

APPEAL NO. 000506

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 27, 2000. The issues at the CCH were carrier waiver regarding the cervical spine injury of the respondent (claimant); and whether the _____, compensable injury was a producing cause of the claimant=s Acervical spine problems.@ The hearing officer determined that Acarrier@ waived the right to contest compensability of the claimant=s cervical spine problems and that the _____, compensable injury is a producing cause of the claimant=s cervical spine problems. An appeal was filed, apparently on behalf of both the self-insured employer and (the third party administrator), requesting that we reverse the hearing officer=s decision. The claimant responds, urging affirmance.

DECISION

We affirm as reformed.

From reading the brief regarding the waiver issue, it appears that the appeal in this case was filed on behalf of both the third party administrator and the self-insured employer. The record indicates that the self-insured was theAcarrier@in this case and that the third-party administrator was not theAcarrier.@ We reform the decision and order to reflect that the proper Acarrier@is the self-insured. We will treat this appeal as an appeal on behalf of the self-insured rather than the third party administrator.

The self-insured contends the hearing officer erred in determining that the _____, compensable injury was a producing cause of the claimant=s Acervical spine problems.@ The self-insured asserts that claimant delayed in complaining of a neck injury and that the initial medical records did not state that there was a neck injury. It is undisputed that claimant sustained a compensable injury on _____. Claimant testified that he injured his neck in addition to his low back and right shoulder.

The hearing officer summarized the facts in the decision and order. Briefly, claimant fell backwards while tightening a reactor with a wrench. He said he injured his low back, right shoulder, and neck. Claimant said he complained of his neck to the first doctor he saw, Dr. H. He said Dr. H provided treatment to his neck. A medical report from Dr. H dated _____, the date of the injury, states that claimant complained of tingling in his right upper extremity, that he planned to order films of the neck and back, and that theAssessment@ included Aright upper extremity paresthias.@ Later medical records from Dr. H mention neck pain.

The applicable law and our appellate standard of review are set forth in Texas Workers' Compensation Commission Appeal No. 950537, decided May 24, 1995; Texas Workers' Compensation Commission Appeal No. 951959, decided January 3, 1996; Section 410.165(a); Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); and Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this case, the hearing officer weighed the evidence and determined that claimant's injury extended to his neck. This extent of injury issue involved a fact question for the hearing officer, which she resolved. Appeal No. 951959, *supra*. The hearing officer could decide to believe all, none, or any part of the evidence. She decided what weight to give to the evidence. Campos, *supra*. The fact that the initial medical report did not specifically state that claimant had a neck injury was a factor for the hearing officer to consider in resolving the fact issues in the case. After reviewing the evidence, including claimant's testimony, we conclude that the hearing officer's determination regarding extent of injury is not so against the great weight and preponderance of the evidence as to be wrong or manifestly unjust. Cain, *supra*.

The self-insured next contends that the hearing officer erred in determining that it waived the right to contest the compensability of claimant's cervical injury. The request for review states, "A carrier disagrees that the receipt of [the April 15, 1998, medical report of Dr. S] triggered the 60 day time period." The brief also stated that the July 28, 1998, contest of compensability was timely filed within 60 days of the June 5, 1998, date that "a carrier" [apparently meaning the third party administrator] began handling this claim.

At the CCH, the hearing officer stated that she would include a stipulation that employer was self-insured on the date of injury. Even though the hearing officer did not include this stipulation, the attorney for the self-insured stated at the hearing that it agreed to it. There was evidence that: (1) in June 1998 the third party administrator became involved with claimant's claim for the first time; and (2) claimant's claim had been handled by the self-insured in house before that time.

The hearing officer determined the compensability issue regarding the cervical injury in claimant's favor. Therefore, the issue of waiver of creating compensability has been, in effect, mooted by this decision affirming that determination. Even if the waiver issue was not moot, we reject the contention that the 60-day period begins on the date that the third party administrator received notice of facts showing compensability. Section 409.021(c) concerns waiver of the right to contest compensability by a carrier and Section 401.011(27)(B) provides that the term "insurance carrier" includes a certified self-insured.¹ The 60 days begins when the self-insured receives the applicable notice. Additionally, we note that not only

¹We note that Rule 124.6 was repealed effective March 13, 2000, and that new Rule 124.3, effective March 13, 2000, regarding extent of injury and carrier waiver was not applicable at the pertinent times in this case.

is this argument raised for the first time on appeal, the self-insured's attorney specifically stated at the CCH that he was not making the argument that the 60 days begins when the third party administrator receives the notice of facts showing compensability. Therefore, for these reasons, we reject this contention.

Regarding the contention that the written notice to the self-insured was not sufficient, the April 15, 1998, record from Dr. S stated that the nature of [the] injury was a fall with back and neck trauma. There was evidence that this was received by the self-insured in April 1998. The dispute of compensability of the neck injury was filed in July 1998.

The hearing officer stated in her decision and order that there is a report from [Dr. S] dated April 15, 1998, . . . which fairly informs the carrier of [claimant's] contention that his neck problems are related to the compensable injury. The hearing officer stated that the carrier filed its dispute to [claimant's] cervical problems on July 28, 1998. Some panels of the Appeals Panel have concluded that a carrier has 60 days to contest compensability regarding the claimed extent of injury where it receives notice claiming injury to additional parts of the body not previously claimed. See, e.g., Texas Workers' Compensation Commission Appeal No. 982835, decided January 20, 1999; Texas Workers' Compensation Commission Appeal No. 992850, decided February 2, 2000; Texas Workers' Compensation Commission Appeal No. 93491, decided August 2, 1993. But see Texas Workers' Compensation Commission Appeal No. 971634, decided October 6, 1997 (Judge Kelley concurring.) We conclude that the hearing officer did not err in determining that the notice was adequate for the purposes of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 124.1(a)(3). We reject the contention regarding carrier waiver. In affirming that there was waiver regarding the neck injury, we note that the waiver was by the self-insured, who was the carrier for the purposes of Section 409.021(c). We also reform Finding of Fact No. 6 to delete the words on November 30, 1999, as this was neither the date of the injury nor the date of receipt of the April 15, 1998, report found by the hearing officer in her statement of the evidence. In the decision and order, the hearing officer stated that the date of receipt was in April 1998, as clearly indicated by the self-insured's date stamp. This appears to be a typographical error.

As reformed, we affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Although I agree with the hearing officer's finding of a waiver, I disagree with her reasoning to get there. Significant in my reasoning is that the neck was asserted to have been injured on the day in question, and was not claimed as a follow-on injury. The hearing officer commented in the decision that the Employer's First Report of Injury or Illness (TWCC-1) could not be considered as written notice of injury because the neck was not listed. This is not correct.

The TWCC-1 is by definition the written notice of injury. 28 TEX. ADMIN. CODE ' 124.1(a)(1) (Rule 124.1). It is up to the carrier to develop, through timely investigation of the claim, the scope of the physical injury sustained on the date claimed. Information that could not have been reasonably discovered within 60 days through investigation might later be the basis of reopening compensability through "newly discovered evidence", but that newly discovered evidence does not become the first written notice of injury. The April 15th report of the doctor was not in this case first written notice of injury, but merely a medical record that should have been discovered and reacted to within the first 60 days after the TWCC-1 was received.

Susan M. Kelley
Appeals Judge