

APPEAL NO. 000367

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 January 25, 2000. The hearing officer determined that the injury sustained by the appellant (claimant) on _____, includes a cervical strain but does not include radiculopathy at the C8 level nor degenerative discs at the C5-6 levels. He further determined that the respondent (carrier) waived its right to contest the compensability of the cervical strain but did not waive its right to contest the compensability of the cervical radiculopathy and degenerative cervical discs. Claimant has requested our review of the determinations that her injury does not extend to the C8 radiculopathy and to the C5-6 discs and that the carrier has not waived its right to contest the compensability of those injuries. The carrier's response asserts the sufficiency of the evidence to support those challenged determinations. Neither party has appealed the determinations that claimant's injury includes a cervical strain and that the carrier has waived its right to contest the compensability of the cervical strain. Consequently, those determinations have become final by operation of law. Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated that on _____, claimant was employed by (employer); that on that date she sustained an injury in the course and scope of her employment; that the carrier accepted an injury to claimant's left hand, arm, and shoulder; and that the carrier first disputed a cervical injury on August 20, 1999, when it filed a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21).

Claimant has not challenged factual findings that claimant's initial reported injury was a bump/pull to the left hand and arm; that claimant continued working until the plant closed (in January 1999); that claimant first reported neck pain on November 11, 1997; that claimant was diagnosed with an acute strain in the left paracervical area on November 25, 1998, by Dr P; and that claimant reported a burning sensation in her left paracervical area on January 6, 1998, as well as pain in the neck.

Claimant, who had worked for the employer for nearly six years sewing pants, said that she holds the pants with her left hand and pushes them to the back and that on _____, when she pushed some pants to the back, she "felt something pull" and "had a bump" on top of her left hand. She said that she reported the injury to the employer that day. In her handwritten report of injury of _____, claimant described having injured her left hand when she pulled her hand out of the pants pocket and felt something pull. In the attached pain drawing claimant marked the top of her left hand. Claimant further stated that she was treated by an occupational therapist, Ms. E, that more "bumps" appeared on her left forearm, that she was thereafter referred to Dr. P for treatment, and that Dr. P told her she had pulled a muscle and that the bumps were related to the pain. She further

testified that Dr. P told her that her pain originates in her neck and that during his treatments he would "pop" her neck; that Dr. P later referred her to Dr. C who performed left shoulder surgery (March 13, 1998, arthroscopic decompression); and that in July 1999, after having returned to Dr. P, she changed treating doctors to Dr. D who has told her that she has damaged nerves and muscle strain and that the nerves on the left side of her neck are "irritated." Claimant indicated that she currently has pain in her left wrist, left shoulder, and neck muscles on the left side down to her shoulder.

Concerning the carrier waiver issue, claimant made the point that the carrier not only paid all the medical expenses for her left hand, arm and shoulder but also paid for tests ordered by Dr. C and Dr. D including an MRI, EMG, CT scan, and x-rays.

Ms. E testified that she provided claimant with 15 occupational therapy treatments from October 15 through December 1, 1997, as part of Dr. P's treatment plan, and that she treated the body parts of which claimant complained, namely, the left hand, the area below the left elbow, and the area above the left elbow up to the shoulder. Ms. E, an occupational therapist for 18 years, further stated that Dr. P's records do not reflect that he diagnosed a cervical or thoracic spine injury but only noted pain from muscle spasm and that Dr. P provided claimant with osteopathic treatment for muscle tension.

In her Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), which she signed on June 22, 1998, claimant stated that her injured body part was all of her left hand up to her shoulder and in her Employee's Request to Change Treating Doctors (TWCC-53) from Dr. P to Dr. D, which she signed on July 9, 1999, claimant described her injury as being to the left shoulder.

In his initial evaluation of October 15, 1997, Dr. P stated that claimant had full cervical range of motion and that his assessment was pain within the left nondominant extremity, secondary to muscle tension. Dr. P's October 21, 1997, report diagnosed lateral epicondylitis and first rib subluxation with cervical spasm. Dr. P stated on November 25, 1997, that claimant has an acute sprain in the left paracervical area with subluxed first rib on the left and that she has left subacromial bursa (left shoulder) pain and is tight in the cervical area. On December 9, 1997, Dr. P added the diagnosis of left shoulder impingement syndrome. In his referral report to Dr. C of January 6, 1998, Dr. P noted, among other things, that claimant complained of burning pain in the left paracervical area and had some palpable muscle spasm in that area. In her pain drawings for Dr. P on May 18, May 22, and June 6, 1998, claimant marked her left elbow, left shoulder, and left trapezius muscle areas. Dr. P's diagnosis on May 19, 1998, was acute somatic dysfunction of the cervical and thoracic spine with first rib subluxation secondary to muscle tension caused by the decompression in the left shoulder and he treated her cervical and upper thoracic area with osteopathic manipulative therapy.

The July 9, 1998, EMG and nerve conduction study (NCV) report of Dr. V noted "mildly an abnormal [EMG] of the left upper extremity with normal detailed NCV" and evidence of a mild chronic denervation process affecting C8 innervated muscles of the left upper extremity consistent with either a mild chronic left C8 radiculopathy or a mild injury to

the C8 fibers of the lower left brachial plexus. This report bears a date stamp reflecting receipt by the carrier on July 27, 1998.

The July 15, 1998, report of the designated doctor, Dr. W, assigned claimant a 12% impairment rating for her upper extremity.

Dr. D's report of July 27, 1999, apparently the date he first saw claimant upon referral from Dr. P, states that his impression is left C8 radiculopathy, diagnosed by EMG/NCV studies, and persistent left shoulder pain; and that a cervical spine MRI would be ordered. Dr. D's note of August 20, 1999, states that in his opinion claimant's work activity "may have accelerated the development of a C8 radiculopathy."

In his letter of August 24, 1999, to the Texas Workers' Compensation Commission (Commission), Dr. P states in detail why he feels that claimant's work did not accelerate her C8 radiculopathy.

The cervical spine MRI report of October 21, 1999, states that the study was essentially negative except for possibly mild compromise of the neural foramina on the left at the C5-6 level caused by mild arthritic changes.

Dr. D's November 5, 1999, record states his assessment as cervical radiculopathy secondary to disc degeneration and foraminal stenosis at C5-6 on the left. Dr. D reported on December 7, 1999, that he is requesting an EMG and CT scan to follow up on the cervical spine because of a discrepancy between the cervical spine MRI and the EMG/NCV.

Claimant has challenged the following findings and conclusions:

FINDINGS OF FACT

7. Radiculopathy is referred pain, a symptom, and not an injury.
8. Degenerative discs are an ordinary disease of life absent showing of some traumatic event or of repetitive trauma documented with expert evidence.

* * * *

11. Claimant's mechanism of injury is consistent with a cervical strain.
12. Claimant did not prove by a preponderance of the evidence that she suffered repetitive trauma to the neck which could produce degenerative discs.

CONCLUSIONS OF LAW

4. Carrier did not waive the right to contest the compensability of C-8 radiculopathy and degeneration of the C5/6 discs.

* * * *

6. The compensable injury does not include C-8 radiculopathy or degenerative C5/6 discs.

It is not clear from the hearing officer's decision, in view of the record, whether he determined that claimant had a degenerative disc of the C5-6 level or multiple degenerative discs, e.g., at C4-5 and C5-6. This should be clarified.

Claimant had the burden to prove that her compensable injury of _____, extended to "C-8 radiculopathy or degeneration of the C5/6 disc with foraminal stenosis." On the waiver issue, claimant had the burden to prove when the carrier received written notice of those claimed injuries (Texas Workers' Compensation Commission Appeal No. 962512, decided January 27, 1997). The date the carrier contested the compensability of those claimed injuries was stipulated to be August 20, 1999.

The Appeals Panel has said that in workers' compensation cases, the disputed issue of injury can, generally, be established by the lay testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). Further, the Appeals Panel has required expert evidence to prove the nexus between the work and the claimed injury or injuries when they are beyond common knowledge as they are, given the particular facts of this case.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), 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)), and determines what facts have been established from the conflicting evidence (St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.)). As an appellate reviewing tribunal, the Appeals Panel 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 reverse Finding of Fact No. 7 and remand for the hearing officer to advise us of the basis for this finding from the evidence of record. Radiculopathy is defined in DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, pg. 1404 (28th ed. 1994) as "a disease of the nerve roots." The 1989 Act defines "injury" 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). Further, the issue which requires a factual finding

or findings is whether claimant proved by a preponderance of the evidence that her C-8 radiculopathy was caused by her work on _____. Claimant's testimony did refer to a specific event at work on that day. We cannot infer such a finding.

We do not view Finding of Fact No. 8 as being against the great weight of the evidence as a general statement. We find the evidence sufficient to support Finding of Fact No. 12. However, the issue which requires a factual finding or findings is whether claimant proved by a preponderance of the evidence that her degenerative disc disease at C5-6 was caused by her work on _____. Claimant's testimony did refer to a specific event on that day. We cannot infer such a finding supports the conclusion.

Because there are insufficient findings of fact to support Conclusion of Law No. 6, we reverse that conclusion.

Regarding Conclusion of Law No. 4, we reverse this determination because there are insufficient factual findings to support it. While the parties stipulated that the carrier first disputed a cervical injury on August 20, 1999, there are no findings concerning when the carrier had written notice, compliant with the notice requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1 of the claimed "C-8 radiculopathy" injury and the claimed "degeneration of the C5/6 disc" injury. Without findings as to when the waiver clock states, the issue cannot be resolved. We remand for the hearing officer to make the necessary factual findings based on the evidence of record.

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.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

CONCUR IN THE RESULT:

Stark O. Sanders, Jr.
Chief Appeals Judge