APPEAL NO. 950181

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On November 30, 1994, a contested case hearing (CCH) was held in (city), Texas, (hearing officer) presiding. The record was closed on December 6, 1994. The issues at the hearing were: "1) is the Claimant's lumbar condition a result of the compensable injury sustained on or about (date of injury); and 2) did the Carrier waive the right to contest the compensability of the claimed low back injury by not contesting compensability within 60 days of notification of the injury?" The hearing officer determined that the claimant had not sustained a work-related low back injury on A (date), in the course and scope of his employment but the carrier is nonetheless liable for claimant's back injury because it failed to timely contest the compensability of the back injury once it received notification thereof.

Appellant, carrier, appealed only the determination that it had not timely controverted the back injury and that claimant initially only reported an injury to his ankle. Carrier alleged that it disputed claimant's back injury within 60 days of receiving written notification of claimant's contentions of a back injury. Neither party appealed the hearing officer's determination that claimant had not sustained a work-related low back injury and therefore that determination has become final. Section 410.169. Respondent, claimant, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

It was stipulated that claimant sustained a compensable left ankle injury in the course and scope of his employment on (date of injury), when he fell off a "sleeper rack." Claimant testified that he fell about 20 feet to the ground and maintains that he injured his back as well as his left ankle. Claimant testified that his ankle injury (not at issue here) was more severe than the back injury and required surgery on two occasions in August 1993 and February 1994. Although not in evidence, there were references to one or more benefit review conferences (BRC) regarding maximum medical improvement (MMI) and impairment rating (IR) for the ankle injury. (Dr. T), apparently a consultant who saw claimant, in a report dated June 16, 1993, which principally addresses the ankle injury, commented "[h]e also has associated numbness on his right lower leg which is from his iliac crest down to his medial malleolus." Claimant alleges that all references to his right leg (surgery had been performed on the left ankle) documented his back injury. Operative notes regarding his left ankle make no mention of a back injury.

In a report dated April 20, 1994, (Dr. S),[1] listed as claimant's three chief complaints: "1. Low back pain radiating into the right leg to the knee with some numbness. 2. Pain in the left ankle. 3. Loss of vision." In the body of the report Dr. S states:

> He has reached statutory MMI from his accident and was given a 21% [IR] [for his ankle] by (Dr. W). This did not take into consideration his low back.
>
> * * * *
>
> He has been referred here by his attorney for evaluation of his low back as well as for his left ankle. He has also requested a change in treating doctors.
>
> * * * *
>
> He states that his low back pain and pain down the right leg is constant and is aggravated by prolonged walking, sitting or standing, coughing occasionally hurts his back. Lifting and bending hurts.
>
> He has constant numbness in the right leg which is worse at night.
>
> * * * *
>
> PERTINENT FINDINGS: Range of motion is limited in all directions because of back pain. . . . Extension is about one-third of expected normal and right and left bending is about half of expected normal.

Dr. S's impression was:

> 1.Back pain and leg pain with possible lumbar radiculopathy.
>
> 2.Traumatic left foot pain and sensitivity with suspected reflex sympathetic dystrophy.
>
> 3.Alteration of visual acuity post trauma, etiology unclear.

It appears that copies of this report were sent to "TWCC" and carrier. A date stamp might indicate that the carrier received the report on May 3, 1994. In evidence is a Notice of Refused/Disputed Claim (TWCC-21) dated "5/10/94" refusing payment because: "Injury

[1]Although not entirely clear, Dr. S is apparently claimant's current treating doctor. Claimant had complained that earlier doctors only treated his ankle and that he wanted a "whole body doctor." Dr. S is an orthopedic surgeon.

is to the left ankle from work. Eye condition is not related to original injury." No mention is made of an alleged back injury.

In a Specific and Subsequent Medical Report (TWCC-64) dated June 7, 1994, Dr. S remarked: "[Claimant] also has a lot of pain in his back and pain in his legs." The treatment plan consisted of "Lumbar Spine MRI to evaluate the possibility of lumbar disc herniation." Another TWCC-64, dated September 15, 1994, from Dr. S stated:

> I feel the patient should have lumbar spine MRI to evaluate possible lumbar injury that was sustained at the time of his fall. There does appear to be a clear causal relationship between patient's history of falling approximately 30 feet, injuring his ankle may very well have created a lumbar spine injury.

Although not in evidence, carrier refers to an August 15, 1994, BRC (apparently relating to the ankle injury) where claimant "was claiming he injured his back and was relating his back treatment to the 1992 injury." Carrier recites it disputed the back injury (apparently verbally) and a designated doctor was appointed for the ankle injury. Another BRC was held on October 3, 1994, involving the disputed issues in this case. Carrier, at that time, had not specifically disputed the back injury on a TWCC-21, although they had disputed an alleged eye injury on the May 10, 1994, TWCC-21.

Carrier prepared a TWCC-21, dated October 10, 1994, disputing the back injury and by affidavit testified that TWCC-21 "was mailed to the Workers' Compensation Commission in (city) on October 10, 1994." The October 10th TWCC-21 has never been received by the Commission. The hearing officer commented, in her statement of evidence:

> The Benefit Review Officer noted that as of the [BRC] on October 3, 1994, the Carrier had not yet contested the back injury. Both parties put into evidence a copy of a TWCC-21 Form dated October 10, 1994 that reflects a dispute of the back injury, but this form had not yet been filed with the Texas Workers' Compensation Commission as of the date of the [CCH] according to our computer file and the claim file. The sworn statement of the Carrier's case manager establishes only that the form was sent to the Texas Workers' Compensation Commission--there is no evidence that it has ever been received. And even if it had been received on or after October 10, 1994, it still would not have been timely since the carrier was notified on or about April 25, 1994, that the claimant was asserting a work-related back injury of (date of injury).

Carrier appealed, alleging that "claimant seeks to elevate form over substance." Carrier alleges it was first aware that claimant was alleging a back injury "at the [BRC] in August" and that allegation was disputed by carrier "at two [BRCs] and in a TWCC-21

form." Carrier cites Appeals Panel decisions and alleges the hearing officer's decision "is incorrect and ignores the substance of all arguments that took place."

Section 409.021(c) states:

> If an insurance carrier does not contest the 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.

Further, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(a) (Rule 124.6(a)) requires a notice of refused or disputed claim be "on a form TWCC-21 and in the manner prescribed by the commission." Rule 124.6(c) provides that the TWCC-21 must be filed "on or before the 60th day after the carrier received written notice of the injury. . . ."

The question then is whether Dr. S's report of April 20, 1994, which the carrier appears to concede was received on or before May 3, 1994, and the TWCC-64, dated June 7, 1994, constitute such written notice to require a TWCC-21 dispute within 60 days. In Texas Workers' Compensation Commission Appeal No. 93198, decided April 22, 1993, an unpublished decision which has nonetheless been cited a number of times, the Appeals Panel stated:

> We can not read Article 8308-5.21 (since codified as Sections 409.021 and 409.022) to provide that a carrier need not contest such additional or follow-on injuries within 60 days once on notice of such injuries and that it can contest the compensability of such additional or follow-on injuries at any time into the indefinite future.

Texas Workers' Compensation Commission Appeal No. 93491, decided August 2, 1993, cites Appeal No. 93198 and Texas Workers' Compensation Commission Appeal No. 92437, decided September 28, 1992, as being dispositive of the need to contest additional injuries or follow-on injuries within 60 days of receiving written notice of those injuries. Appeal No. 93491 also involved a situation where an eye abrasion was reported in a medical report after compensation for head and stomach injuries had been commenced. The Appeals Panel held:

> Dr. MA specifically advised the carrier that the claimant was wearing contacts at work, that it was likely that the contacts became infected with chemicals at work, and that the infected contacts could have caused the claimant's eye infections. We believe that this was sufficient notice to the carrier that the claimant was attributing her eye abrasions and infections which are not mere symptoms, to her alleged work-related injury. Yet, the carrier did not ever file a TWCC-21 to dispute the compensability of the claimant's eye injury. The claimant's eye injury is an additional injury from the alleged work-related

> injury of December 5, 1991, and the carrier should have disputed it within 60 days of notice, but did not.

What constitutes written notice was addressed in Texas Workers' Compensation Commission Appeal No. 950100, decided February 28, 1995, which provided that:

> written notice can consist of the employer's first report of injury, notification by the Commission, or "any other written document, regardless of source, which fairly informs the insurance carrier of the injury, and facts showing compensability." Rule 124.1(a)(3). Whether a written notice "fairly" informs the carrier as described above is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93120, decided April 2, 1993.

Based on the above precedent we believe that the hearing officer could find that Dr. S's report of April 20th, sent to and apparently received by carrier on or before May 3rd, "fairly" informed the carrier that claimant was alleging a back injury arising out of his compensable (date of injury), fall. The hearing officer determined that carrier failed to timely contest the compensability of claimant's low back injury. A fact that gives the hearing officer's determinations additional support is that Dr. S's April 20th report listed as complaints, 1) the low back pain; 2) the ankle injury; and, 3) a vision problem. Carrier had accepted compensability for the ankle injury early on, had contested compensability of the vision problem in a May 10, 1994, TWCC-21 (after being in receipt of Dr. S's April 20th report) but made no mention of the back injury. We find that the hearing officer's determination that carrier had written notice of claimant's allegation of a back injury "on or about April 25, 1994," and certainly no later than May 3, 1994, and that carrier, as of November 30, 1994 (or even October 10, 1994), had not filed a TWCC-21 contesting compensability of claimant's alleged back injury to be supported by the evidence.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge