APPEAL NO. 970704

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 April 2, 1997. With regard to the issues at the CCH, she determined that the respondent's (claimant) _____, compensable injury does extend to his hypertrophic obstructive cardiomyopathy (HOC) and that the appellant (carrier) waived its opportunity to contest the compensability of the claimant's HOC. The carrier appeals, requesting a reversal of the decision, and the claimant responds, requesting its affirmance.

DECISION

We affirm.

The claimant testified at the CCH that on _____, he was exposed to a gas leak and that the gas may have been hydrogen sulfide (H_2S). On December 7, 1995, the parties entered into a Benefit Dispute Agreement (TWCC-24), agreeing as follows:

DISPUTED ISSUE(S)	RESOLUTION
What is the extent of injuries resulting from the _____ throat, left leg and back.	Parties agree the Claimant's injuries include his lungs, heart,injury?
Did the Carrier timely dispute the Claimant's heart, throat, left leg and back?	Parties agree that the Carrier failed to timely dispute the Claimant's injury to his heart, throat, left leg and back and have therefore waived the right to do so.

The carrier argues that the claimant did not meet his burden of proof to show, by a reasonable medical probability, his HOC is related to his compensable injury. It claims that HOC is a congenital condition and that the compensable injury neither caused nor aggravated it. The claimant agrees that his HOC is congenital, but argues that his injury aggravated it and, therefore, it is compensable. In the alternative, he argues that the carrier accepted liability for HOC when it entered into the TWCC-24, because it agreed that his injury extends to his heart and HOC is a heart condition.

The claimant testified that he was taken to the hospital on July 12, 1995. A July 12, 1995, echocardiogram, taken at the hospital by Dr. M, reflects "probable mild IHSS [idiopathic hypertrophic subaortic stenosis] . . . . " He was in the hospital again on February 2, 1996, when Dr. M diagnosed IHSS and sinus tachycardia. In an October 8, 1996, note from Dr. R, a cardiologist, he diagnoses the claimant with HOC and stated that "any damage to [the claimant's] lungs certainly exacerbates [his] symptoms associated with this

disease." On December 3, 1996, Dr. J, the claimant's family doctor, opined as follows:

> [The claimant] was in perfectly good health prior to his injury that he [sic] occurred in _____. After his episode of [H_2S] inhalation his cardiac symptoms worsened significantly. I believe, in my judgment, that probably/possibly the IHSS symptoms worsened because of the severe bronchospasm . . . .

On December 11, 1996, Dr. M explained that "IHSS is a form of hypertrophic cardiomyopathy." Dr. T, an internist who reviewed medical records on the carrier's behalf, testified that the claimant's history is inconsistent with HOC and that H_2S is not likely to cause HOC.

An aggravation of a preexisting bodily infirmity may, in certain circumstances, be a compensable injury. Texas Workers' Compensation Commission Appeal No. 93533, decided August 6, 1993. We have affirmed a decision where H_2S inhalation was determined to have caused or aggravated an employee's condition. *See* Texas Workers' Compensation Commission Appeal No. 951817, decided December 15, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 951321, decided September 22, 1995. *Compare* Texas Workers' Compensation Commission Appeal No. 92202, decided July 6, 1992. Whether a compensable injury extends to a part of an employee's body or to a condition is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92653, decided January 21, 1993. The contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We conclude that the determination with regard to the extent of the claimant's injury is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

The carrier's November 19, 1996, Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21), the only TWCC-21 in evidence, contains the following language in the section entitled "Payment refused or disputed for the following reason(s):"

> The [carrier] disputes liability for [claimant's] hypertrophic obstructive cardiomyopathy h/c it is inherited condition and not causally related to the employee's chemical exposure of _____. The [carrier] had previously

> accepted [claimant's] "heart condition" on 12/7/95. At that time the hypertrophic cardiomyopathy had not been definitively dx. It was not dx until 10/8/96 by [Dr. R], a cardiologist who examined the employee at the request of the treating Dr. This dx is newly discovered evidence and the [carrier] has good and sufficient cause to be relieved of TWCC24.

The affidavit of Ms. L, its adjuster, confirms the contents of the TWCC-21. The evidence does not reflect that the carrier requested an issue on whether it should be relieved of the effects of the TWCC-24. Section 410.030; Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 147.4(d)(1) (Rule 147.4(d)(1)). The issue is whether it timely contested the compensability of the HOC and the dispute with regard to the issue is as to when the carrier first received written notice of the HOC. There is no dispute as to when it contested the compensability of the HOC. If the carrier received notice of the claimant's HOC condition before September 20, 1996, then the November 19, 1996, contest of the compensability of the HOC was untimely and it waived its opportunity to contest the compensability of the HOC.

With regard to the carrier's timely contest of the compensability of the claimant's HOC issue, the hearing officer made the following findings of fact:

> 11. On or about October 10, 1996, Carrier received written notice of injury with respect to Claimant's [HOC].
>
> 12. Within sixty days of October 10, 1996, Carrier disputed the alleged compensability of Claimant's [HOC].
>
> 13. Although Carrier timely disputed Claimant's [HOC] Carrier previously failed to timely dispute Claimant's [IHSS], which is the same condition by a different name.

She concluded that the carrier waived its opportunity to contest the compensability of the HOC. In her "discussion" contained in the decision, the hearing officer states:

> HOC and IHSS are, at least in Claimant's case, essentially different names for the same medical condition, a condition which was diagnosed long before Carrier agreed, on December 7, 1995, that Claimant's heart condition (a term which presumably referred to IHSS) was compensable in that Carrier had failed to lodge a timely dispute of the alleged compensability of that condition.

A carrier must contest compensability of an injury on or before the 60th day after it is notified of the injury or else it waives its right to contest compensability and is liable for payment of benefits. Section 409.021(c), Rule 124.6(c). The hearing officer must determine when the carrier was notified of the injury and the sufficiency of the notice to the carrier. A notice of injury, for the purposes of starting the time period for contesting compensability, must be written and must fairly inform the carrier of the nature of the injury, the name of the injured employee, the identity of the employer, the approximate date of injury, and must state "facts showing compensability." Rule 124.1(a). The writing may be from any source. Rule 124.1(a)(3). A carrier must timely contest compensability of additional injuries. Texas Workers' Compensation Commission Appeal No. 950183, decided March 22, 1995. Notices that claim injury to additional parts of the body not previously claimed will start a new 60-day time period for contesting compensability for those particular parts of the body. Texas Workers' Compensation Commission Appeal No. 950522, decided May 11, 1995; Texas Workers' Compensation Commission Appeal No. 93491, decided August 2, 1993. Written reports that consider whether a condition is work related may constitute written notice of injury under Rule 124.1, whether or not a concrete diagnosis is made. Appeal No. 950522, *supra.*

The carrier argues that the claimant did not meet his burden to prove when it received notice of the compensability of the HOC. It points out that the hearing officer did not make a finding of fact with regard to when it received notice and the first evidence of any notice of the compensability of HOC or IHSS was its October 11, 1996, receipt of Dr. R's note. The claimant argues that the carrier had notice of all his heart and lung conditions prior to December 12, 1995, the date it agreed that his injury extends to his heart. The claimant's IHSS was diagnosed prior to the December 12, 1995, TWCC-24, as evidenced by the July 17, 1995, echocardiogram. Additionally, the February 2, 1996, hospital report mention IHSS. The hearing officer, as finder of fact, must resolve inconsistencies and conflicts in the evidence with regard to whether a carrier timely contests the compensability of an employee's additional injuries and conditions in inhalation cases. Texas Workers' Compensation Commission Appeal Nos. 962148, 962149, and 962150, decided December 16, 1996.

We conclude that the hearing officer's determination with regard to whether the carrier timely contested the compensability of the claimant's HOC is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Cain, *supra*.

In his response, the claimant requests issuance of an order on attorneys fees ordering the carrier to pay his attorneys fees for filing the response. However, we cannot consider his request as an appeal since it was not received by mail by the 15th day after the deemed date of his receipt of the hearing officer's decision. Rule 143.3(c)(1). Additionally, the above-referenced decision states that "separate orders may be issued regarding attorneys fees," and, therefore, we do not at this time have jurisdiction over any attorneys fees in this claim. Section 410.204(a).

The decision is not against the great weight and preponderance of the evidence and, therefore, we affirm.

_____
Christopher L. Rhodes
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge