

APPEAL NO. 94275

Pursuant To the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), a contested case hearing was held in (city), Texas, on February 3, 1994, (hearing officer) presiding as hearing officer. He determined that the appellant's (claimant) compensable injury did not extend to an injury to her neck and shoulder and her correct impairment rating was eight percent. Claimant requests that the Appeals Panel review the decision made by the hearing officer and that she be awarded 19% originally given by the designated doctor. Respondent (carrier) urges that the evidence is sufficient to support the decision of the hearing officer and asks that it be affirmed.

DECISION

Finding the evidence sufficient to support the findings and conclusions of the hearing officer, the decision and order are affirmed.

Initially we note that the tape recording of this contested case hearing was of such poor quality that a professional court reporter retained by the carrier to transcribe the proceeding from the tape recording was unable to do so. Nonetheless, we have painstakingly listened and relistened to the tape recording on different recorders and are satisfied that we have been able to construct a complete record satisfying the mandates of Sections 410.164(a) and 410.203(a)(1). Remand is a distinct possibility when tape recording are of such marginal quality.

The issues at the hearing and which we examine on this appeal involve whether the claimant's injury extended to her shoulder and neck and the claimant's correct impairment rating. The parties stipulated at the hearing that maximum medical improvement (MMI) had been reached on December 9, 1992, and that (Dr. L) was the "agreed upon" designated doctor. The claimant was employed in a position that required significant overtime and involved much repetitive hand and wrist motion such as writing, typing, and keyboard operation. In any event, she had noticed pain in her hands and wrists and when knots appeared in (month year), she reported her injury and saw a doctor. She also stated that she had shoulder and neck pain; however, the earlier medical records do not reflect this. She was eventually diagnosed with myofascial dysfunction in both her wrists. She did not return to work and underwent treatment which included physical therapy. She saw several doctors over the ensuing months and she and the carrier agreed on Dr. L as the designated doctor to assess her impairment rating. Dr. L. initially (June 2, 1993) assessed an impairment rating of 19% which specifically included a rating extending to the neck and shoulder. Subsequently, in a July 1, 1993, letter, Dr. L stated that "[a]fter reviewing the chart of [claimant], I would like to correct my prior statement of 19% impairment rating to a 8% impairment rating due to the fact that I realized I was only to do an impairment rating on the wrists and hands and not to include the shoulders as I had done. I do agree with [Dr. H] MMI date of 12-9-92." (Although not developed in the record, it appears that the designated doctor was contacted by the adjuster concerning the inclusion of impairment for the shoulder). The record also contains an impairment rating from another doctor, (Dr. J), who assessed a 10% impairment rating.

A review of the medical records introduced shows that shoulder and neck pain or injury was not mentioned until sometime later. Of significance, one of claimant's treating doctors, Dr. H indicated in a note dated "7-12-93" that the claimant's shoulder injury was related to the forearm injury; however, in response to a query dated August 11, 1993, checked "no" to the question, "do you feel that full inclusion of the shoulder is justifiable in relation to her original work related injury?" Also, a carrier requested doctor, Dr. P stated in a report dated August 20, 1993:

I feel that since the patient's shoulder complaints were not noted nor addressed by her treating physician and there is documentation by a physical therapist one month prior to the date of MMI that the patient had normal range of motion of the shoulder, that inclusion of the shoulders in relation to [claimant's] original work-related complaints of the forearm and wrist is unwarranted for the purposes of TWCC impairment rating under the AMA guidelines.

Clearly, there was sufficient evidence from which the hearing officer could reasonably determine that the claimant's shoulder condition was not a part of her compensable injury. He is the sole judge of the relevance and materiality of the evidence and the weight and credibility to be given the evidence. Section 410.165(a). We do not substitute our judgment for that of the hearing officer where there is sufficient evidence to support his decision. Texas Workers' Compensation Commission Appeal No. 931148, decided February 1, 1994; Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994. The hearing officer resolves any conflicts and inconsistencies in the evidence and testimony and determines the facts of the case. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Even where other reasonable inferences could be drawn from the evidence, this is not a sufficient basis to disturb the inferences that the hearing officer finds most reasonable. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). And, the hearing officer determines the weight to be given expert testimony. Highlands Underwriter's Insurance Co. v. Carabajal, 503 S.W.2d 336 (Tex. Civ. App.-Corpus Christi 1973, no writ).

Although not developed in the record and not set out on appeal, there is some indication that the designated doctor was unilaterally contacted by other than Texas Workers' Compensation Commission (Commission) personnel. We have noted the impropriety of such activity (Texas Workers' Compensation Commission Appeal No. 94145, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 93762, October 1, 1993) and point out that this matter is now the subject of a Commission Advisory (TWCC Advisory 94-02, dated March 14, 1994).

Finding sufficient evidence to support the determinations of the hearing officer and no reversible error, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge