

APPEAL NO. 990396

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 January 29, 1999. She (hearing officer) determined that appellant (claimant) did not sustain an occupational disease injury "on" _____, and that she did not have disability. Claimant appeals, contending that she did sustain an occupational disease neck injury. Respondent (carrier) responds that claimant had only an ordinary disease of life and that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We reverse and render in part and remand in part.

Claimant contends the hearing officer erred in determining that she did not sustain a compensable injury. She contends that she sustained a work related neck injury. Claimant testified that on _____, she was working making seals at a table when she felt a terrible pain in her neck.¹ Claimant described her work and said she paints cement onto strips of material and then is required to "jerk" each strip of material off of the table after it has dried. Claimant said that after she felt the pain and cried out, she went to the doctor that day and was placed on light-duty status. When claimant was questioned about her injury at the CCH, the ombudsman asked "what date did the injury occur on?" The ombudsman appeared to ask claimant about an injury as though a specific incident occurred on _____. Claimant said she was not aware of any cervical problems until the incident on _____. Claimant also testified, however, that she had started having neck pains about two weeks before the _____, pain incident. Claimant said her employer did not have any light duty that she could perform and that she has not worked since July 30, 1998. Claimant said that Dr. K told her she injured her neck by working with her neck in a flexed position.

In a July 6, 1998, occupational health data sheet signed by a physician's assistant, it states under "diagnosis," "cervical strain and cervical disc degeneration." In an October 1998, letter, Dr. K said claimant is "off work due to an aggravation of a pre-existing condition related to the job activity over the years of working with her head down, repetitive neck movements and so on." In a November 3, 1998, letter, Dr. G stated, "it is my medical opinion that [claimant] at most sustained a cervical strain injury in this accident that occurred on _____." Dr. G also stated that claimant had a preexisting ordinary disease of life, osteophytes. In a January 12, 1999, letter, Dr. K stated that claimant's MRI showed osteophytosis. He also said:

¹There was also evidence that this took place on (alleged date of injury). For the purposes of this appeal, we will assume the pain claimant described happened on _____.

She does have cervical spondylosis. This is probably long-standing, but has precipitation of existing condition by the job activity on _____. Her cervical condition is also related to chronic repetitive neck movements.

She has done the job for [her employer] at least for the last twelve years working on the line laying strips of material, looking down and up, and moving across, looking back with repetitive neck movements.

At the CCH, the following transpired:

HEARING OFFICER: Are you claiming that – whether you had a cervical strain or not. [sic]

[CLAIMANT]: I'm claiming that my job affected it. Is that answering your question?

HEARING OFFICER: Do you know what a strain of your neck is?

[CLAIMANT]: I'm really, I'm so confused about the terms they give.

* * *

During closing arguments, the following occurred:

HEARING OFFICER: Is carrier asserting that we only have one condition or that we have two conditions, one of which was a cervical strain with degenerative disc disease

[CARRIER ATTORNEY]: [T]here is no medical evidence of an injury-producing event that caused cervical strain. . . .

HEARING OFFICER: So, you're saying . . . that there never was a strain?

[CARRIER ATTORNEY]: I don't think that the medical evidence supports anything other than [degenerative disc disease]. Of course, [claimant's] testimony is contrary to that

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that the employee sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as damage or harm to the physical structure of the body and a disease naturally resulting from the damage or harm. Section 401.011(26). The definition of "injury" includes occupational diseases. An occupational disease is defined as "a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body," but 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." Section 401.011(34).

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence, Section 410.165(a), including the medical evidence. Where there is conflict in the evidence, the hearing officer resolves the conflicts and determines what facts have been established. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In this case, the hearing officer determined that claimant did not sustain an occupational disease neck injury. The hearing officer also determined that, "claimant sustained a cervical strain on _____, in the course and scope of her employment." The ombudsman in this case stated that claimant was not claiming a specific injury occurred on _____. However, it is clear that claimant was asserting that she had a compensable neck injury and that she did not understand the difference between an occupational disease injury and a specific injury. From the testimony and argument, we conclude that the issue of whether claimant sustained a compensable neck injury on _____, was tried by consent. In this case, given the medical evidence, testimony, and argument from carrier, it cannot be said that carrier did not consider whether a specific injury occurred on _____. Further, given the state of the record and the hearing officer's determination that claimant did sustain a cervical strain at work, it would be a senseless misuse of Texas Workers' Compensation Commission (Commission) resources to force claimant to file a another claim and re-litigate an issue that has been essentially tried by consent. We note that carrier did not appeal the determination that claimant sustained a cervical strain in the course and scope of employment in this case. Therefore, under the facts of this case, we render a determination that claimant sustained a compensable cervical strain injury on _____. Texas Workers' Compensation Commission Appeal No. 93094, decided March 19, 1993. We reverse the disability issue and remand that issue to the hearing officer for reconsideration consistent with this decision.

We reverse the hearing officer's determination and claimant did not sustain a compensable injury and render a determination that claimant did sustain a compensable injury. We reverse the issue of disability and remand that issue to the hearing officer for reconsideration consistent with this decision.

Judy Stephens
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief, Appeals Judge

Robert W. Potts
Appeals Judge