

APPEAL NO. 991971

Following a contested case hearing 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 appellant's (claimant) compensable injury does not include her cervical spine and that the respondent (carrier) timely contested the compensability of the claimed cervical spine injury. Claimant requests our review of the extent-of-injury determination on evidentiary insufficiency grounds. The carrier responds that the evidence is sufficient to support not only the challenged extent-of-injury determination but also the timely contest-of-compensability determination should the Appeals Panel regard claimant's request for review as including that issue.

DECISION

Affirmed.

We note at the outset that the hearing officer's Decision and Order reflects that the carrier's exhibits are numbered "1" through "8," followed by "1" through "11." The record reflects that the carrier did not introduce its exhibits numbered "1" through "4" and that it did introduce exhibits numbered "5" through "22."

The parties stipulated that on _____, claimant sustained a compensable injury and that the carrier did not contest the compensability of the claimed cervical injury within 60 days of receiving the March 18, 1998, letter of Dr. S. The hearing officer found this report insufficient as written notice of a cervical injury. It was not disputed that the carrier accepted liability for a work-related injury on _____, to claimant's right shoulder and lumbar spine.

Claimant testified that since October 1995 she worked for (employer) as a "hand-ride" driver and that her duties included assisting persons in wheelchairs in getting their chairs onto the lift and into the van. She said that on the injury date, _____, she struggled to get a wheelchair over the flap on the lift and onto the lift and, in the process, felt pain in her right shoulder and back. She said that three to four days later, she began having neck pain; that she thought the neck pain was from her shoulder injury; that she was first treated by Dr. L, a chiropractor; that she later saw Dr. S, who gave her shots in the shoulder and said they would also relieve her neck pain; that Dr. S recommended that she undergo rotator cuff surgery but that she told Dr. S, "you know how I feel about surgery"; that she also refused low back surgery; and that she changed treating doctors to Dr. V, a chiropractor, apparently in February 1999.

Claimant conceded that she sustained a neck injury in a motor vehicle accident in 1996. She also indicated that she had neck pain in 1997 and had been told it was associated with her carpal tunnel syndrome which is the subject of another workers'

compensation claim. Claimant agreed on cross-examination that after her _____, injury, she reported to her supervisor, Mr. T, to (clinic 1) and (hospital) where she was seen on " _____," and to (clinic 2) where she was seen on "2/4/98," that she had pain in and injured her right shoulder and low back but did not report neck pain. She further conceded that while she was referred by Dr. L and Dr. S for diagnostic tests on her right shoulder and low back, she was not referred for such tests on her cervical spine. Both claimant's handwritten accident statement and the Supervisor's First Report of Injury, written by Mr. T on " _____," state that claimant complained of pain in her right upper shoulder and lower back. The clinic 1 record of " _____" states the diagnosis as lower back and right shoulder strain; the hospital record states the nature of the problem as "hurt right shoulder and low back," and the clinic 2 record refers to a back strain.

Dr. L's Initial Medical Report (TWCC-61) of "2-3-98" states diagnoses relating to claimant's lumbar spine and shoulder but not her neck, and Dr. L's subsequent records through "3-6-98" do not reflect a neck injury.

The March 18, 1998, letter of Dr. S, whose status in the case at that point is not clear, states that he first saw claimant on that date; that she had been treating with Dr. L since February 3, 1998; that she gave a history of lifting a wheelchair with patient over the flap on the van lift and feeling a tingling in the lumbar spine and a locking up of the right upper extremity; and that she complained to Dr. S of pain in the lumbar area with radiation down the right leg and of pain, crepitation, weakness, and clicking in the right shoulder. In another section of the report Dr. S stated that while lifting a passenger in a wheelchair claimant "felt a pulling and burning type of pain in the right shoulder, neck and lower back area which went down the right leg," and that she was being treated by Dr. L. Dr. S then reported the results of his physical examination of the right shoulder and lumbar spine and stated the impression, by history, as pain, locking, crepitation, and weakness of the right shoulder and right arm and lumbar pain with radiation down the right leg. Dr. S felt that claimant required an MRI and bone scan of the right shoulder and a lumbar spine bone scan.

The April 29, 1998, report of Dr. Dr. WS, who performed an independent medical examination, found claimant to be at maximum medical improvement (MMI), and assigned an impairment rating (IR) of "0%," but does not reflect indication of a neck injury.

Dr. S reported on June 20, 1998, that he again saw claimant; that she maintained her right shoulder and lumbar spine complaints; that after his work-up, he felt that claimant had a soft tissue injury in the lumbar area and a probable right shoulder impingement syndrome; that claimant had been given injections in her lumbar spine and shoulder; that she declined to participate in a work hardening program; and that he felt she had reached MMI with a two percent IR for the shoulder and a zero percent rating for the lumbar spine.

The August 17, 1998, report of Dr. G, the designated doctor, assigned an IR of "2%" for claimant's shoulder and "0%" for her lumbar spine and made no mention of a neck injury.

Dr. S further reported on December 30, 1998, that claimant came to see him on that date for a comprehensive evaluation of the right shoulder and lumbar spine and, again, there was no mention of a cervical injury or treatment.

Dr. V's initial report of February 24, 1999, states that claimant changed treating doctors from Dr. L to Dr. S on or about March 5, 1998; that claimant notes lumbar spine pain and right shoulder/right cervical area pain; and that the diagnoses includes not only right shoulder and lumbar spine problems but also thoracic spine problems, cervical disc displacement, cervical sprain/strain, and cervicobrachial radiculopathy. This document, in evidence as Carrier's Exhibit No. 21, bears a stamp mark stating "RECD MAR 17, 1999." Dr. V's April 29, 1999, "Letter of Medical Necessity Request for Benefit Review Conference" states that he determined on February 24, 1999, when he first saw claimant, that while claimant may have had "an irritation" of the right shoulder, he believed that her actual injury was to the cervical spine and that her pain was a radiculopathy "from a cervical spine towards the area of the right shoulder itself." Dr. V also said that he referred claimant to Dr. R, a neurosurgeon.

Dr. R's April 7, 1999, report states his impression as right lumbar radiculopathy, right cervical radiculopathy, and lumbar facet syndrome. Dr. R further stated that claimant had tenderness to palpation at the right cervical spine. He noted that the diagnostic tests included MRI and CT scans of the lumbar spine but neither mentions nor orders any cervical spine diagnostic testing.

The April 9, 1999, report of Dr. L, a chiropractor who reviewed claimant's records, concluded that although Dr. V diagnosed cervical disc displacement and lumbar disc displacement, these diagnoses are not supported objectively by MRI findings.

In evidence is the carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated April 26, 1999, disputing a claim for a cervical spine injury. The carrier introduced a Texas Workers' Compensation Commission (Commission) Texas Compass Claim Forms List purporting to show that the Commission received a TWCC-21 pertaining to claimant on April 26, 1999. Claimant did not contend that this form failed to establish that the carrier's TWCC-21 disputing her claim for a cervical injury was received by the Commission on April 26, 1999.

The hearing officer's Finding of Fact No. 2 states that claimant does not have a cervical spine injury. Relative to that finding, the hearing officer's Conclusion of Law No. 3 states as follows: "The cervical spine is not a part of the compensable injury on or before the 60th day after being notified of the injury. [Emphasis supplied.]" In Conclusion of Law No 4, the hearing officer states that "[c]arrier contested compensability on or before the 60th day after being notified of the injury. [Emphasis supplied.]" Since it is apparent that

Conclusion of Law No. 3 has been garbled by stating verbiage relating to Conclusion of Law No. 4, we will disregard the unrelated part of Conclusion of Law No. 3.

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 the challenged factual findings of a hearing officer unless they are 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). We are satisfied that the finding of fact pertaining to the extent-of-injury issue is sufficiently supported by the evidence. We do not read claimant's request for review as appealing the hearing officer's determination of the timely contest-of-compensability issue. However, were we to review it, we would find the evidence sufficient to support that determination.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge