APPEAL NO. 94488

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On March 21, 1994, a contested case hearing on remand was held. The case had been remanded in Texas Workers' Compensation Commission Appeal No. 931149, decided February 4, 1994. The issues determined at the contested case hearing were whether the claimant (respondent) sustained a compensable occupational disease on (date of injury), in the course and scope of her employment as a reservations clerk with (employer), and whether she had disability therefrom. It was stipulated that claimant had reached maximum medical improvement from her alleged injury on March 17, 1993.

The hearing officer determined that claimant sustained a compensable occupational disease in the course and scope of her employment. The hearing officer further found that claimant had disability from (date of injury), until March 23, 1993[1], but that temporary income benefits were due only through March 17, 1993, the date of maximum medical improvement.

The carrier has appealed, arguing that speaking in an ordinary tone of voice all day at work is not a repetitive trauma injury, that claimant's condition is an ordinary disease of life and not compensable, and that the great weight of evidence proves this. The carrier argues that the sole reason for remand of the case was to enable claimant to present evidence that had been erroneously excluded in the first hearing, and since claimant was unable to produce such evidence, the result reached by the hearing officer in her first decision should not have changed. The disability findings are not appealed. The claimant responds by asking that the decision be affirmed.

DECISION

We affirm the hearing officer's decision and order.

To summarize the evidence from the first hearing, the claimant stated that she had been employed by the employer as a reservations agent for nearly six years at the time of her injury. She said that on (date of injury), with no forewarning, her voice "just left" at around 4:00 in the afternoon. Claimant stated that this was the first hoarseness she had. Claimant described her job duties as taking incoming calls, informing callers about various fares, and arranging for reservations and automobile rentals. She stated that agents were required to maintain a certain voice level, which, while not yelling, had to be audible, even-toned, and cheerful. She stated that telephone calls were taped and that every two or three months they listened to the tape and were graded on how the calls were handled. She stated that if the agent's voice was not as cheerful or at a level that it should be, that

[1]Finding of Fact No. 10 contains an apparent typographical error, indicating "February 26" instead of (date of in injury); we note, however that the rest of the decision and conclusions of law correctly use the (date of injury) date.

would be mentioned. She said that she worked 10-12 hours a day, which she characterized as "overtime," and that calls lasted on the average 15 minutes. The only breaks allowed were fifteen minutes in the morning, fifteen in the afternoon, and a half an hour for lunch. She said that another 20 minutes of the "employer's time" would be allowed throughout the day, but that it was generally reserved for paperwork.

The claimant testified that she lived alone, had no pets, and directed her telephone calls during the week to her telephone answering machine. She said that when she got home, she didn't want to talk on the telephone. At the first hearing, claimant said she did not smoke.

Claimant was eventually diagnosed with vocal cord nodes, or polyps, of which hoarseness was a symptom, and she had a microlaryngoscopy surgery on March 2nd.

Her surgeon, Dr. R recorded on February 10th that claimant had persistent hoarseness associated with cough and bronchitis for the past six weeks, with hoarseness becoming worse two weeks before. His assessment was "[c]hronic laryngitis as well as bilateral vocal cord nodules associated with moderate vocal cord abuse."

On February 24th, he noted that she was no better in spite of voice rest and found persistent vocal cord nodules with moderate edema of the vocal cords. On March 17th, he stated "[b]ecause of the fact that she works significantly greater than 40 hours per week continually using her voice, I suggest a period of voice rest." A letter dated March 18th says: "It is my opinion that these nodules are definitely due to excessive vocal use in her job as a reservation agent at [employer]."

Additional facts were developed on remand. Claimant was unable to bring her coworker, Ms. H, to the hearing; because Ms. H's husband did not wish her to appear as a witness. Claimant said that Ms. H had also had surgery for vocal nodes, which she understood the employer had paid for, although she did not know if Ms. H was paid through workers' compensation or health insurance. She testified that Ms. H's duties were the same as hers, although she did not know Ms. H's personal life or work hours. She understood that Ms. H's doctor was "Dr. H"

Claimant produced three of her voice tape evaluation forms, two from before the injury and one from February 1994. In all evaluations, the quality of her voice was evaluated. It is noted in her October 1991 evaluation: "Keep a smile in your voice!" The comment on February 1994 evaluation was the observation: "Need to add some pep to your voice!! Show some enthusiasm!" She testified that she had been told by an assistant manager that if an employee did not feel well, she was not supposed to show it in her voice.

Claimant returned to work on March 23, 1993, and had been working full time since then. She stated that since returning, she had some episodes of hoarseness, which Dr. R told her was to be expected because the healing process would take around nine months. During the remand hearing, claimant testified under cross-examination that she generally worked eight to ten hours a day.

At this hearing, claimant testified that she presently smoked once in a while, but had not smoked at the time of the prior contested case hearing or at the time that her problem first appeared. Claimant said she had smoked about five years and stopped smoking in November 1992, at which point she had been smoking half a pack a day. In December 1992, she resumed smoking about three cigarettes a day, but then stopped smoking entirely in (month year) and did not resume until sometime in November 1993 after the contested case hearing. Her rate of smoking at the time of the remand hearing was a pack of cigarettes a week, and she was in the process of quitting again. The carrier brought out that claimant had bronchitis in February and March 1992.

The carrier presented a "To Whom It May Concern" letter dated March 21, 1994, from Dr. GH[2], of Occupational Health Centers, containing three points:

1. Speaking in a conversational tone of voice is not considered a traumatic work experience.

2. There is no epidemiological evidence that people who talk constantly at work in a conversational tone of voice are more likely to develop vocal cord nodules than the general population.

3. Vocal cord nodules are known to occur more frequently in people who are professional singers and in those individuals who smoke. This condition is also known to occur at random in the general population.

No hypothetical question was posed to Dr. GH concerning the specific elements of either claimant's or Ms. H's occupational voice use, or whether such would be deemed to be "conversational".

In our previous appellate decision, we reversed the case not only to allow claimant to present additional evidence of similarly afflicted coworkers, but because we were

---

[2] Although this may be the same person as "Dr. H," who operated on Ms. H, that was not definitely stated or proven in the record.

concerned that the hearing officer had interpreted Texas Workers' Compensation Commission Appeal No. 92525, decided November 19, 1992, as a blanket prohibition on compensability of voice-related problems. We emphasized that the finder of fact still had the authority to weigh such cases in light of applicable law and definitions. Appeal No. 92525, *supra*, also had some factual differences from the evidence in this case. Finally, we pointed out that when a condition naturally results from work-related damage or harm to the physical structure of the body, it can still be considered to be part of the injury, as specifically noted in the last portion of the definition of occupational disease set out in Section 401.011(34): "The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease." (Emphasis added.)

Despite the carrier's continued argument that claimant spoke conversationally all day, we believe the evidence points toward a necessity for the claimant to maintain a voice quality which was not merely conversational, but to some extent enhanced. We indicated in our earlier decision that this appeared to be the case, yet the expert evidence presented by the carrier presupposes that the use of claimant's voice was ordinary. No hypothetical question was posed at all detailing the function of claimant's work and voice use, or whether same could be considered merely "conversational." On claimant's side of the case, claimant's surgeon stated that the cause of the nodes was excessive use of her voice (and not just greater use). The hearing officer evidently gave more credence to claimant's doctors than to the generalized statements from Dr. GH.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Co. of Pittsburgh, Pa. v. Soto, 819 S.W.2d 619, 620 (Tex. App.- El Paso 1991, writ denied).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). That is not the case here, and we affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge