

APPEAL NO. 000867

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 9, 2000. The hearing officer concluded that the appellant's (claimant) compensable injury of _____, does not extend to reflex sympathetic dystrophy (RSD) and that the respondent (carrier) did not waive its right to contest the compensability of RSD. Claimant has requested our review of these legal conclusions and three underlying findings of fact for evidentiary sufficiency. The carrier first asserts in its response that claimant's appeal is untimely and then urges the sufficiency of the evidence to support the challenged determinations.

DECISION

Affirmed.

Concerning the timeliness of claimant's request for review, the records of the Texas Workers' Compensation Commission (Commission) reflect that the hearing officer's decision was distributed to the parties on March 31, 2000, under a cover letter of that date. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)), effective August 29, 1999, provides, in part, that for purposes of determining the date of receipt for those written communications sent by the Commission which require the recipient to perform an action by a specific date after receipt, unless the great weight of evidence indicates otherwise, the Commission shall deem the received date to be five days after the date mailed. Thus, claimant is deemed to have received the hearing officer's decision on April 5, 2000, a Wednesday, absent the great weight of the evidence to the contrary. Rule 143.3(c) provides, in part, that a request for review shall be presumed to be timely filed if mailed on or before the 15th day after the date of receipt of the hearing officer's decision and received by the Commission not later than the 20th day after the date of the hearing officer's decision. According to the postmark and Commission stamp on the envelope, claimant's request for review was mailed on April 20, 2000, and was received by the Commission on April 25, 2000. Accordingly, claimant's appeal was timely filed.

Not appealed is the finding that claimant injured her right thumb at work on _____. Claimant testified that on that date, while trying to open the door of a van, her right hand slipped off the handle and fell back and her right thumb struck the door. She said that two days later, she was seen at a (clinic) with her right hand swollen and bruised and that after several visits to the clinic, she was seen on June 30, 1998, by Dr. N, to whom she had been referred. The clinic records reflect that claimant was given a thumb splint and that during one of her several visits the physician assistant treating her thumb injury stated that she also suspected a vascular disease in the second and third digits. Dr. N wrote on June 30, 1998, that he did a careful clinical examination for possible RSD and that no asymmetry with respect to perspiration, color, temperature, or swelling was noted. Claimant said she stopped seeing Dr. N because her condition was not improving. She

also said that her right hand symptoms included intermittent inflammation, discoloration, swelling, and numbness; that her hand is cold every day; and that she believes she has RSD in three fingers of her right hand.

Claimant further testified that her family doctor referred her to a rheumatologist, Dr. L, who felt she had a possible rheumatoid factor. Dr. L's report of April 21, 1999, states the impression as polyarthralgias and that claimant had a positive rheumatoid factor and "ANA." Claimant said that Dr. L referred her to Dr. P for an EMG and that Dr. P told her that her EMG was normal and that he felt she had RSD. Dr. P's April 16, 1999, report states that claimant's right upper extremity EMG and nerve conduction studies were normal and that he strongly suspects she has "a sympathetic dystrophy secondary to her previous thumb injury." This report does not reflect on its face when it was received by the carrier.

Claimant stated that on April 27, 1999, she changed treating doctors to Dr. KD, an orthopedic surgeon, who did not know what was wrong with her hand and began investigating a possible vascular disorder. Dr. KD's notes of June 1, 1999, include "[right] hand small vessel [disorder] vs RSD" and another set of notes includes "RSD vs embolic [disorders]." Dr. KD's notes do not reflect on their face that they were sent to and received by the carrier. However, Dr. KD did write the carrier on July 20, 1999, stating that claimant's echocardiogram was normal and that her arteriogram noted no definitive block in the right wrist artery. Dr. KD further stated that he recommended stellate ganglion blocks to decrease claimant's symptoms and that if the blocks are unsuccessful, "there may be a [RSD] type of component to her injury that is causing some vasa spasms." This letter indicates it was received by the carrier on August 17, 1999. Dr. KD wrote on January 12, 2000, that claimant had a bone scan "that revealed no necessary [RSD]"; that he discussed with claimant his belief that there is some type of sympathetic discharge but that he is uncertain whether she is having something related to RSD or to the sympathetic tone of the fingers.

Claimant said that Dr. KD referred her in August 1999 to Dr. T, a pain management specialist, for stellate ganglion block treatment of her RSD and that the carrier refused to pay for this treatment. Dr. T's record of August 4, 1999, states the impression as RSD of the right upper extremity. Dr. T's record of August 17, 1999, states the assessment as "[RSD] of upper extremities status post diagnostic and therapeutic Stellate Ganglion Block with excellent results." Dr. T's report of September 7, 1999, states the assessment as "RSD that is complexed regional pain syndrome of right upper extremity." Dr. T's record of September 22, 1999, states the assessment as "right-sided [RSD] that is of the complexed regional syndrome." These records of Dr. T do not reflect on their face that they were sent to and received by the carrier. In evidence is the affidavit of Ms. T, the adjuster, stating that the carrier first received Dr. T's August 4, August 17, and September 22, 1999, reports on November 30, 1999, when the carrier received the exchange from the carrier's representative at the benefit review conference (BRC) held on November 23, 1999. Another affidavit of Ms. T states that Dr. T's September 1, 1999, report was received by the carrier on September 29, 1999, and that Dr. T's September 7, 1999, report was first

received by the carrier on February 9, 2000. Dr. T's September 1, 1999, report is not in evidence.

Claimant also testified that she underwent two bone scans which did not indicate RSD but that Dr. KD told her the second scan, performed on December 6, 1999, was "no good" because her ganglion block injections would have affected it. She further stated that she was examined on one occasion in October 1998 by Dr. GD on behalf of the carrier; that Dr. GD determined that she had reached maximum medical improvement (MMI) and assigned her an impairment rating (IR) of six percent; that in December 1998 Dr. N assigned her a two percent IR; and that in December 1998 she signed a BRC agreement for six percent because she then felt it was correct

Dr. GD's medical record review of October 7, 1999, received by the carrier on November 8, 1999, states that he evaluated claimant in October 1998, found her to be at MMI, and assigned an IR of six percent. He further states that unless a triple phase bone scan is repeated and shows evidence of abnormalities consistent with RSD, claimant has a chronic arthritic pain syndrome, and that there is no indication in the physical therapist's more recent evaluation or in Dr. N's examinations prior to that of RSD. Dr. GD testified that he ordered a bone scan to give claimant "the benefit of the doubt" about RSD; that a bone scan would help make a diagnosis of RSD; that both bone scans were within normal limits; and that based on his clinical observations, as well as the bone scans, it was his opinion that claimant did not have RSD. Concerning the issue of the second bone scan and claimant's having had stellate ganglion blocks, Dr. GD stated that while stellate ganglion blocks could result in a false positive, they would not cause a false negative. Dr. GD concluded that based on his clinical examination and his review of the medical records, including those of the rheumatologist and the pain specialist, claimant had an acute trauma to the thumb and some underlying connective tissue disorder but not RSD. Dr. GD also stated that claimant's observed holding, touching, and squeezing of her right hand fingers with her left hand speaks against her having RSD because of the extreme sensitivity of RSD to touch.

The carrier's Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) dated "02/09/99" states that the carrier "disputes extent of injury to include small vessel thrombosis, subclavian thrombosis or right hand disease as it is not related to or medically necessary to our injury limited to right thumb sprain and partial UCL tear." The carrier's TWCC-21 dated "11/23/99" states that the carrier disputes any extent of injury to include RSD, depression, financial stress, and any psychological issues.

In addition to the dispositive legal conclusions, claimant challenges factual findings that her _____, injury is limited to her right thumb; that she does not have RSD; that the carrier's first written knowledge of the claimed RSD was November 23, 1999; and that the carrier timely contested the compensability of the RSD.

Claimant had the burden to prove by a preponderance of the evidence that her injury extended to RSD and that the carrier failed to timely contest the compensability of the

claimed RSD. 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 (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, 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 and we do not find them so in this case. 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). While the evidence was in conflict, the hearing officer was not compelled by the weight of the evidence to resolve the contested issues in claimant's favor. The hearing officer could credit the testimony of Dr. GD concerning claimant having RSD.

Concerning the carrier waiver issue, the hearing officer stated that the adjuster's affidavits reflect that the carrier's first written knowledge of RSD being part of the claimed injury was after the BRC and that there is no credible evidence that the carrier had written notice of this injury prior to November 23, 1999. Thus, concluded the hearing officer, the carrier did timely dispute the compensability of the RSD on November 23, 1999. We note that in Texas Workers' Compensation Commission Appeal No. 000784, decided May 30, 2000, a case involving an extent of injury issue and a CCH held before the March 13, 2000, effective date of Rule 124.3, the Appeals Panel reversed the decision and order of a hearing officer and rendered a new decision that the carrier did not waive its right to contest the compensability of the claimed bowel and erectile dysfunction conditions of the claimant. The Appeals Panel reasoned that the Commission has construed Section 409.021 as not providing for waiver of the right to contest extent of injury.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge