

APPEAL NO. 950025
FILED FEBRUARY 21, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On October 12, 1994, a contested case hearing (CCH) was held. The issues were:

1. Did Claimant sustain a compensable injury on _____ (in the course and scope of employment).
2. Are Claimant's neck and shoulder problems a result of the compensable injury sustained on or about _____.
3. Did Carrier contest compensability on or before the 60th day after being notified of the injury.
4. Did Claimant timely report her injury to the employer, and if not, did she have good cause for late reporting.

The hearing officer determined that claimant sustained a compensable injury to her left shoulder and neck on _____ (all dates are 1993, unless otherwise noted), that claimant timely reported her injury to the employer and that carrier's Notice of Refused/Disputed Claim (TWCC-21) disputed only a timely reporting of the injury and raised a sole cause defense. He also held that carrier did not adequately dispute compensability of the claim.

Appellant, carrier, contends that the hearing officer erred in his determination that claimant had given timely notice, that claimant had proven causation and that carrier had not timely controverted compensability. Carrier requests that we "vacate and reform" the hearing officer's decision or remand that decision. Respondent, claimant, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Initially we note that the CCH was held on October 12, 1994, the hearing officer recites the record was left open until October 17, 1994, and the hearing officer signed the decision October 21, 1994. Nonetheless, for some inexplicable reason, the decision and order were not distributed until December 23, 1994, over two months after it had been signed by the hearing officer.

Claimant was employed as a licensed vocational nurse (LVN) by the employer performing staff nursing and doing "home visits." Facts developed through testimony and

medical evidence establish that claimant had been involved in a serious automobile accident in 1984, when her car "was rear-ended by an automobile going 80 miles per hour," another automobile accident in 1989, a slip and fall in September 1990 and another rear-end auto accident in 1991. Nonetheless, claimant had apparently been continuously employed by the employer (or its predecessor company) since June 1988. Claimant testified that on _____, she was engaged in rendering "total patient care" to a 32 to 35 pound "immobile" child (referred to as the patient). Claimant worked a 12 hour shift (7:00 a.m. to 7:00 p.m.) doing "track care", feeding and carrying the patient up and down stairs. Claimant testified that in the late afternoon she was working on bench exercises with the patient when he began to fall and that claimant "grabbed him and pulled him back up." Claimant said initially she felt only tenderness and soreness but her neck and shoulder became "real painful" as the evening progressed. Claimant said that _____ was a Saturday of the (Holiday) weekend, that she was in pain over the weekend but that she did a one hour "home visit" on Sunday, (day after date of injury), and one on Monday, (date). Claimant testified that she sought medical care from (Dr. L) on Tuesday, (date), the next regular work day, and that Dr. L diagnosed bursitis, giving claimant anti-inflammatories and steroids. Claimant testified that she spoke with her office manager, (Ms. BS) on September 7th, gave Ms. BS the doctor's excuse and stated that she thought that she had injured herself working with the patient. According to claimant, Ms. BS said "we need to fill out some paper work" but that claimant said the doctor had diagnosed bursitis and "[i]t's going to go away." Claimant testified that when the pain did not go away she called Dr. L, who apparently was unavailable, and spoke with Dr. L's partner (Dr. S). According to claimant, Dr. S was going to inject the bursae but claimant told him "this pain is not bursitis." Dr. S then sent claimant out for an MRI on September 15th. Claimant said the MRI showed a herniated disk at C6-7, and that she then went to see (Dr. K) who thought that claimant should have surgery. Claimant then sought treatment with (Dr. W) who had treated her for one or more of her prior injuries including the 1984 car accident. Claimant testified that on September 16th, she called the employer and spoke with Ms. BS and reported that she had a herniated disk, would be off work and inquired about long term disability benefits. Claimant testified that on October 4th she again called the employer, spoke with Ms. BS, told Ms. BS and the director of nursing, (Ms. SC), that she wished to file a workers' compensation claim for her herniated disk. Claimant said she was given a form (Employer's First Report of Injury or Illness--TWCC-1) which her husband picked up, and that claimant filled out the form, signed it, dated it (incorrectly) "(date of injury)" and returned it a few days later. It is undisputed that after the form was returned, Ms. BS marked out the "(date of injury)" date, wrote in "10-4-93" and initialled the form. In the section of the form which asks how and why the injury occurred (Block 20) claimant wrote "See attached." None of the forms (more than one copy of the TWCC-1 were offered and admitted into evidence) have an attachment; however, one of carrier's exhibits does contain an undated two page handwritten statement of how the accident occurred and the medical treatment claimant received. That statement makes no reference to any event or treatment after September 20th.

Ms. BS testified and acknowledged that she spoke with claimant on September 7th, but that claimant did not describe or claim a work-related injury on _____. Ms. BS said claimant told her she had bursitis. Ms. BS agrees that she again spoke with claimant on September 16th, that claimant told her that the doctor had told claimant that she had a herniated disk, and that she had talked to claimant about how claimant had been lifting heavy plants at home. Apparently as a result of that conversation Ms. BS prepared a memo, dated September 16th, to the employer, advising claimant would be "off work due to a herniated disk" for several weeks. In the memo Ms. BS discusses payment of claimant's "ins. deduction" (apparently referring to group health and disability coverage) and states "[t]his is not a worker's comp. claim." Ms. BS stated on cross-examination that this statement was her assumption. Ms. BS agreed that claimant called on October 4th, stated she wanted to file a workers' compensation claim for her herniated disk and that Ms. BS referred claimant to Ms. SC. Ms. BS said that claimant did not describe any incident on _____.

Ms. SC testified that she had been made aware of claimant's missing work in mid-September and that claimant would be off work but that claimant specifically told her that it would not be a workers' compensation claim. Ms. SC said claimant mentioned a prior auto accident, moving plants and studying as causes for claimant's problems. Ms. SC states claimant called on October 4th and spoke with Ms. BS, and that claimant wanted to file a workers' compensation claim but that claimant "didn't discuss the specifics at all." The hearing officer specifically asked Ms. SC, after claimant said she wanted to file a claim for a herniated disk, "[d]id you ask her what happened?" Ms. SC responded that claimant ". . . was not being very conversational. I gave her the information she asked for, and that was pretty much it." Ms. SC testified the first time she knew claimant was claiming a _____ injury was when she received the completed TWCC-1 form back on October 7th or 8th. The employer forwarded the TWCC-1 to the carrier. Carrier's TWCC-21 recites it received the first written notice of injury on October 15th. On the TWCC-21, dated October 22nd, carrier refused the claim for the following stated reason:

1. Claimant did not timely report a work related accident to the Insd per Article 8308, Section 5.01(a).

Investigation continues as it appears claimant has a previous injury that could be resulting in her current problems.

There is medical evidence of claimant's prior injuries in the record but those will not be recited here. Dr. L, the first doctor to see claimant after _____, in a brief handwritten note, gives an impression of bursitis. No history is recited. A September 13th note indicates "continuing neck pain" with a referral for an MRI. Dr. K, in a report dated September 20th, recites the history of the 1984 car accident (makes no mention of a _____ event) but states:

Was told by the neurosurgeon that she had no disc at that time. She underwent a myelogram and there was nothing surgical at the time but she was told that she would chronically have problems with her neck and limited her weight lifting to 20 lbs. for the rest of her life.

Dr. K went on to note "moderate distress," and noted an MRI review "suggests a disc herniation on the left side, C7." Dr. K prescribed physical therapy, pain medications and possible hospitalization for myelography. Dr. K's diagnosis was "Post traumatic C sprain, rule out disc herniation left C7." Claimant was also seen by (Dr. O) on referral "by Husband" also on September 20th. Dr. O in the past history recited "'84 MVA - rear-ended @ ≈ 80 mph, cervical traction X 3 mos. φ anomalies found & myelogram." No mention is made of a _____ lifting incident. Dr. O conducted what appears to be a thorough examination, past history, surgeries, life style, allergies, and range of motion (ROM) testing. Dr. O's clinical impression was "C6-7 Radiculopathy," and MRI findings "strongly suspicious of a left lateral disc herniation at C6-7." (Although carrier strongly emphasizes the length of this report, 16 pages, as indicative of its accuracy and comprehensiveness), we note that the report includes substantial duplication in letters to claimant, which were submitted as a portion of the original report.) Dr. O notes that "[t]he patient did not know the nature of the original onset of the problem." Claimant testified that she told all of her doctors about the _____ incident involving the patient.

Claimant was also seen by (Dr. M) who in a report dated August 4, 1994 (eleven months after the injury), noted the _____ incident, recited claimant's past and present complaints, stated that he conducted a physical exam including ROM testing and concluded ". . . [claimant] indeed does have a small left sided C6-7 disc protrusion." Dr. M recommended "a series of epidural steroid injections . . . C6-7 intradiscal steroid injection . . . discontinue the heavy narcotic medication. . . ." Dr. M does not recommend spinal surgery.

The hearing officer made the following determinations which have been specifically contested by carrier.

FINDINGS OF FACT

1. Claimant reported that she was filing a workers' compensation claim for possibly diagnosed herniated disc to [Ms. SC] and [Ms. BS] on October 4, 1993. Such notice was sufficient to put the Employer on notice that Claimant was claiming that she had an injury that was related to her work. October 4, 1993 is the 30th day after _____.
2. On October 22, 1993 carrier filed a TWCC-21 in which it stated it was contesting Claimant's claim for compensation on the following basis: "Claimant did not timely report a work related accident to the INDS

[sic] per Article 8308 section 5.01(9). Investigation continues as it appears Claimant has a previous injury that could be resulting in her current problems." The Carrier's TWCC-21 is insufficient to notify the Claimant that the Carrier was contesting on the basis that it did not believe that an accident occurred in the course and scope of her employment. Carrier did not file another TWCC-21 within 60 days after it first had notice that Claimant claimed a _____ injury.

3. Claimant's symptoms of neck and arm pain beginning _____ were not caused by a prior automobile accidents in 1984, or by a slip and fall in 1993.

CONCLUSIONS OF LAW

4. Because Claimant has shown by a preponderance of the evidence that she suffered an injury to her left shoulder and neck on _____ during the course and scope of her employment with Employer, she has shown she has a compensable injury within the meaning of the Act.
5. Because Claimant has shown by a preponderance of the evidence that she notified a manager of her Employer by October 4, 1993 that she was claiming she had suffered an injury while at work, she has timely notified her Employer within the meaning of the Act, and the Carrier is not excused for liability for benefits for late reporting.
6. Because Claimant has shown by a preponderance of the evidence that the Carrier did not adequately notify the Commission or the Claimant that it was contesting the compensability of the underlined claim within 60 days after the Carrier first received notice, the Carrier has waived its right to contest the compensability of the claim within the meaning of the Act.
7. Because the Carrier has not shown that Claimant's symptoms after _____ were solely caused by a prior accident or injury, it may not avoid liability based on a sole cause defense.

Carrier in its appeal summarizes claimant's prior accidents, medical records, and reviews claimant's, Ms. BS's and Ms. SC's testimony, from its perspective. Carrier first contests that claimant gave timely notice of the injury, conceding that the employer "was aware of the neck problems" but contending that those neck problems "arose from the 1984 auto accident, moving house plants and studying for too long." Carrier emphasizes that Drs. L, K and O made no note of a _____ incident. While it is undisputed that claimant told Ms. BS and Ms. SC she intended to file a workers' compensation claim on October 4th, carrier maintains claimant did not tell the employer "her problems were work related (and) She did not inform them for what ailment she wanted to file the claim

for." The hearing officer might well have found it curious, as evidenced by his questions to Ms. SC, why Ms. BS and Ms. SC did not bother to ask claimant about the nature of the work-related injury for which claimant was filing a claim. In any event, the hearing officer is the sole judge of the weight and credibility to be given to the evidence (Section 410.165(a)). When presented with conflicting testimony and evidence, the hearing officer may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). As the fact finder, the hearing officer must resolve conflicts and inconsistencies in the evidence, weigh the credibility of the witnesses, and make findings of fact. Texas Workers' Compensation Commission appeal No. 92657, decided January 15, 1993. An appellate 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. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Where sufficient evidence supports the findings and they are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We find that the hearing officer could have believed claimant's testimony that she advised Ms. BS and Ms. SC of, initially, the (erroneous) diagnosis of bursitis and subsequently her possible herniated cervical disk caused as a result of attending the patient on _____, the medical reports and testimony of employer's supervisors notwithstanding. Further, the hearing officer could draw reasonable inferences from the events which took place on October 4th. We find there is sufficient evidence to support the hearing officer's determination on this point.

Next carrier contends that "a claimant always has the burden of proof . . . to establish that a work-related accident is the producing cause of the alleged injuries (citations omitted). . . . by a preponderance of the MEDICAL evidence." (Emphasis in the original.) Carrier cites Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992, as authority for this point. We note that Appeal No. 91124 was a repetitive trauma injury case which cited Texas Employers' Insurance Association v. Ramirez, 770 S.W.2d 896, 899 (Tex. App.-Corpus Christi 1989, writ denied); Davis v. Employers Insurance of Wausau, 694 S.W.2d 105, 107 (Tex. Civ. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). The Appeals Panel went on to state:

The Ramirez court, however, noted the general rule in Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 494 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.) that in workers' compensation cases the issues of injury and disability can be established by the lay testimony of the claimant alone, even if contradicted by the unanimous opinion of medical experts. A "narrow exception" requiring expert testimony exists where a claimant asserts that his injury caused or aggravated cancer or a disease, or when an injury to a specific part of the body is alleged to have caused damage to another unrelated part of the body.

Such is not the case here, where claimant relates shoulder and neck pain related to working with the patient. As stated previously, a finding of injury may be based upon the testimony of the claimant alone. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case the hearing officer found the claimant's injury included an injury to her neck and shoulder. There was sufficient evidence to support this finding from the testimony of the claimant as well as the medical reports. Although there was conflicting evidence which might lead to a different conclusion, resolving this conflict is the province of the hearing officer and, following the proper standard of appellate review discussed *supra*, we will not substitute our judgment for the hearing officer. See also Texas Workers' Compensation Commission Appeal No. 941179, decided October 14, 1994. Carrier contends that because the hearing officer failed (allegedly) to make a specific "ruling" that the claimant's neck and shoulder problems were related to the _____ incident "the decision is fatally defective. . . ." We disagree and point out that the hearing officer's Conclusion of Law No. 4, quoted above, was sufficiently specific on this point.

Lastly, carrier argues that its TWCC-21, under the "fair reading rule" is "disputing the claim because the injury is not work-related, then the controversion is sufficient." The October 22nd TWCC-21, quoted *supra*, clearly disputes failure to timely report the injury and that "a previous injury . . . could be resulting in her current problems." A timely controversion on one ground does not mean that carrier can thereafter substitute or add any other grounds it may deem appropriate. We do not deem the "fair reading rule" to mean that timely controversion of lack of notice and a previous injury as the cause of claimant's "current problems" includes the defense that no injury was sustained in the course and scope of employment. Nor do we find merit in carrier's argument that claimant presented "virtually no evidence" on this issue. The TWCC-21 was in evidence and the hearing officer was free to read and interpret it. There is no requirement that claimant must produce separate evidence showing that carrier had not controverted compensability.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge