APPEAL NO. 990487

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 1, 1999. He determined that: (1) the appellant (claimant) did not sustain an injury to her neck and shoulders on _____;[1] (2) claimant's neck and shoulder problems are not the natural and direct result of her bilateral carpal tunnel syndrome (CTS); (3) the first certification of maximum medical improvement (MMI) and impairment rating (IR) by Dr. P (the "first certification") became final because it was not disputed within 90 days; (4) respondent (carrier) waived the right to contest the compensability of claimant's neck and shoulder problems; and (5) claimant reached MMI on May 3, 1993, with an IR of four percent. Claimant appeals, contending that her neck and shoulder problems are part of her injury and that she did not receive notice of the first certification in August 1993, so she could not have disputed it within 90 days. Carrier responds that the Appeals Panel should affirm the hearing officer's decision and order. Carrier did not appeal the determination that it waived the right to contest the compensability of claimant's neck and shoulder problems.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that her neck and shoulder problems were not the direct and natural result of her CTS injury. Under the 1989 Act, the claimant has the burden of proving that she sustained a compensable injury and the extent of the injury. Texas Workers' Compensation Commission Appeal No. 950537, decided May 24, 1995. The 1989 Act defines injury, in pertinent part, as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Existence and extent of injury are fact questions for the hearing officer. Texas Workers' Compensation Commission Appeal No. 951959, decided January 3, 1996. The hearing officer is the sole judge of the weight and credibility to be given to the evidence and the relevance and materiality to assign to the evidence. Section 410.165(a). As the fact finder, the hearing officer is charged with the responsibility to resolve the conflicts in the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer may believe all, none, or any part of any witness's testimony and may properly decide what weight he should assign to the evidence before him. Campos, *supra*. We will not substitute our judgment for the hearing officer's where his determinations are supported by sufficient evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Claimant testified that she sustained a compensable bilateral CTS injury with a date of injury of_____. Claimant said she saw a doctor in May 1992 because of pain in her

[1]The exact wording of this issue was "[i]s the claimant's myofascial pain in the neck and both shoulders a result of the compensable injury that she sustained on May 13, 1992?"

neck, wrists, and shoulders. She testified that Dr. P told her that she had CTS and that the neck and shoulder pain was part of the CTS. Claimant said she had surgery on her hands in 1992 and that her neck and shoulder pain increased after that time. Claimant said she has had trigger point injections, therapy, and exercise to treat her pain.

In this case, the hearing officer weighed the evidence and determined that claimant's injury did not extend to her neck and shoulders. This extent-of-injury issue involved a fact question for the hearing officer, which he resolved. Appeal No. 951959, *supra.* There was conflicting medical evidence regarding the relation of claimant's "myofascial pain in the neck and both shoulders" to the _____, injury. In a January 23, 1998, medical record, Dr. P stated that claimant's injury led to claimant's myofascial trigger points in the neck and shoulders. However, in a December 29, 1997, peer review report, Dr. S stated that claimant's cervical and shoulder complaints are not related to the _____, injury. The hearing officer could decide to believe all, none, or any part of the evidence and decided what weight to give to the evidence. Campos, *supra*. After reviewing the evidence, as set forth above, we conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be wrong or manifestly unjust. Cain, *supra.* We note that the hearing officer determined that the "myofascial pain in claimant's neck and shoulders is deemed a result of" claimant's injury as a matter of law due to carrier waiver.

Claimant contends the hearing officer erred in determining that the first certification became final under the 90-day rule. The record reflects that on August 4, 1993, Dr. P certified that claimant reached MMI on May 3, 1993, with a four percent IR. Claimant testified that she did not receive the notice of the first certification from carrier that was mailed on August 10, 1993. Claimant also said she did not receive notice in 1993 from Dr. P regarding the first certification. When asked why, claimant said that one of Dr. P's employees told her that one of Dr. P's former employees had not handled paperwork properly in the past. Claimant said she found out about the first certification in 1997 when she made a request for her medical records. Claimant said she requested her medical records because she had been refused medical treatment by carrier. An August 10, 1993, letter from carrier to claimant states that Dr. P certified a four percent IR and that this IR would become final if not disputed within 90 days. An August 27, 1997, Dispute Resolution Information System note shows that claimant called the Texas Workers' Compensation Commission regarding a dispute of the first certification. Claimant said she had been unaware of the requirements regarding the 90-day rule.

The hearing officer determined that: (1) claimant received notice of the first certification by August 15, 1993; and (2) the first certification became final pursuant to Rule 130.5(e), because claimant did not dispute until August 27, 1997.

Rule 130.5(e) provides that the first IR assigned to an injured worker will become final if not disputed within 90 days after the doctor assigned it. The 90-day period starts to run from the date the parties become aware of the rating. Texas Workers' Compensation Commission Appeal No. 92693, decided February 8, 1993. The fact that a party was not

aware of the 90-day rule does not excuse the failure to comply with the rule. Texas Workers' Compensation Commission Appeal No. 94269, decided April 20, 1994.

The hearing officer heard the testimony from claimant and reviewed the evidence regarding when claimant received notice of the first certification. He was the sole judge of the credibility of the evidence and he determined that claimant received notice of the first certification on or before August 15, 1993. Because claimant did not dispute the first certification within 90 days of that date, the hearing officer did not err in determining that the first certification became final. We have reviewed the record and we conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

Claimant complained in her appeal that she was not permitted to speak in detail about the issues. However, our review of the record does not indicate that claimant was not permitted to state her position or prevented from offering evidence. We perceive no error.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge