

APPEAL NO. 94257

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 28, 1994, a contested case hearing was held. The issue was whether the cervical condition of the appellant, who is the claimant herein, was related to her compensable injury on _____.

The hearing officer determined that claimant had not proven that her neck injury occurred on the date in question, and found that her neck injury was caused by improper compliance with her doctor's instructions and was therefore self-imposed.

The claimant has appealed, arguing that she was initially not able to feel the pain in her neck because of medication, and that new evidence has come up since the contested case hearing establishing the link between the neck and the thumb injury. There was no response from the carrier.

DECISION

We affirm the hearing officer's decision and order.

The claimant, on _____, worked on an assembly line for (employer), packing pickled okra into jars. While taking a brief break and chatting with coworkers, claimant rested her hand on the conveyor belt disk that was turned off at the time. Without warning, another employee turned on the conveyor and claimant's hand was moved under the stationary jar divider which grabbed the thumb on her right hand. Claimant testified that as she jerked her thumb out, she experienced pain all the way up her arm to her neck.

The claimant was treated at an emergency room of a local hospital, and was referred to Dr. W for follow up. Dr. W treated claimant for six or seven months. His first reports do not note a neck injury. During this period, claimant attended physical therapy session, but stated that these did not help her much at all. Dr. W noted in February 1993 that claimant was developing a problem from using her thumb splint full time and he recommended against this. Dr. W noted on May 5, 1993, that claimant was still wearing her thumb splint excessively. Dr. W eventually stated that there was nothing further he could do, and completed a TWCC-69, Report of Medical Evaluation, which certified that claimant reached maximum medical improvement (MMI) on July 1, 1993, with a two percent impairment rating. In December 1992 he wrote a letter which stated that he could not directly relate claimant's neck problems to her accident but that such was "frequently seen as a natural progression."

A functional capacity test report indicates that Dr. W reported in February 1993 that claimant was to use the splint only at night or for heavy duty work. The report in evidence stated that the injury was to the hand, shoulder, and neck. Claimant was discharged in

February 1993 from further testing and work-hardening therapy because of nonattendance.

Claimant saw a designated doctor appointed by the Texas Workers' Compensation Commission (Commission). The doctor was Dr. P, who examined her twice and whose TWCC-69 (filed after her second visit) certified MMI on February 23, 1993, and assigned a five percent whole body impairment, which he derived from various discrete ratings for her thumb, wrist, and shoulder. Dr. P also noted that claimant had a muscle spasm in the lower cervical and upper thoracic spine secondary to nonutilization of the upper extremity. He noted that her cervical problems were self-inflicted and not due to injury. Dr. P noted a concern that claimant would not voluntarily move her thumb and he predicted that she would lose her range of motion if aggressive occupational therapy were not followed. He recommended therapy, but determined on a return visit that claimant did not comply, and therefore, he assessed MMI. Dr. P recited the results of a functional capacity test as confirmatory of claimant's symptom magnification.

Although the theory of claimant's case, as articulated by the ombudsman, was that failure of earlier treatment records to document a neck injury resulted from miscommunication with translators, claimant's testimony did not identify any such miscommunication, and she stated that she read her doctor's reports and thought they were accurate.

We note that the appeal was timely filed, in accordance with our rules. Second, the Appeals Panel will generally not consider evidence not submitted into the record of the hearing. We note that although the claimant contends that such evidence was not previously available, most of the documents attached to the appeal consist of notes from Dr. W purportedly created soon after the injury. It is clear that these notes could have been obtained and properly submitted into the hearing record. The hearing officer repeatedly asked the claimant during the hearing if she had anything additional to add to her testimony and evidence that she felt he should consider.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). Likewise, we agree that the trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers' Insurance Ass'n v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ).

An "injury" includes damage or harm to the body and "a disease or infection naturally resulting from the damage or harm." As we have stated in the context of damage resulting from drugs taken for a compensable injury, damage or harm that results from the failure of a claimant to comply with doctor's instructions is not included within the scope of the original compensable injury. See Texas Workers' Compensation Commission Appeal No. 93612, decided September 3, 1993. We believe that the hearing officer could consider this case as similar in that there is evidence that the relatively simple injury to the thumb and hand became greater because claimant was not following the prescribed use of the splint and therapy.

The decision and order of the hearing officer are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Neseholtz
Appeals Judge