APPEAL NO. 000713

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 March 23, 2000. The issues were whether the appellant's (claimant) compensable injury of _____, included the pelvis and right and left wrists and elbows; and whether the respondent (carrier) timely contested the compensability of these injuries. The carrier conceded at the CCH and the hearing officer determined that the compensable injury included the left elbow and bilateral carpal tunnel syndrome (CTS). The hearing officer further determined that the compensable injury did not include the right elbow or pelvis; and that the carrier did not waive the right to dispute the extent of the claimant=s injuries because it was not required to do so. The claimant appeals, contending that the factual determinations of the hearing officer were contrary to the great weight of the evidence and that the waiver determination was contrary to law. The carrier replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable injury in a motor vehicle accident (MVA) on _____. Disputes arising out of this injury have been the subject of prior proceedings. *See* Texas Workers' Compensation Commission Appeal No. 992230, decided November 17, 1999 (Unpublished).

We address the carrier waiver issue first. The claimant contended that the carrier received written notice of a claimed pelvic injury (pelvic tilt) and a right elbow injury and failed to dispute these injuries within the 60 days after receiving notice. He argued both at the CCH and on appeal that Section 409.021 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 124.6 (Rule 124.6), as interpreted by numerous Appeals Panel decisions *(see, e.g.*, Texas Workers' Compensation Commission Appeal No. 94798, decided July 26, 1994; and Texas Workers' Compensation Commission Appeal No. 92391, decided August 2, 1993), required the carrier to timely file such a dispute with the Texas Workers' Compensation Commission (Commission) and that its failure to do so made these claimed injuries compensable as a matter of law.

The hearing officer commented in his decision and order that Rule 124.3(c), which became effective March 13, 2000, changed the precedent cited by the claimant with the result that a failure to timely dispute extent of injury does not create liability on the part of the carrier. Rule 124.3(c) provides that Section 409.021 and the implementing provisions of this statute in Rule 124.3(a) "do not apply to disputes of extent of injury." Rule 124.3(c) further provides that if a carrier receives a medical bill and wishes to dispute liability for the treatment it shall file a notice of dispute not later than the earlier of the date the medical bill is denied or the due date for paying or denying the medical bill. The preamble to this rule states that failure to timely

dispute the extent of injury "is a compliance issue. It does not create liability."[1] The new Rule 124.3 gives no guidance as to what event must occur on or after its effective date in order for the rule to be applicable in a given case. We hold that the new Rule 124.3 is applicable in those cases in which a CCH is convened on or after March 13, 2000, to address a disputed issue of carrier waiver in the context of an extent of injury question, because it precludes the Commission from imposing a waiver after that date. The CCH in this case was convened on March 23, 2000. Therefore, the hearing officer properly applied Rule 124.3 and the claimant's reliance of prior law was misplaced.

The claimant also appeals the hearing officer's determinations that the compensable injury did not include a pelvic or right elbow injury. With regard to the pelvis, the claimant contended that he smashed both knees into the dashboard of the truck he was driving and that this caused a one-inch pelvic tilt. He also testified that before the injury he had passed a thorough Department of Transportation (DOT) physical, which did not disclose a pelvic tilt. In support of his position, the claimant relied on a December 18, 1998, Report of Medical Evaluation (TWCC-69) of Dr. M, who wrote that lumbar x-rays showed right pelvic unleveling of one inch. This condition was not included in the list of diagnostic codes contained in the report, nor was there any further explanation of causation. Dr. D also wrote in a report of August 21, 1998, that lumbar radiographs showed pelvic unleveling, but this condition was not included in the list of diagnoses, nor was a statement of causation given. On February 23, 2000, Mr. K, a physician assistant to Dr. E, wrote that the MVA in which the claimant "apparently smashed his knees against the dashboard" caused pelvic unleveling. According to the transcript of a prior CCH (addressing different issues) held on September 17, 1999, the claimant did not include a pelvic or right elbow injury when asked to list the injuries he sustained on _____. He testified at the CCH below that he learned of his pelvic injury in August 1998.

Dr. H reviewed the claimant's medical records at the request of the carrier and testified at the CCH.[2] In his opinion, the claimant's pelvic tilt was chronic and not acute or caused by the MVA. He said that in his medical experience it was not uncommon for patients to have a pelvic tilt and not realize it until an examination was done for other purposes; that he did not believe the smashing of the knees into the dashboard caused the pelvic tilt; and that DOT physicals are so brief that he would not expect a pelvic tilt to be detected.

[1]We also observe that Rule 124.6 was repealed effective March 13, 2000.

[2]Apparently, he reviewed more medical records than were actually introduced into evidence.

With regard to the claimant's right elbow injury, it was not clear what the diagnosis was. The medical evidence at the CCH relied on by the claimant consisted of a letter of Dr. E on September 1, 1999, which referred to mild ulnar sensory neuropathy across the **left** elbow. Later in the letter, Dr. E refers to "injuries about his elbow**s**." (Emphasis added.) The claimant argued that the use of the plural "elbows" is evidence of a right elbow injury. Also in evidence was an undated nerve conduction study, which was normal for the right ulnar and radial sensory nerve. Mr. K wrote that "[d]uring the accident the patient also injured his bilateral elbows. . . ." Dr. H testified that he did not think the claimant's compensable injury extended to the right elbow because of lack of early complaints of a right elbow injury and the absence of any reference to the right elbow in numerous pain drawings he reviewed.[3]

The claimant had the burden of proving his compensable injury included the pelvis and right elbow. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether it did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer commented that he was not persuaded by the claimant's evidence essentially because of the lack of any explanation of causation and the failure to mention or to describe what the claimed right elbow injury consisted of. In his appeal, the claimant argues that the hearing officer was not a witness to the MVA nor is he a doctor who physically examined him and hence was in no position to reject his evidence. While we agree that the hearing officer was not a doctor, he was charged with the responsibility as fact finder to determine what the claimant's evidence established. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. This includes medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer simply did not find the claimant's evidence persuasive on the extent-of-injury question or that the claimant met his burden of proving the extent of injury. Instead, he found the conflicting opinion of Dr. H more credible and persuasive. We will reverse a factual determination of a hearing officer only if that determination is so against 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the evidence for that of the hearing officer. Rather, we find the opinion of Dr. H, deemed credible and persuasive by the hearing officer, sufficient evidence to support his determination that the compensable injury did not include the pelvis or right elbow.

Finally, the claimant asserts on appeal that the hearing officer erred in Conclusion of Law No. 3, that the "compensable injury includes his left elbow and bi-lateral [CTS]." The claimant contends that the left wrist should be added to compensability. We believe that the

[3]As noted above, these were not in evidence.

only correct interpretation of this conclusion of law is that both wrists are part of the compensable injury, as the carrier conceded, and that the injury is CTS.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge