

APPEAL NO. 990743

On March 15, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issue at the CCH was whether appellant/cross-respondent's (claimant) _____, injury included the cervical and thoracic spine, right shoulder, and right knee. The claimant requests reversal of the hearing officer's decision that the _____, injury does not include the cervical and thoracic spine, right shoulder, and right knee, and that the claimant's injury of _____, was limited to her left ankle. The respondent/cross-appellant (carrier) requests that we reform the hearing officer's decision to reflect that the injury was to the claimant's right ankle.

DECISION

Affirmed as reformed herein.

According to a hospital emergency room (ER) report, claimant was seen at the ER on March 28, 1998, for complaints of pain in her head, neck, and shoulders. A medical record dated March 31, 1998, reflects that claimant had tender muscles in her cervical and thoracic areas and that she was diagnosed as having a musculoskeletal strain. Other medical records reflect that on April 1, 1998, claimant complained of right shoulder pain and that on April 2, 1998, she wanted to be referred to a neurologist because of shoulder and neck pain. Cervical x-rays were done on April 1, 1998, and the radiologist reported that they showed C5-6 disc space narrowing with degenerative spurring. Dr. R wrote on June 4, 1998, that claimant had been experiencing problems with migraine headaches and that she had gone to the ER twice for that problem.

Claimant testified that on _____, while working as a telephone sales representative for the employer, the heel of her shoe went through the floor when she stood up at her desk and that when she turned, she fell to the floor hitting the entire left side of her body. Claimant provided a witness statement from a coworker. Claimant testified that, initially, her main complaints were about her right ankle. She completed an injury report on _____, noting that the part of her body that was injured on that day was her right ankle. Carrier represented that it had accepted an injury to claimant's right ankle and in a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) wrote that it accepted a right ankle injury only.

Claimant was taken to the ER on _____, where x-rays of her right ankle were taken and were reported to be normal. Claimant was diagnosed as having a right ankle sprain, a splint was put on her right ankle, and she was prescribed crutches and pain medications and was taken off work until June 29, 1998. Claimant was released to return to work with restrictions on June 29th and claimant said that on that day she attempted to return to work on crutches and that is when she began feeling shoulder pain. She said that on June 29th she reported her shoulder pain to an injury counselor and to a person in the personnel department.

Dr. S saw claimant on June 30, 1998, and he diagnosed her as having a sprained ankle, a leg contusion, and a knee contusion, and noted that claimant had sprained her right ankle when she fell at work on _____ and that she continued to have pain and swelling in her right ankle. Dr. M saw claimant on July 2, 1998, and he reported that claimant was at that time complaining of pain in her leg, thoracic spine, and right shoulder and that claimant told him that when she fell at work on _____, she hurt her right ankle, neck, shoulders, and arms. Dr. M ordered x-rays of claimant's cervical and thoracic spine, right leg, and right shoulder. A radiologist reported that x-rays taken on July 2nd showed degenerative changes in the cervical spine, mild scoliosis of the thoracic spine, and normal examinations of the right tibia, right fibula, right knee, right foot, right ankle, and right shoulder. The radiologist also reported that an MRI of claimant's right ankle done on July 14th was normal. In an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated July 13, 1998, claimant claimed that she injured her right ankle, right shoulder, and neck at work on _____.

A radiologist reported that claimant had a normal MRI examination of her right shoulder on August 4, 1998, and that an MRI of claimant's cervical spine done the same day showed generalized bulging of the annulus fibrosis at the C5-6 level and a three millimeter protrusion of the nucleus pulposus at the same level, with displacement of the left side of the spinal cord. Dr. MA reported that on August 12, 1998, claimant had a normal EMG and nerve conduction study of her right upper extremity. Dr. B noted on August 13, 1998, that claimant's cervical and right shoulder symptoms did not begin until one to two weeks after her injury of _____. On November 11, 1998, claimant underwent cervical surgery for a herniated cervical disc at the C5-6 level. Claimant indicated that the surgery was paid for under her own insurance. Claimant testified that approximately eight years earlier she had been diagnosed as having a herniated cervical disc at the same level as was operated on on November 11, 1998; that she had been told at that time that it was possible she may need surgery in the future; and that she had chosen not to have surgery prior to her November 11th surgery.

Claimant also testified that four to six months prior to her injury of _____, she fell down stairs at work and injured "that same ankle," which we take to mean her right ankle as that was the ankle injured on _____. The hearing officer's statement in her decision that the fall down the stairs occurred at claimant's apartment a few months prior to the injury of _____ and resulted in an injury to her left ankle, while not supported by the evidence, does not amount to reversible error. The claimant also testified that a rubber ring fell from a security camera in a store and hit the right side of her body but that she had not sought any medical treatment with regard to the accident at the store. A document indicates that that incident occurred in May 1998.

Dr. M, who has been treating claimant, wrote on November 30, 1998, that when he saw claimant on July 2, 1998, she was complaining, among other things, of pain in her neck involving both shoulders, and of pain radiating down her right upper extremity. Dr. M stated

that the claimant had preexisting degenerative changes in the vertebrae and subsequently developed a herniated disc as a result of her injury of _____, which precipitated and aggravated her symptoms due to impingement on the spinal cord; that a fall on the left side can produce symptoms on the right side of the body; and that the twisting motion that claimant had on her right ankle could have caused an opposing force between claimant's trunk and neck causing injury to the vertebrae and leading to the herniated nucleus pulposus.

The hearing officer found that claimant did not injure her cervical spine, thoracic spine, right knee, or right shoulder on _____. Claimant had the burden to prove the extent of her compensable injury. Texas Workers' Compensation Commission Appeal No. 960733, decided May 24, 1996. The issue on the extent of claimant's compensable injury presented a fact question for the hearing officer to determine. Claimant's contention regarding placing the burden of proof on carrier to establish that a preexisting cervical condition is the sole cause of her "disability and need for treatment" assumes that she sustained a work-related cervical injury on _____; however, whether she sustained a cervical, thoracic, shoulder, and knee injury on that date was the issue before the hearing officer. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision that claimant's injury of _____, does not include her cervical and thoracic spine, right shoulder, and right knee is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Both parties note on appeal that the hearing officer incorrectly states in her Statement of the Evidence that claimant injured her left ankle at work on _____, and incorrectly finds in Finding of Fact No. 5 that claimant's injury of _____, was limited to her left ankle. It is undisputed that claimant injured her right ankle at work on _____, and there is no evidence that she sustained any injury to her left ankle. We reform the hearing officer's Statement of the Evidence and her Finding of Fact No. 5 to change the words "left ankle" to "right ankle."

As reformed herein, the hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge