

APPEAL NO. 990132

A contested case hearing (CCH) was originally held on July 21, 1998, under the provisions of the Texas Workers' Compensation Act, TEX. LAB CODE ANN. §401.001 *et seq.* (1989 Act). The appellant (carrier) and the respondent (claimant) stipulated that on \_\_\_\_\_, the claimant sustained a compensable injury to her right wrist and elbow. The hearing officer determined that the claimant had disability beginning on November 15, 1997, and continuing through the date of the hearing. That determination was not appealed and became final under the provisions of Section 410.169. The hearing officer also made the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

2. Claimant did not prove by a preponderance of the medical evidence that she suffered an injury to the right shoulder in the course and scope of her employment on \_\_\_\_\_.
3. Claimant's complaints regarding the shoulder are of muscle spasm related to change in the use of the arm and not of injury to the arm.

**CONCLUSIONS OF LAW**

3. Claimant did not injure her right shoulder on \_\_\_\_\_.
4. Claimant's injury does not extend to an injury of the right shoulder.

The claimant appealed those determinations, urging that the evidence established that she suffered an injury to her right shoulder and upper back in the fall on \_\_\_\_\_, and in the alternative, that in the natural course of events her compensable injury extended to her right shoulder and upper back. In Texas Workers' Compensation Commission Appeal No. 982046, decided October 5, 1998, the Appeals Panel held that Finding of Fact No. 2 is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust; noted that the testimony of the claimant alone may be sufficient to establish that an injury occurred in the course and scope of employment and that the testimony of the claimant on whether an injury was sustained is not conclusive and only raises an issue for the hearing officer to decide; stated that an additional finding of fact is necessary to support Conclusion of Law No 3; reversed Conclusion of Law No 3; and remanded for the hearing officer to consider the testimony of the claimant and the medical evidence in making the additional finding of fact. The Appeals Panel also held that Finding of Fact No. 3 is not sufficient on which to base Conclusion of Law No. 4, reversed Conclusion of Law No. 4, and remanded for the hearing officer to make findings of fact on which a conclusion of law on extent of injury may be based and to make appropriate conclusions of law to resolve the issue of whether the compensable injury included injury to the right shoulder and upper

back. The hearing officer and the parties met informally on December 18, 1998; another CCH was not held; the hearing officer considered the record developed at the CCH held on July 21, 1998; and he rendered another decision on December 31, 1998, in which he stated that the Appeals Panel remanded the case to decide the following:

1. In addition to the compensable injury to her right wrist, did Claimant sustain an injury to her right shoulder and upper back as a result of her compensable injury of \_\_\_\_\_.

He made the following findings of fact and conclusions of law:

### **FINDINGS OF FACT**

2. Claimant told her doctor about an injury to her spine and right shoulder on Day after, the day after her injury.
3. Claimant has complained of pain in the shoulder for an extended period of time and has documented muscle spasm in the trapezius muscles.
4. Claimant has changed the way she uses her arm as a result of the compensable injury to her wrist and elbow.
5. Claimant suffered an injury to her right shoulder and upper back on \_\_\_\_\_.
6. Claimant has developed muscle spasm and pain in her right trapezius as a result of the compensable injury.

### **CONCLUSIONS OF LAW**

3. Claimant suffered an injury to her right shoulder and upper back on \_\_\_\_\_ in the course and scope of her employment.
4. Claimant's injury extends to an injury of the right shoulder and upper back.

The carrier appealed, contended that the hearing officer erred in framing the issue and in not including Finding of Fact No 3 made at the first hearing in the findings of fact that he made on remand, contended that the determinations made on remand are against the great weight and preponderance of the evidence, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor. The claimant responded; urged that the evidence is sufficient to support the determination that she suffered an injury to her right shoulder and upper back at the time of her fall on \_\_\_\_\_; and requested that the decision of the hearing officer be affirmed.

## DECISION

We affirm.

We first address the contention that the hearing officer erred in stating the issue on remand. In the Decision and Order issued after the remand, the hearing officer stated the issue to be exactly the way he stated the issue in his Decision and Order issued after the CCH held on July 21, 1998. In Appeal No. 982046, *supra*, the Appeals Panel noted that Findings of Fact Nos. 2 and 3 were not sufficient to support Conclusions of Law Nos. 3 and 4; reversed those conclusions of law; and remanded for the hearing officer to make findings of fact on which conclusions of law that resolved the disputed issue concerning injury in the course and scope of employment could be made and to make appropriate conclusions of law to resolve that disputed issue. Resolution of that disputed issue was complicated by the claimant asserting alternative theories for injury to her right shoulder and upper back to be included in the compensable injury she sustained on \_\_\_\_\_. One theory is that her right shoulder and upper back were injured when she fell and the other theory is that injury to her right shoulder and upper back resulted from the altered way in which she used her right arm because of the compensable injury to her right wrist and elbow. The workers' compensation dispute resolution process is not governed by strict rules of pleading and procedure, and a claimant may plead alternative theories provided they are not contradictory or mutually exclusive. Texas Workers' Compensation Commission Appeal No. 951848, decided December 18, 1995. The way the disputed issue is stated in both of the Decisions and Orders issued by the hearing officer is sufficient to permit the alternative theories for including injury to the right shoulder and upper back in the compensable injury. The hearing officer did not commit error in not changing the disputed issue on remand.

The carrier also contends that the hearing officer erred by not including Finding of Fact No. 2 in the Decision and Order issued after the CCH held on July 21, 1998, in the Decision and Order issued on remand. In Appeal No. 982046, *supra*, the Appeals Panel stated that Finding of Fact No. 2 was not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, but that it was not sufficient by itself to support Conclusion of Law No. 3. It cited Appeals Panel decisions stating that the testimony of the claimant alone may be sufficient to establish that an injury occurred in the course and scope of employment and that the testimony of the claimant was not conclusive but only raised as issue for the hearing officer to resolve, reversed Conclusion of Law No. 3, and remanded for the hearing officer to consider the testimony of the claimant and the medical evidence to make an additional finding of fact and a conclusion of law to determine whether the claimant injured her right shoulder and upper back when she fell on \_\_\_\_\_. While it would have been preferable for the hearing officer to have included Finding of Fact No. 3 in the Decision and Order rendered after the July 21, 1998, CCH; his failure to do so was not reversible error. That Decision and Order indicates that the hearing officer improperly required that the claimant prove by a preponderance of the medical evidence that she injured her right shoulder and upper back when she fell on \_\_\_\_\_. The Decision and Order dated December 31, 1998, indicates that the hearing officer considered the testimony of the claimant and the medical evidence and found that she injured her right

shoulder and upper back when she fell on \_\_\_\_\_. The carrier urged that the hearing officer erred in making Findings of Fact Nos. 2 through 6 and Conclusions of Law Nos. 3 and 4. That different factual determinations could have been made based upon the same evidence is not a sufficient basis to overturn factual determinations of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. Only were we to conclude, which we do not in this case, that the appealed determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Alan C. Ernst  
Appeals Judge