

APPEAL NO. 000007

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 December 14, 1999. The issues at the CCH were whether the appellant (claimant) sustained an injury to his neck in addition to his left shoulder on _____, and whether the respondent (carrier) contested compensability on or before the 60th day after being notified of the injury to the neck. The hearing officer determined that the claimant did not sustain an injury to his neck in addition to his left shoulder on _____, and that the carrier did contest compensability on or before the 60th day after being notified of the injury to his neck. The claimant appeals, urging that the hearing officer's decision is not supported by the evidence and should be reversed. The appeals file contains no response from the carrier.

DECISION

Affirmed.

The parties stipulated that on _____, the claimant sustained a compensable injury. The claimant testified that on _____, while teaching and assisting a disabled adult how to load a snack machine, the student lost control, hit him in the middle of his chest, and his body was thrown backwards, injuring his left shoulder and neck. The claimant testified that he immediately reported the incident to the employer and a couple of hours later he noticed that his neck was stiff and his left shoulder and neck area was numb. The claimant said that the pain increased and on October 8, 1998, he sought medical treatment at (clinic). According to the claimant, he told the doctor that he was having pain in his neck and left shoulder, but the doctor decided to treat his shoulder first. The claimant testified that he repeatedly told his treating doctor, Dr. N, and Dr. N's referral, Dr. R, that he had neck pain and that it was more pronounced than his shoulder pain. Dr. R performed arthroscopic surgery on the claimant's left shoulder on December 8, 1998. The claimant testified that on February 13, 1999, while in a casino, a sign weighing approximately five ounces fell from above and hit him in the neck. The claimant said that the incident of February 13, 1999, did not make his neck pain any worse and that he informed Dr. N of the incident.

The medical records from the clinic on October 8, 1999, contain a history which states that the claimant jerked his neck and shoulder back and that his "neck no longer hurts, but his shoulder still hurts." The claimant was diagnosed with a left shoulder sprain. The medical records do not contain any reference to complaints of neck pain until December 16, 1998, when Dr. R states:

[The claimant] is eight days post-op from his left shoulder surgery. He says his shoulder really seems to be doing well. He is having a lot of pain in his neck.

Dr. R's records from January through July 1999 contain no mention of complaints of neck pain. On February 9, 1999, the claimant was examined by Dr. K, who noted that the claimant denied any neck pain. Dr. R referred the claimant to Dr. P, who examined the claimant on August 3, 1999. Dr. P's report states that the reason for the consultation was left neck and shoulder pain. Dr. P prescribed medication and physical therapy and recommended a cervical MRI. Dr. N agreed with Dr. P's recommendations and on August 26, 1999, wrote a letter stating that the claimant's "neck was injured at the time of the original accident, as noted on the initial injury report and should be included for treatment." On October 21, 1999, Dr. N wrote a letter which states:

This patient has had neck pain ever since his original injury and even though it is not mentioned every time in the notes from his visits, he has always had it. At times, it was masked or covered by the pain pills he was taking for his shoulder and/or knee surgery. It should be stated again that the neck injury is a part of the original Workman's Comp Injury for his shoulder, and has been stated as such previously.

The claimant had the burden to prove the extent of his 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). Based on the evidence presented, the hearing officer concluded that the claimant did not meet his burden of proving that he sustained a neck injury on _____. 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 the claimant did not sustain an injury to his neck in addition to his left shoulder on _____.

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." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1 (a) (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.

The claimant argues that the report of Dr. R dated December 16, 1998, provided written notice of a neck injury to the carrier. The hearing officer found that the carrier first received adequate written notice of a claimed cervical injury by reports dated August 3 and 26, 1999, and that the carrier timely disputed the cervical spine injury on September 13, 1999. The hearing officer notes that the report of Dr. P dated August 3, 1999, does not indicate when it was received by the carrier and the report of Dr. N dated August 26, 1999, was file stamped received by the carrier on September 15, 1999. After review of Dr. R's medical report dated December 16, 1998, we conclude that it was insufficient to fairly inform the carrier of a neck injury. While it does indicate that the claimant is having "pain in his neck," it appears to be a symptom resulting from the shoulder surgery performed eight days prior and does not adequately inform the carrier that the claimant sustained a neck injury on _____. We find the evidence sufficient to support the hearing officer's determination that the carrier did contest compensability on or before the 60th day after being notified of the injury to his neck.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge