

APPEAL NO. 980256  
FILED MARCH 20, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 10, 1997, in (City), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were whether the appellant's (claimant herein) compensable injury of \_\_\_\_\_, was a producing cause of her current neck and bilateral shoulder condition and whether the claimant had disability resulting from the injury sustained on \_\_\_\_\_, and if so, for what periods. The hearing officer found that the \_\_\_\_\_, incident at work aggravated the claimant's preexisting condition but that the effects of this aggravation were resolved by December 4, 1994. The hearing officer concluded that the claimant's compensable injury of \_\_\_\_\_, is not a producing cause of the claimant's current neck and bilateral shoulder condition and that the claimant did not have disability from the injury sustained on \_\_\_\_\_. The claimant appeals attacking a number of the hearing officer's fact findings as being contrary to the evidence including specifically challenging his finding that her injury had resolved. The claimant also complains that subpoenas for witnesses she requested were denied. The respondent (self-insured) responds that the hearing officer's findings and conclusions are supported by the evidence and that the claimant did not show good cause for the witness subpoenas she requested.

DECISION

We affirm in part and reverse and render in part.

The hearing officer outlines the evidence in this case in his decision and order. The claimant in her appeal, objects to the hearing officer's rendition of the evidence, but her challenge goes to the weight the hearing officer gave to some of the evidence rather than attacking the accuracy of his description of the evidence. We therefore adopt the hearing officer's rendition of the evidence and will only briefly summarize the evidence in our decision that is germane to our resolution of this appeal. The parties did not dispute that the claimant suffered a compensable injury on \_\_\_\_\_. The claimant described this injury as taking place when a Mr. J, a co-worker, grabbed her on the neck and shoulders and shook her in what she described as an unprovoked attack. Mr. J testified that he placed his hands on the claimant's shoulders and told her to "smile the sun is out." Mr. J testified the claimant stated she had back problems and that he apologized to her. There is evidence from other co-workers that the claimant screamed and became upset after the incident with Mr. J and that one co-worker stood up and stated that "don't you know she has a bad back."

There was a great deal of evidence concerning a motor vehicle accident (MVA) the claimant had in 1991; a carpal tunnel injury she had in (carpal tunnel date of injury); a November 14, 1994, diagnosis of fibromyalgia; and an injury she had on December 4,

1994, at (retail store) that resulted in litigation. There was medical evidence stating the claimant's neck and shoulder problems were due to the \_\_\_\_\_, injury. It was undisputed that the claimant, who had worked for the self-insured for over 20 years, did not work after December 4, 1994, and has retired from the self-insured's employment. There was conflicting evidence as to whether or not the claimant worked between \_\_\_\_\_, and December 5, 1994.

The hearing officer's Finding of Facts and Conclusions of Law include the following:

### **FINDINGS OF FACT**

2. In 1991 the Claimant was involved in a [MVA] which resulted in significant, chronic injuries to her neck and shoulders.
3. Claimant was still receiving treatment which included physical therapy, TENS unit, and anti-inflammatory medication in November 1994.
4. On November 14, 1994, Claimant was examined by [Dr. S], a Rheumatologist, who noted Claimant was complaining of severe neck and posterior shoulder pain along with arm pain bilaterally since September 1991 when she was rear ended in a [MVA].
5. On \_\_\_\_\_, a co-worker placed his hands on Claimant [sic] shoulders and aggravating [sic] her pre-existing condition, which resulted in muscle spasms. The effects of that aggravation were resolved by December 4, 1994.
6. On December 4, 1994, Claimant was injured in a non-work related accident at (retail store) which resulted in injuries to her head, neck, shoulders, and ribs.
7. Claimant has not worked due to her injuries from December 5, 1994 until the present.
8. Claimant also had a work related injury in the form of carpal tunnel syndrome to both arms on (carpal tunnel date of injury), for which she received a 13% impairment rating [IR].
9. That [IR] was certified on February 6, 1997 by [Dr. W], Commission [Texas Workers' Compensation Commission] selected designated doctor, included a 5% rating from Table

29, IIB for 5% and a loss of motion in the cervical spine for 8%.

10. Claimant's inability to obtain and retain employment at her pre-injury wage from December 5, 1994 until the present is not due to the compensable injury of \_\_\_\_\_.

### **CONCLUSIONS OF LAW**

3. The Claimant's compensable injury of \_\_\_\_\_ is not a producing cause of the Claimant's current neck and bilateral shoulder condition.
4. The Claimant did not have disability resulting from the injury sustained on \_\_\_\_\_.

The hearing officer's Decision and Order reads as follows:

### **DECISION**

The Claimant's compensable injury of \_\_\_\_\_ is not a producing cause of the Claimant's current neck and bilateral shoulder condition. The Claimant did not have disability resulting from the injury sustained on \_\_\_\_\_.

### **ORDER**

The Carrier [self-insured] is not liable for benefits and it is so ORDERED.

The claimant argues in her appeal that the evidence was contrary to the hearing officer's finding that her \_\_\_\_\_, injury had resolved. We have an even more fundamental problem with this determination--the jurisdiction of the hearing officer. We note that questions of jurisdiction may not only be first raised on appeal, but are always at issue whether raised by the parties or not. Texas Workers' Compensation Appeal No. 971871, decided October 29, 1997. In the present case we find that the hearing officer exceeded his jurisdiction in a similar manner as the hearing officer did in Appeal No. 971871. In Appeal No. 971871 we stated in part as follows:

The order of the hearing officer states that the carrier is not liable for additional workers' compensation benefits. It appears that, based upon the finding of the hearing officer that the claimant does not continue to experience the effects of his compensable injury, she is ruling that the claimant is entitled to no further workers' compensation benefits, including medical benefits. Whether or not treatment is reasonable and necessary for the claimant's compensable injury in the past or in the future is not

within the jurisdiction of the hearing officer. The determination of what "health care is reasonably required by the nature of the injury" is a matter for the Medical Review Division of the [Commission]. Section 413.031(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.305 (Rule 133.305). The determination of "benefit disputes" are adjudicated by the Commission's Hearing[s] Division. Rule 140.1. A "benefit dispute" is one "regarding compensability or eligibility for, or the amount of, income or death benefits." *Id.*

We also note that the hearing officer does not have jurisdiction over prospective or unaccrued income benefits. Thus, we have held that the hearing officer only has jurisdiction to determine disability up to the date of the CCH. Texas Workers' Compensation Commission Appeal No. 931049, decided December 31, 1993. Thus, the hearing officer's order exceeded her jurisdiction in determining that the claimant has no future disability.

We also resolve the disability issue in the present case on the same basis as we did in Appeal No. 971871. As we stated in Appeal No. 971871, the question of disability is one fact to be determined by the hearing officer as the trier of fact. We will only overturn such a factual determination if it is contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We do not find that to be the case in the present case. The claimant certainly presented evidence to support a finding of disability, but the hearing officer was not bound to accept that evidence. As the trier of fact he may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). It was also his province to resolve the conflicting evidence as to whether or not the claimant worked between \_\_\_\_\_, and December 5, 1994.

We affirm the hearing officer's resolution of the disability issue. We reverse the decision and order of the hearing officer in part and affirm in part. We specifically strike the following sentence from Finding of Fact No. 5, "[t]he effects of the aggravation were resolved by December 4, 1994."

We reverse the order of the hearing officer and render a new order stating as follows:

**ORDER**

The self-insured is liable for all medical and income benefits pursuant to the 1989 Act, the Rules of the Commission and this decision.

In light of our decision in this case, any error by the hearing officer denying the claimant's requests for subpoenas would be harmless as none of the subpoenas sought were for witnesses to testify regarding the issue of disability.

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Alan C. Ernst  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge