

APPEAL NO. 000494

On February 10, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether appellant (claimant) sustained a compensable injury to her neck and right shoulder in addition to her right wrist on _____; and (2) whether respondent (carrier) waived the right to contest the compensability of the cervical area and right shoulder by not contesting "the compensability" within 60 days of being notified of the injury. Claimant appeals the hearing officer's finding that she did not injure her neck or right shoulder in the course and scope of her employment on _____, and the hearing officer's conclusion that claimant did not sustain a compensable injury to her neck and right shoulder in addition to her right wrist on _____. Carrier filed a response, which is untimely as an appeal, in which it contends that it did timely contest compensability of the claimed neck and right shoulder injuries and in which it requests affirmance of the hearing officer's decision that claimant did not sustain a compensable injury to her neck and right shoulder in addition to her right wrist on _____. There has been no timely appeal of the hearing officer's decision that carrier waived the right to contest compensability of the cervical area and the right shoulder by not contesting compensability within 60 days of being notified of "the injury," and thus that portion of the hearing officer's decision has become final. Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

The carrier's Austin representative received a copy of the hearing officer's decision on February 14, 2000. Carrier states in its response that it received a copy of claimant's appeal on March 6, 2000. Carrier's response was received by the Texas Workers' Compensation Commission on March 20, 2000. Carrier's response was timely filed as a response. Section 410.202(b). However, since carrier's response was not filed within the 15-day time period for filing an appeal under Section 410.202(a), we will not consider carrier's assertion that it timely contested the claimed neck and shoulder injuries, and the hearing officer's decision that carrier waived the right to contest the compensability of the cervical area and right shoulder by not contesting compensability within 60 days of being notified of the injury has become final. Section 410.169.

Claimant testified that she normally worked as a press operator for employer but that the week before _____, she was moved to a job packing tile in boxes and lifting the boxes to the conveyor belt. Claimant indicated that after a few days on the packing job she began having problems in her right hand, right shoulder, and neck. Claimant was seen by Dr. A on September 16, 1998, and he noted that claimant did repetitive motion type work with her right hand and diagnosed carpal tunnel syndrome (CTS). The parties stipulated that claimant sustained a compensable injury on _____. Carrier apparently accepted liability for a compensable injury to claimant's right hand/wrist. Claimant began treating with Dr. S, D.C., on October 15, 1998, and in his initial report Dr. S diagnosed claimant as

having brachial radiculitis, cervical nerve root irritation, and cervicalgia. He noted in the history section of his report that claimant injured her shoulders, neck, and right wrist lifting boxes in the employer's packing department. On a "diagnostic sheet," Dr. S noted, among other things, that claimant has brachial radiculitis, a sprain/strain of the shoulder, rotator cuff syndrome, cervicalgia, cervical nerve root irritation, and possible right CTS. In a neurological examination report of October 30, 1998, Dr. D, D.C., noted impressions of right CTS, right wrist sprain/strain, right lateral epicondylitis, and right cervical strain. Dr. D wrote that, based upon claimant's statement, claimant developed a compensable injury to her right upper extremity and cervical spine as a result of repetitive trauma on _____.

Dr. C reported that a cervical MRI done on November 19, 1998, showed straightening of the cervical lordosis, a congenitally smaller cervical spinal canal, disc bulges at C4-5 and C6-7, and a disc protrusion or herniation at C5-6. Dr. H, D.C., wrote in January 1999 that claimant has tenderness of the right wrist, forearm, shoulder, and the right side of her neck. In January 1999, Dr. S noted diagnoses of CTS, cervical disc herniation, and brachial radiculitis. Dr. CA, D.C., examined claimant at carrier's request and he reported in March 1999 that claimant reached maximum medical improvement (MMI) on March 17, 1999, with a zero percent impairment rating (IR). Dr. CA diagnosed claimant as having a resolved cervical cranial syndrome and possible mild right CTS. Dr. CA wrote that the cervical spine does not appear to be causally related to the hand injury. Dr. S disagreed with the MMI date and IR reported by Dr. CA. Claimant underwent a right CTS release in May 1999. In September 1999, Dr. AD, D.C., the designated doctor, reported that claimant reached MMI on September 17, 1999, with a four percent IR for impairment of her right wrist. Dr. AD wrote that claimant is having cervical and right shoulder pain but that those areas were not part of the initial injury and would not be included in the IR. Dr. DU examined claimant in September 1999 and diagnosed an impingement syndrome of the right shoulder and wrote that it appeared that that is part of the original injury at work.

There is ample medical evidence that claimant has physical harm or damage to her neck and right shoulder. Whether such injuries occurred in the course and scope of employment was a question of fact. In the Statement of the Evidence portion of his decision, the hearing officer wrote that based on the medical reports and diagnostic testing, he found that the problems with the neck and shoulder are not part of the compensable injury. Claimant appeals the hearing officer's finding that claimant did not injure her neck or right shoulder in the course and scope of her employment on _____. Whether claimant injured her neck and shoulder in the course and scope of her employment was a fact question for the hearing officer to determine from the evidence presented. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's finding the claimant did not injure her neck or right shoulder in the course and scope of her employment on _____, is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Claimant also appeals the hearing officer's conclusion that claimant did not sustain a compensable injury to her neck and right shoulder in addition to her right wrist on _____. Claimant points out that she has an injury to her neck and right shoulder and that the hearing officer decided that carrier had waived the right to contest compensability of the cervical area and right shoulder by not timely contesting compensability. As noted, there has been no timely appeal of the hearing officer's decision that carrier waived the right to contest compensability of the cervical area and right shoulder. Section 409.021(c) provides that, if an insurance carrier does not contest compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability, and that the initiation of payments by an insurance carrier does not affect the right to continue to investigate or deny the compensability of an injury during the 60-day period. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6, which was in effect during the relevant time periods, provided, in part, in subsection (c) that, if a carrier disputes compensability after payment of benefits has begun, the carrier shall file a notice of refused or disputed claim, on or before the 60th day after the carrier received written notice of the injury. In the instant case, although the hearing officer found that claimant did not injure her neck or right shoulder in the course and scope of her employment on _____, the injury to claimant's neck and right shoulder became part of the compensable injury because carrier waived the right to contest compensability of the cervical area and right shoulder by not timely contesting compensability. Texas Workers' Compensation Commission Appeal No. 992763, decided January 24, 2000; Texas Workers' Compensation Commission Appeal No. 93491, decided August 2, 1993; Texas Workers' Compensation Commission Appeal No. 000301, decided March 29, 2000. Consequently, we reverse the hearing officer's decision that claimant did not sustain a compensable injury to her neck and right shoulder on _____, and we render a decision that claimant's neck and right shoulder injuries are part of her compensable injury due to carrier's waiver of the right to contest compensability of the cervical area and right shoulder.

We affirm the hearing officer's finding that claimant did not injure her neck or right shoulder in the course and scope of her employment on _____. We reverse the hearing officer's decision that claimant did not sustain a compensable injury to her neck and right shoulder in addition to the right wrist on _____, and we render a decision that claimant's neck and right shoulder injuries are part of her compensable injury due to carrier's waiver of the right to contest compensability of the cervical area and right shoulder. Carrier is liable for workers' compensation benefits related to claimant's neck and right shoulder injury, in addition to the injury to her right wrist.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Elaine M. Chaney
Appeals Judge