APPEAL NO. 92617

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.01 (Vernon Supp 1992). On September 28, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. On October 5, 1992, he reopened the evidence until October 21, 1992, at which time it was closed, and he rendered his decision that appellant, claimant herein, did not injure her neck on the job but that her back injury caused disability from (date of injury) to (date). Claimant asserts error in regard to the determination of no neck injury on (date of injury) and in the hearing officer's request to the designated doctor to review his report based on the absence of such an injury.

DECISION

Finding that the decision is sufficiently supported by the evidence, we affirm.

Appellant had worked for employer for approximately seven months when she felt pain in her back on (date of injury), from moving two boxes, each containing lingerie and weighing between eight and ten pounds. At the hearing she said she felt pain in "all my back; my back, literally, from the middle of my back down to my lower back." In a different part of the transcript she said, "I felt pain all over my back but, and particularly, in my lower back." A manager was summoned at the time of injury. It is not controverted that claimant told the first two doctors she saw that she hurt her back. The issues at the hearing were whether claimant's neck problem was caused by the event of (date of injury), and what dates, if any, did claimant have disability. Claimant said she first told her third doctor of neck pain on February 25, 1992. Claimant never testified at the hearing that the incident of (date of injury) gave rise to her neck pain; she did not state when she first noticed neck pain; and she did not explain why she thought it might be connected to the injury in the scope of employment. Claimant did not produce any statements or witness testimony saying that she had remarked about, or given an indication of, a neck problem within seven weeks of the work incident. Claimant's testimony was directed at when she first told which doctor that she had some neck pain. Claimant did offer into evidence her notice of claim dated January 24, 1992, which recites, "I lifted a box causing injury to my back, waist, neck, shoulders, legs and body in general."

There are no medical records offered in regard to the first doctor claimant saw. Claimant testified that she was not satisfied by the first doctor and went to Dr. M. Claimant did not say what tests or treatment, other than medication, Dr. M ordered, but she did say he took her off work from January 13th to January 17th and her last visit to him was on January 23, 1992. Claimant first saw Dr. N on February 25, 1992. It was Dr. N who claimant first told of neck pain. His report of February 25th refers to the (date of injury) accident at work and said she complained of discomfort. He then says:

[n]eck pain has also been present, radiating interscapularly into both shoulder areas and upper extremity discomfort, characterized by aches and pain, and

intermittent tingling in the upper extremities. The discomfort has been present throughout this period of time.

Dr. N's records indicate that subsequently she was provided massage therapy and was referred for pain therapy to Dr. A. Dr. A commented:

her neck pain. . . started to bother her approximately three to four weeks after her initial injury.

Dr. A also referred to a CT scan indicating herniation at the C4-5 space with some protrusion at the C5-6 space. Dr. A also said on June 11, 1992:

[i]t is not uncommon, let me emphasize, that a patient's symptoms may develop two, three, possibly four weeks after the initial injury.

The carrier provided more records of Dr. M, claimant's second doctor, who is board certified in orthopedic surgery. His physical examination of January 13th found no problem with the neck and notes that she only complained of low back pain. He referred her for a lumbar MRI which was normal. In answer to a query from the carrier, Dr. M in April 1992, said:

[b]ased upon the history and physical which we obtained at the time she was first seen, there is no objective evidence to indicate a problem with the cervical spine as a result of the work-related injury.

The carrier also sent claimant for an examination to Dr. GW who found maximum medical improvement on (date) with 5% impairment reported in one part of his report and 10% reported in another; he did consider the "small" bulging discs at C4-5 and C5-6.

Dr. W was a designated doctor who examined claimant as a result of the benefit review conference. He found that she reached MMI on August 31, 1992 with 12% impairment, based on 7% for the neck and 5% for the lower back. The hearing officer, after completing the hearing on September 28, reopened the record by letter to all the parties dated October 5, 1992. In that letter he announced that he would ask the designated doctor to provide a new report based on the hearing officer's factual findings--which included no neck injury. He invited additional medical evidence from the parties. In another letter to Dr. W, also dated October 5th and provided to all the parties, the hearing officer instructed the designated doctor to limit his report to the back injury and to provide a date of MMI based only on the back injury. (Income benefits that are based on disability end when MMI is reached.) On October 15th, the hearing officer sent a copy of the designated doctor's new report, which assessed 5% impairment for the lower back and referred to (date), as "a logical date of MMI" (this was the date set forth by Dr. GW), to the parties. The hearing officer announced that the record would be closed three days after each received this copy; he closed the record on October 21, 1992.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. We will not overturn his findings on the evidence unless they are against the great weight and preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 91079, dated January 6, 1992. This case presents a fact situation which has some similarities to that in Texas Workers' Compensation Commission Appeal No. 92503, dated October 23, 1992, which reversed a hearing officer's finding that a later reported injury was not from the same accident. Several points of evidence were examined in that case and some are clearly distinguishable in this case. In Appeal No. 92503, claimant produced evidence that he experienced the later injury within days; in this case claimant not only did not produce anyone else to provide evidence but did not even testify that she had such pain within seven weeks. The prior appeal also likened the accident to the type that "common knowledge" could support in regard to claimant's assertions. (As opposed to injury for which expert evidence must make the connection.) The only knowledge expressed in the case before us about a connection is from Dr. A who said a patient's symptoms "may develop . . . four weeks after the initial injury." This may be contrasted to the court's opinion in Royal Globe Insurance Co. v. Suson, 626 S.W.2d 161 (Tex. App.-Fort Worth 1981, writ ref'd n.r.e.), a back case in which a worker felt a pop in his back, which had been previously injured. In affirming a decision for the claimant, the court quoted from Insurance Company of North America v. Kneten, 440 S.W.2d 52 (Tex. 1969), "(a)s in all those cases where a back injury promptly follows a lifting strain, or a ruptured blood vessel. . .it is reasonable to believe that what the employee did on the job precipitated physical failure." (emphasis added)

Without the neck injury promptly following the incident, the trier of fact could view "common knowledge" as insufficient to connect this injury to the accident under these facts. Claimant did not testify how or when it occurred or even when pain began. One doctor, Dr. N, said claimant said it was there all along; another, Dr. A, said she said it started causing discomfort three to four weeks later. Dr. M said she never said anything about the neck and his exam found no abnormality in that area. These doctors did not differ so much in diagnosis as they reflected different stories told them by claimant. Any conflict in medical evidence is for the hearing officer to resolve. *See* Texas Workers' Compensation Commission Appeal No. 91002, dated August 7, 1991. No doctor then said, as did the physician in Hartford Accident & Indemnity Co., 498 S.W.2d 419 (Tex. Civ. App.-Houston [1st Dist] 1973, writ ref'd n.r.e.), that claimant's injury was caused by trauma. (In that case 50 pound sacks were lifted all day and pain was first felt that night). This Appeals Panel has reported medical evidence in Texas Workers' Compensation Commission Appeal No. 92316, dated August 21, 1992, that disc herniation frequently happens without trauma. Since disc herniation frequently happens without trauma, it would appear reasonable for the hearing officer to conclude that the evidence did not show, under these circumstances, that claimant's neck discs herniated from the accident when no neck injury was mentioned even though prompt onset of lower back pain occurred and was recorded. While the period of time involved was longer from injury to first report to a doctor, Texas Workers' Compensation Commission Appeal No. 92326, dated August 28, 1992, has affirmed a hearing officer who

found that a particular injury did not stem from the incident when it was not reported to several doctors and first arose in a doctor's report six months after the incident. The hearing officer's finding that no neck injury was shown to have been caused by the (date of injury) accident is not against the great weight and preponderance of the evidence.

Issue is also taken with the hearing officer's decision to reopen the record and seek another report from the Commission selected and appointed designated doctor, who had assessed an impairment rating and date of maximum medical improvement. The hearing officer is responsible for the full development of facts required for the determinations to be made. *See* Article 8308-6.34(b) of the 1989 Act. He sought evidence relative to issues that were before the hearing he was conducting. He opened the record for development of more medical evidence by either party and received none. This Appeals Panel has said in Texas Workers' Compensation Commission Appeal No. 92441, dated October 8, 1992, that a designated doctor's report can be revised. In that instance it was not at the request of the hearing officer so our review emphasized that the revision occurred before the hearing and for no motive other than the evaluation of the claimant. Also in that case we noted that the hearing officer, at the end of the hearing, left the record open for a set period of time to allow comments on the designated doctor's changes from other medical practitioners. We see no real difference in holding the record open at the end of a hearing and reopening it one week later when both parties are given fair opportunity to present evidence in regard to the same matter.

The decision and order of the hearing officer are not against the great weight and preponderance of the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge