the left shoulder pain from 1-1/2 years ago."

Claimant's position at the hearing was, in essence, that his right shoulder, back and both hips were also injured on _____, by the repetitious traumatic activities of his work, albeit that the pain was more pronounced in the left shoulder and neck which were the focus of the initial treatment, and that the pain in his right shoulder, back, and hips became progressively worse. He further maintained that by at least February 2, 1998, the carrier had written notice from his medical records that his _____, injury included his right shoulder, low back, and both hips and did not timely contest the compensability of these injuries. As already discussed, the carrier contended first that, during the earlier CCH, evidence was adduced indicating that claimant's _____, repetitious trauma injury included more than his left shoulder and neck, more specifically his right shoulder, and thus the decision following that hearing resulted in the injury issue in that hearing becoming *res judicata*. The carrier also contended that claimant's evidence failed to establish that he did in fact sustain an injury to his right shoulder, low back, and bilateral hips on _____. The carrier further maintained that claimant's medical records only reflected complaints of pain in the additional body parts but not diagnosis and treatment of those body parts and therefore that the medical records relied on by the hearing officer in finding written notice

did not constitute adequate written notice of these injuries, citing our decision in Texas Workers' Compensation Commission Appeal No. 980177, decided March 13, 1998. The carrier also asserted that, apparently despite not yet having had adequate written notice of the additional injuries, it nonetheless "properly filed" on October 30, 1998, a dispute in its Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21).

The hearing officer's findings that claimant worked for the employer for 13 years performing heavy manual labor and that the carrier did not dispute claimant's right shoulder, lower back, and bilateral hip injuries until October 30, 1998, have not been challenged. The carrier's TWCC-21 dated "10/30/98" states that the carrier admits that claimant suffered a left shoulder and neck injury but denies that the injury extends to the back or hips. The carrier's TWCC-21 dated "1-15-99" states that the carrier disputes that claimant's compensable left shoulder and neck injury extends to the right shoulder, hip, back, chest wall, lower extremities, or body in general.

Claimant had the burden to prove by a preponderance of the evidence that his _____, repetitious trauma injury extended to his right shoulder, low back, and bilateral hips, as he claimed. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb a challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The carrier disputes a finding that claimant was exposed to repetitious physically traumatic activities in the workplace. As noted above, a finding to that effect was previously affirmed by the Appeals Panel. Appeal No. 981724, *supra*. The carrier also disputes the finding that claimant's work-related activities aggravated or worsened his right shoulder injury, lower back injury, and bilateral hip injury. We are satisfied that claimant's testimony and the medical records adequately support this finding.

Finally, the carrier challenges the finding that it received written notice of claimant's right shoulder, lower back, and bilateral hip injury by February 2, 1998, at the latest. Section 409.021(c) provides, in part, that "[i]f an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability." Rule 124.1(a)(3) provides, in part, that written notice of injury consists of "any other notification regardless of source, 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." We are satisfied that the three medical reports cited by the hearing officer in his decision as at least collectively providing the carrier with written notice of injury, sufficiently support the challenged finding. In Appeal No. 980177, *supra*, relied on by the carrier, the Appeals Panel reversed the finding of the hearing officer that the carrier in that case was provided with written notice that the injured employee had

not only a cervical spine injury (accepted by the carrier) but also an injury to the thoracic and lumbar spine regions because the finding was based on one medical record which only made mention in the history portion of "also some low back pain." Contrary to the carrier's argument that our decision requires that there be both a diagnosis and treatment of a body part or condition for there to be adequate written notice of an injury, our decision specifically recognized that "a concrete diagnosis is not necessary for good notice to be effected by a medical report. [Citation omitted.]" That decision does go on to state that "a carrier is not required to go on a treasure hunt through medical records to find some reference to possible other symptoms or pain and thereby be held to be on notice that such pain reflects specific injuries outside of those specifically diagnosed and subsequently treated over a lengthy period of time," and that "[t]o invoke waiver, the 'other notification' must 'fairly' inform the carrier of facts showing compensability." We are satisfied that the report of the treating doctor and the two referral doctor reports, in the context of the carrier's having accepted and authorized treatment for the neck and left shoulder injuries, did fairly inform the carrier that claimant also contended he had injuries to his right shoulder, low back, and both hips.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge