APPEAL NO. 000432

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 January 25, 2000. The issues at the CCH were whether the respondent (carrier) waived its right to contest compensability of the claimed injury to the lumbar spine by not contesting compensability within 60 days of notification, and whether the compensable injury sustained by the appellant (claimant) extends to an injury of the lumbar spine. The hearing officer determined that the claimant did not suffer an injury to her lumbar spine on _____, and the compensable injury does not extend to an injury to the lumbar spine; and that the carrier did not waive the right to contest compensability of the claimed injury to the lumbar spine. The claimant appeals several findings of fact and conclusions of law, urging that the hearing officer "diagnosed a mild disc bulge" and overstepped his authority and discretion in making such a finding, that the claimant suffers from disc disease at L5-S1 and that surgery is needed, that the decision should be reversed in regard to the waiver issue, and that the order is in error. The carrier replies that the evidence is sufficient to support the hearing officer's findings of fact and conclusions of law, that the order is not in error, and that the decision should be affirmed.

DECISION

Affirmed in part, reversed and remanded in part.

The claimant sustained a compensable injury on _____. The claimant testified that she worked as a printing press operator and was required to put products in a deep plastic container at shoulder height and lift the containers. The claimant said that she had problems reaching to put the materials in the containers because of her height, and that when loaded the containers weighed 40 to 50 pounds. According to the claimant, she began to feel numbness and tingling on the left side of her body and had pain in her neck, shoulder and arms. The claimant testified that the mechanism of injury was constant lifting and moving the containers, and that her neck popped when she was placing a container into storage. The claimant said that her symptoms worsened and she developed low back pain between _____, and May 1997. The claimant was diagnosed with fibromyalgia by Dr. Y in late 1996 and had shoulder surgery performed by Dr. B in March 1997. According to the claimant, she complained to her doctors about back pain and Dr.Y told her that her back pain was due to the fibromyalgia. The claimant asserts that she was first diagnosed with a lumbar injury, lumbar impingement and right leg radiculopathy, on March 21, 1997, by Dr. L.

The medical records do not reflect complaints of lumbar pain until March 21, 1997. On October 30, 1997, Dr. L recommended a lumbar MRI which was performed on November 7, 1997. The radiologist's impression was "[m]ild disc desiccation at the L5/S1 level. Small central annular bulges are present at this level. Otherwise normal MRI of the lumbar spine." A myelogram performed in October 1998 was normal, and a CT scan following discography indicated "mild narrowing of the spinal canal diameters at L4-L5." In

1999, Dr. L recommended surgery, an anterior discectomy and interbody fusion with BAK cages at L5-S1, and a posterior decompression at L5-S1. The carrier's second opinion doctor agreed with Dr. L's recommendation for spinal surgery. The claimant testified that she subsequently chose Dr. H for a second opinion. Dr. H diagnosed the claimant with discogenic pain at L5-S1 and spinal stenosis secondary to lateral recess stenosis at L5-S1 with radiculopathy, and recommended spinal surgery.

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 410.011(26). It has been held that the immediate effects of an injury are not solely determinative of the nature and extent of that injury and that the "full consequences of the original injury . . . upon the general health and body of the workman are to be considered." Texas Employers' Insurance Association v. Thorn, 611 S.W.2d 140 (Tex. Civ. App.-Waco 1980, no writ), quoted in Texas Workers' Compensation Commission Appeal No. 94232, decided April 11, 1994. The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

The hearing officer made findings that the claimant's objective testing is negative except for a mild disc bulge at L5-S1; that the claimant's mechanism of injury would not produce a lumbar spine injury; and that the claimant did not prove by a preponderance of the evidence that she suffered a lumbar spine injury on _____, or that her injury has extended to an injury to the lumbar spine. The carrier argues that the hearing officer overstepped his authority and discretion in making the following finding of fact:

FINDING OF FACT

10. Claimant's objective testing is negative except for a mild disc bulge at L5-S1.

According to the claimant, the hearing officer "diagnosed a mild disc bulge," and that based on this erroneous finding, the remaining findings of fact became error. We find no merit in the claimant's argument. Finding of Fact No. 10 merely states what the objective testing reflected, which is supported by the medical evidence, and was not required for the resolution of the extent-of-injury issue. The hearing officer did not make a finding that the claimant's lumbar injury is a mild disc bulge at L5-S1; however, it was within the hearing

officer's province to determine what type of lumbar injury exists in resolving the issue of whether an injury was sustained. The claimant testified that she sustained both a repetitive trauma injury lifting the containers and a specific injury when she lifted a container and felt her neck pop. The medical records reflect a history of repetitive use, but there is no mention of the claimant's neck popping. The hearing officer considered all of the evidence and resolved the conflicts in the evidence against the claimant. When reviewing a hearing officer's decision for factual sufficiency of the evidence, we will reverse such decision only if it is so contrary to the great weight and preponderance 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 Co., 715 S.W.2d 629, 635 (Tex. 1986). We find there was sufficient evidence to support the determination of the hearing officer that the claimant did not suffer an injury to her lumbar spine on _____, and the compensable injury does not extend to an injury to the lumbar spine.

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 argued that Dr. L's office note of March 21, 1997, constituted written notice to the carrier. On appeal, the claimant asserts that the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) forms dated April 18, 1997, and September 27, 1996, indicate a "back" injury. The carrier argued that the first record which put the carrier on notice of the claimant's lumbar injury was Dr. L's record dated October 30, 1997. Relative to the waiver issue the hearing officer made the following findings of fact:

FINDINGS OF FACT

5. Claimant did not prove by a preponderance of the evidence that Carrier received the office note from Claimant's treating doctor dated March 21, 1997.
6. The office note dated March 21, 1997 would not constitute notice to Carrier that Claimant was alleging the back pain was part of the

compensable injury based on the originally reported mechanism of injury.

* * * *

8. Carrier first received a copy of the March 21, 1997 office note when records were received for provision to the designated doctor who examined Claimant on December 9, 1997.

9. Carrier timely disputed the lumbar region as a matter of precaution although the report of March 21, 1997 did not constitute actual notice to Carrier.

The hearing officer did not make findings concerning when the carrier first received written notice of the lumbar injury and when the carrier disputed the lumbar injury. Such findings are essential in determining whether the carrier waived its right to contest the compensability of the claimant's lumbar injury. The evidence is sufficient to support Findings of Fact Nos. 5 and 6. The office note from Dr. L dated March 21, 1997, does not meet the criteria of Rule 124.1 because it does not reflect a date of injury or facts showing compensability. Contrary to Finding of Fact No. 8, there was no evidence presented to indicate that the carrier received a copy of the March 21, 1997, office note. Although Finding of Fact No. 9 states that the carrier "timely disputed" the lumbar injury, it does not provide any dates to support such a conclusion. Accordingly, we reverse Findings of Fact Nos. 8 and 9, and Conclusion of Law No. 4. We remand the case for the hearing officer to make findings of fact, based on the existing record, regarding when the carrier received sufficient written notice of claimant's lumbar injury, what constituted the written notice, and when carrier contested compensability of the lumbar injury.

We reverse the hearing officer's order. The order states "[c]arrier is not liable for benefits on this claim and it is so ordered." The claimant sustained a compensable injury on _____, and is entitled to benefits for such injury, regardless of whether the lumbar injury is compensable. On remand, the hearing officer should issue the appropriate order after determining whether the carrier waived its right to contest the claimant's lumbar injury.

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 Texas Workers' Compensation 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:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge