

APPEAL NO. 000119

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 8, 1999. With respect to the issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable cervical injury in addition to a lumbar injury on \_\_\_\_\_; that the claimant did not sustain a compensable injury to his thoracic spine or his shoulders; and that the appellant (carrier) waived its right to contest compensability of the claimant's cervical spine injury but did not waive the right to contest compensability of the claimed injuries to the thoracic spine or both shoulders. In its appeal, the carrier asserts error in the hearing officer's determinations that the claimant's compensable injury extends to his cervical spine and that the carrier waived its right to contest compensability of the cervical injury. The appeals file does not contain a response to the carrier's appeal from the claimant. In addition, the claimant did not appeal the determinations that his compensable injury did not extend to the thoracic spine and both shoulders and that the carrier did not waive its right to contest the thoracic and shoulder injuries.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable lumbar injury in a lifting incident on \_\_\_\_\_, in the course and scope of his employment with a builder. On July 20, 1999, the claimant sought medical treatment with Dr. William Dodge (Dr. D). In an Initial Medical Report (TWCC-61) of that date, Dr. D diagnosed radicular back pain and referred the claimant for a lumbar MRI. The claimant testified that Dr. D released him to return to work and he decided to consult with Dr. Johann Van Beest (Dr. V), a chiropractor, because he did not believe he was capable of returning to work. The claimant stated that he injured his neck in addition to his low back at work on \_\_\_\_\_, and that he advised Dr. V of his neck problems at his initial appointment. On cross-examination, the claimant stated that it was possible that at the benefit review conference (BRC) he indicated that he had only hurt his low back. In addition, the claimant acknowledged that he only reported a low back injury to his employer and that likewise in the recorded statement he gave to an adjuster with the carrier, the low back was the sole injury claimed. Nancy Simmons (Ms. S), the secretary/treasurer for the employer, testified that she handles workers' compensation matters. Ms. S stated that neither the claimant, nor his wife, reported any injury other than a low back injury to her.

In a report dated July 30, 1999, Dr. V noted complaints of cervical, thoracic and lumbar pain. An August 6, 1999, cervical CT scan revealed "minimal C5-6 spondylosis." In an August 14, 1999, letter to the carrier, Dr. V stated that the claimant's primary injury was to his lumbar spine; however, Dr. V opined that the claimant had also sustained an injury to his cervical spine in the lifting incident at work on July 19th. Dr. V referred the claimant to Dr. Jacob Rosenstein (Dr. R), a neurosurgeon, primarily for his lumbar injury; however, in

an August 18, 1999, report, Dr. R noted that the claimant's cervical CT scan had shown a mild C5-6 spondylosis.

In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated September 15, 1999, the carrier stated, "Carrier disputes that the compensable injury extends to both shoulders or any other body part. The compensable \_\_\_\_\_ injury is limited to the lumbar area only." That TWCC-21 is date-stamped as having been received in the central office of the Texas Workers' Compensation Commission (Commission) on September 16, 1999. Another TWCC-21 dated August 24, 1999, states "Carrier disputes that injury extends to cervical and thoracic areas. The compensable injury is limited to the lumbar area and no other body parts." That TWCC-21 indicates that it was received by the Commission at the BRC on November 2, 1999. The carrier asserted that it filed another copy of the August 24, 1999, TWCC-21 with the Commission at an earlier date. However, it did not produce a date-stamped copy reflecting when that document was filed. In addition, the hearing officer reviewed Commission records, which likewise did not reveal that the August 24th TWCC-21 was filed with the Commission prior to November 2, 1999. Ms. S testified that the carrier mails her copies of the TWCC-21s it files in the claims of the employer's employees. She stated that she received a copy of the August 24, 1999, TWCC-21 on August 31, 1999.

Initially, we will consider the carrier's challenge that insufficient evidence supports the hearing officer's determination that the claimant's compensable injury extends to his cervical spine. The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury and the nature and extent of the injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. Generally, injury may be proven by the testimony of the claimant alone, if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). 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 manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The carrier contends that the hearing officer's extent-of-injury determination is against the great weight and preponderance of the evidence. The hearing officer was acting within his province as the fact finder in deciding to credit the evidence from the claimant and from Dr. V that the claimant injured his neck, in addition to his low back, in

the lifting incident at work on \_\_\_\_\_. The factors that the carrier emphasizes on appeal, it also emphasized at the hearing; however, the significance, or lack thereof, of those factors was a matter left to the discretion of the hearing officer as the fact finder. Our review of the record does not reveal that the hearing officer's determination that the compensable injury extends to the cervical spine is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse that determination on appeal. Pool; Cain.

The carrier also contends that the hearing officer erred in finding that it waived its right to contest compensability of the cervical injury because it failed to do so within 60 days of the date it received its first written notice of the alleged cervical injury. The hearing officer found that the carrier received its first written notice of the cervical injury "on or about 8-20-99, but at the latest by the end of August, 1999." The carrier asserts that the evidence does not support that determination. We find no merit in that assertion. At the hearing, the carrier's attorney referenced the August 24, 1999, TWCC-21 and stated "we would agree that at least by that date the Carrier had received written notice of a cervical and thoracic claim." Transcript p.15. Thus, the question becomes whether the carrier filed a compensability contest that was sufficiently specific to dispute a cervical injury within 60 days of August 24, 1999. As noted above, the August 24, 1999, TWCC-21 does not contain a date-stamp reflecting when it was filed with the Commission and a check of Commission records indicates that it was not received by the Commission before the November 2, 1999, BRC. Ms. S testified that she received a copy of the August 24, 1999, TWCC-21 on August 31, 1999. The hearing officer could have inferred from that testimony that the TWCC-21 was mailed to the Commission and that the Commission had received it; however, he was not required to do so. The hearing officer was acting within his province as the fact finder in determining that he would not infer that the August 24, 1999, TWCC-21 was filed with the Commission based on the testimony of the employer representative that she received a copy of the document on August 31, 1999.

The carrier also argues that the TWCC-21, which was filed with the Commission on September 16, 1999, timely and sufficiently disputed the cervical injury. Without question, that document was filed within 60 days of August 24, 1999, and would be a timely contest if it is sufficiently specific to serve as a valid contest of compensability. As we stated above, the TWCC-21 identifies the reasons for the dispute as "Carrier disputes that the compensable injury extends to both shoulders or any other body part. The compensable \_\_\_\_\_ injury is limited to the lumbar area only." The hearing officer determined that that TWCC-21 was only effective to contest the shoulders because they were the only body parts specifically identified in the contest. He rejected the argument that the use of the phrase "any other body part" in the contest was effective because that language lacked specificity. However, we note that the carrier's contest also states that the compensable injury is "limited to the lumbar area only." In Texas Workers' Compensation Commission Appeal No. 971846, decided October 27, 1997, the Appeals Panel reversed a hearing officer's determination that the carrier had waived its right to contest compensability in an extent-of-injury case based upon the hearing officer's determination that the contest was not sufficiently specific. In that case, the carrier's statement on the TWCC-21 stated "[i]t is

the carrier's position that the claimant's compensable injury is limited to his right elbow and does not extend to his right shoulder." In reversing and rendering that the carrier had not waived its right to contest compensability, Appeal No. 971846 stated:

In a case involving extent of injury, we reversed the hearing officer and upheld as sufficient a dispute that stated "denying all coverage relating to any back injury" and "accepting only the knee." Texas Workers' Compensation Commission Appeal No. 951093, decided August 22, 1995. We hold that the dispute set out above filed by the carrier in this case was sufficient to dispute compensability of all but the elbow injury and meets the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(a) (Rule 124.6(a)).

Under the guidance of that case, we believe that the carrier's contest in this case, which likewise stated that the compensable injury was "limited to the lumbar area only" was sufficiently specific to dispute any injury other than a lumbar injury. Thus, we reverse the hearing officer's determination that the carrier waived its right to contest compensability of the cervical injury and render a new decision that the carrier did not waive its right to contest the compensability of the cervical injury.

We affirm the hearing officer's determination that the claimant's compensable injury extends to a cervical injury. We reverse the determination that the carrier waived its right to contest compensability of the cervical injury under Section 409.021(c) and render a new decision that the carrier did not waive its right to contest compensability of the cervical injury in this instance.

Elaine M. Chaney  
Appeals Judge

CONCUR:

Robert W. Potts  
Appeals Judge

Susan M. Kelley  
Appeals Judge