

APPEAL NO. 991917

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 10, 1999. The issues at the CCH were whether the respondent (claimant) sustained a compensable injury to her low back in addition to the injury to her hands, arms, shoulders, and neck on _____; and whether the appellant (self-insured) contested compensability on or before the 60th day after being notified of the injury, and, if not, was the self-insured's contest based on newly discovered evidence that could not reasonably have been discovered at an earlier date. The hearing officer determined that on _____, the claimant sustained a compensable injury to her low back, in addition to the compensable injury to her hands, arms, shoulders, and neck; and that the self-insured failed to timely contest compensability of the lower back injury and no newly discovered evidence existed that would allow the self-insured to reopen the issue. The self-insured appeals, urging that the hearing officer abused her discretion in failing to add the issue of waiver of extent-of-injury; that the evidence is insufficient to support a finding of a low back injury; and that there is no provision made for a time frame for the self-insured to dispute the extent of the injury, or in the alternative, the claimant failed to establish when the self-insured received written notice she was alleging a low back injury. The claimant replies that the hearing officer was correct in failing to allow the waiver of extent-of-injury issue, that her back was injured on _____, that the self-insured received written notice of her back injury on April 3, 1997, and that the hearing officer's decision should be affirmed.

DECISION

Affirmed, as reformed, in part, reversed and remanded in part.

At the beginning of the hearing, the self-insured requested that an issue be added: whether the claimant had waived the extent-of-injury issue. The self-insured asserted that the issue was discussed at the benefit review conference (BRC), that the benefit review officer (BRO) refused to include the issue in her report, and that the self-insured timely filed a response to the BRC report requesting that the issue be added. The claimant objected to the issue being added, asserting that the BRO was correct in not adding the issue. On voir dire, the claimant testified that the BRO said she was not going to add the issue because the claimant had a legal right to pursue the low back injury. The self-insured presented several Appeals Panel decisions to the hearing officer concerning the waiver of extent-of-injury issue. The hearing officer, after considering the Appeals Panel decisions and argument of the parties, decided not to allow the issue, and found no good cause to add the issue.

Section 410.151(b) provides, in part, that an issue that was not raised at a BRC may not be considered unless (1) the parties consent or (2) if the issue was not raised, the Texas Workers' Compensation Commission (Commission) determines that good cause existed for not raising the issue at the BRC. Claimant, who was represented by a different ombudsman at the BRC, did not dispute the self-insured's representations to the hearing

officer that waiver of the extent-of-injury issue was raised and discussed at the BRC and that the self-insured requested the BRO add it to the statement of disputes. In Texas Workers' Compensation Commission Appeal No. 941171, decided October 17, 1994, the Appeals Panel found error in the hearing officer's failure to add an issue to the statement of disputes because it was apparent through the BRO's testimony that the matter had been raised and discussed at the BRC. We stated that "[b]ecause it was a matter considered at the BRC, it did not constitute an additional issue for which a motion was required within the time limits established by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7), or for which a good cause finding was required." In Texas Workers' Compensation Commission Appeal No. 961398, decided August 28, 1996, and Texas Workers' Compensation Commission Appeal No. 961846, decided November 4, 1996, the Appeals Panel reversed and remanded for further consideration by the hearing officer the matter of requested additional issues where the requested issues had been raised at the BRC but were not included in the BRO's report.

We view the hearing officer's failure to address the self-insured's request for an issue concerning waiver of the extent-of-injury as reversible error necessitating remand for further consideration. The issue was raised and discussed at the BRC and the BRO was requested to report it as a disputed issue. The BRO was obligated to include in the BRC report a statement of each issue raised but not resolved, the parties' positions, and the BRO's recommendations. Section 410.031(b). A BRO may not decline to report an issue based upon an evaluation that it lacks substantive merit. We remand for further consideration and development of the evidence the issue of whether the claimant has waived her extent-of-injury issue.

The parties stipulated that on _____, the claimant sustained a compensable injury to her hands, arms, shoulders, and neck. The claimant testified that the injury occurred when she fell on pavement and tried to break the fall with her hands. According to the claimant, her back and neck popped, she twisted her ankle, and scraped her arms and knees. The claimant sought medical treatment with Dr. W and has subsequently been examined and treated by numerous doctors. The claimant testified that her low back has hurt since _____, and that although she has told all of the doctors that she injured her low back, they have concentrated on her other injuries and most have refused to treat her low back because the self-insured will not pay. The claimant said she had a low back sprain in 1990, Dr. W treated it, and she fully recovered.

Numerous medical records are in evidence. On May 10, 1995, the claimant filled out a questionnaire for Dr. W indicating that she was suffering from low back pain. Dr. W's notes on May 13, 1995, indicate that the claimant was complaining of lumbar pain and on May 18, 1995, the claimant received heat to her lumbar area. The claimant indicated on pain diagrams throughout the period May 13, 1995, through July 2, 1996, pain in her low back. On July 17, 1997, Dr. T had a lumbar MRI performed which indicates that the claimant has moderate multi-level degenerative changes without evidence of any herniated nucleus pulposus, spinal stenosis, or neural foraminal stenosis. On August 17, 1998, the claimant was examined by Dr. R, who noted that the claimant's low back pain has become

increasingly bothersome. In a letter dated November 2, 1998, Dr. R states that the medical records show that the claimant's low back was indeed injured on _____. According to the claimant, she has received some treatment for her low back which includes heat and ice packs, a TENS unit, and trigger point injections.

The claimant had the burden to prove the extent of her compensable injury. The 1989 Act defines "injury," in pertinent part, as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). 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). The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a).

The self-insured asserts that the hearing officer erred in finding that the claimant's low back problems are part of the compensable injury because the medical reports indicate "low back pain" with no accompanying diagnosis or record of treatment. The record indicates that the claimant complained of back pain beginning May 10, 1995, and that there was a tentative diagnosis of sciatica given by Dr. W. The claimant did receive minimal treatment for her low back pain. Based on the evidence presented, the hearing officer concluded that the claimant met her burden of proving she sustained a compensable injury to her low back on _____. The hearing officer notes that the mechanism of injury is consistent with a low back injury. When reviewing a hearing officer's decision, we will 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). We find there was sufficient evidence to support the hearing officer's determination that on _____, the claimant sustained an injury to her low back. The hearing officer determined in Conclusion of Law No. 4 that "[o]n _____, Claimant sustained a compensable injury to her low back, in addition to the compensable injury to her hands, arms, shoulders, and neck." Because we are remanding the issue of whether the claimant has waived her extent-of-injury issue, we cannot affirm that the low back injury is compensable. We reform Conclusion of Law No. 4, and the Decision to state: On _____, the claimant sustained an injury in the course and scope of her employment to her low back, in addition to the compensable injury to her hands, arms, shoulders, and neck.

A carrier is required to dispute the compensability of an injury not later than 60 days after receipt of notice of injury, or it will waive its right to do so. Section 409.021(c). 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. Rule 124.1(a)(3). 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. Texas Workers' Compensation Commission Appeal No. 950522, decided May 11, 1995. An employee who argues that a document is written notice of the compensability of a particular injury and that receipt of the document makes the carrier's contest of compensability untimely, has the burden of proving when the notice was received. Texas Workers' Compensation Commission Appeal No. 941398, decided December 1, 1994; Texas Workers' Compensation Commission Appeal No. 990307, decided March 24, 1999.

In this case, the claimant asserted that the self-insured had written notice of the injury on April 16, 1998, as evidenced by self-insured's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) which states as the nature of the injury "Sprain-Back-Lower (Lumbar Spine) -Severe TRUNK - Lower Back Area (Inc: lumbar and Lumbo-Sacral)." The self-insured filed a TWCC-21 disputing the low back injury on August 28, 1998. The hearing officer determined that the self-insured received its first written notice of the claimant's lower back injury no later than April 3, 1997, yet did not contest compensability until August 28, 1998. Dr. T's report of March 13, 1997, states "The patient landed on her forearms and wrists, injuring her neck, back, shoulders, upper extremities and wrist joints." The report is date stamped as having been received by the self-insured's third party administrator on April 3, 1997.

The self-insured argues that there is no provision in the Texas Workers' Compensation Act or Rules which requires a time frame for a carrier to dispute the extent of an injury. We disagree. Section 409.021(c) and Rule 124.6 are applicable to extent-of-injury issues, because they are compensability issues. We have previously held that when the carrier receives notice of an injury to a part of the body that is different from the original notice, the carrier has 60 days to dispute the compensability of the claimed injury to the different part of the body. Texas Workers' Compensation Commission Appeal No. 94943, decided August 31, 1994. We fail to see how Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999), a case which provides that there are no exceptions to Rule 130.5(e), is applicable to the issue of self-insured's failure to timely contest compensability of an extent-of-injury issue. We find sufficient evidence to support the hearing officer's determination that the self-insured failed to timely contest compensability of the low back injury and no newly discovered evidence existed that would allow the self-insured to reopen compensability.

We affirm, as reformed, the hearing officer's decision that on _____, the claimant sustained an injury in the course and scope of her employment to her low back, in addition to the compensable injury to her hands, arms, shoulders, and neck; and that the self-insured failed to timely contest compensability of the lower back injury and no newly discovered evidence existed that would allow the self-insured to reopen compensability. However, we reverse the hearing officer's decision and order and remand the case for further consideration and development of the evidence on the issue of whether the claimant has waived her extent-of-injury issue. On remand, after determining the issue of whether the claimant has waived her extent-of-injury issue, the hearing officer should resolve whether the claimant's low back injury is compensable.

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

Dorian E. Ramirez
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge