

APPEAL NO. 991510

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 June 17, 1999. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury, in the form of an occupational disease, on _____, and whether the claimant had disability. The hearing officer determined that the claimant did not sustain a compensable injury in the form of an occupational disease on _____, and did not have disability. The claimant appeals this determination on sufficiency of the evidence grounds, asserts evidence was improperly excluded, and requests additional evidence be considered. The respondent (carrier) responds that the hearing officer's decision is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust and, therefore, should be affirmed.

DECISION

Affirmed.

The claimant testified that she operated a computerized slitting machine which cut rolls of plastic. She would set up the machine, punch in the size, width and speed, and set the arms to run the size of the rolled product. Her job duties required her to cut off the bad plastic with a utility knife ("slabbing"), lift plastic off the floor, and pack rolls of plastic. The claimant testified that she worked a 12-hour revolving shift, was allowed a 30-minute lunch break, and two 15-minute breaks, but could not take her breaks because the machine was running. According to the claimant, the motions from her job caused an injury to her neck, resulting in headaches which began in mid-July 1996. The claimant testified that she has been unable to work as a result of her injury since _____.

The claimant sought medical treatment on August 5, 1996, with her family physician, Dr. L. Dr. L's records indicate that the claimant had a history of severe pain in the posterior area of her neck that had started 4-5 days prior and had radiated to the occipital and parietal areas of the head. Dr. L diagnosed a neck muscle strain/spasm and treated her with anti-inflammatory medication, muscle relaxants and physiotherapy. The claimant's neck spasm symptoms improved, but the headache component became severe, so Dr. L referred the claimant to various neurologists and pain specialists. The claimant had a CT scan of the head and an MRI of the brain which were normal. The claimant was referred to Dr. M, a headache specialist, who admitted the claimant to the hospital on several occasions: September 3, 1996; September 4, 1996; September 27, 1996; October 6, 1996; March 14, 1996; and March 28, 1996. On November 20, 1996, Dr. M states "[t]here has been a great deal of stress at work and that might have triggered a series of headaches which have not gone away yet. I feel that she is quite disabled at the present time." Dr. M's final diagnosis was "status migrainosis." The claimant has received various other diagnoses which include occipital neuralgia, cervical facet syndrome, myofascial pain, and possible suprascapular nerve entrapment syndrome. The claimant's treatment has

consisted of occipital nerve blocks, facet-medial branch blocks, and a spinal cord stimulator implanted in her neck.

The Texas Workers' Compensation Commission (Commission) appointed Dr. H to examine the claimant for purposes of diagnosis and opinion as to causal relationship to work. Dr. H assessed "probable transformation migraine headache pain, constant syndrome, secondary to occipital nerve neuritis versus benign headache disorder such as a severe form of recurrent muscle tension headaches secondary to nerve irritation and muscle spasm, and right occipital nerve neuritis." The Commission informed Dr. H that the claimant was claiming a repetitive trauma injury and asked Dr. H, if in reasonable medical probability, the claimant's suprascapular nerve entrapment syndrome was a result of the _____, injury. Dr. H responded:

Based on my exam today, I feel the patient does not manifest signs and symptoms of a subscapular nerve entrapment syndrome. I do not have the results of the EMG or NCV but she does not demonstrate any physical findings, nor does she have a dead arm sensation with overhead activities which is found in many athletes using overhead activities, such as swimmers and volleyball players. She has no obvious weakness of external rotation of the right shoulder compared to the left. I feel most of her problems stem from the occipital nerve region and diagnostic and therapeutic tests should be directed to that area.

Dr. L, in a report dated April 29, 1999, states:

Based on the temporary relation of the repetitive trauma injury with the onset of the patient's symptoms, plus the results of the extensive work up of all specialists involved, I believe that in reasonable medical probability [the claimant] is suffering these problems as a result of [sic] the _____ injury.

The carrier presented the testimony of Mr. F, Mr. BU, and Mr. BA to support its position that the claimant did not sustain physical traumatic activities on the job. Mr. F, the metalizing department manager, who was familiar with the physical demands of the claimant's position, testified that the position required minimal repetitiveness; that the maximum allowed to be lifted at one time was 50 pounds; that the claimant complained of headaches between April and August 1996; that one and one-half people were assigned to each machine; that the claimant was given two short breaks and a lunch break; and that the first time he found out that the claimant was alleging a workers' compensation injury was in March 1997. Mr. BU, the production manager, testified that the claimant's job did not require repetitive movement; that the claimant's duties of "slabbing," lifting plastic off the floor, and packing rolls with the assistance of an overhead lift operated from a key pad remote control, comprised less than four hours in a 12-hour shift; and that the rest of the shift was spent monitoring the machine. Mr. BA testified that he was the claimant's supervisor and that in a 12-hour shift, the claimant's job required "slabbing" up to 40 times, picking up plastic off the floor 25 times, and packing rolls 25 times.

An occupational disease is "a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. . . . The term 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). A repetitive trauma injury is "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Section 401.011(36). The Appeals Panel has stated that to recover for such an injury one must prove not only that repetitious, traumatic activities occurred on the job but also that a causal link existed between such activities and the incapacity, that is, "the disease must be inherent in that type of employment as compared with employment generally." Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992. The Appeals Panel has further stated that a claim for repetitive motion injury should be supported by evidence of the extent and nature of the work performed and some description of the repetitive activities that would affect the employee in a way not common to the general population. See, e.g., Texas Workers' Compensation Commission Appeal No. 950202, decided March 23, 1995.

The claimant had the burden to prove that she sustained a compensable repetitive trauma injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether she did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer, as fact finder, may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer was the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). Based on the evidence presented, the hearing officer concluded that the claimant failed to establish by a preponderance of the medical evidence that her injury stems from work-related repetitive trauma. It is up to the fact finder to determine what weight to give to the medical evidence. As the hearing officer noted, the diagnosis of headaches was a common theme among the various neurologists and pain specialists. Only the medical opinion of Dr. L causally relates the claimant's condition with an _____, injury. None of the medical opinions describe repetitive job duties, or relate repetitive job duties to her condition. It was the hearing officer's duty to determine what weight to give the medical evidence and resolve differences of opinion. When reviewing a hearing officer's decision, we will reverse such decision only if it is so 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); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). We find there was sufficient evidence to support the determination of the hearing officer that the claimant did not sustain a compensable injury in the form of an occupational disease on _____.

The claimant appealed the hearing officer's finding of no disability. Disability is defined as "the inability because of a compensable injury to obtain and retain employment

at wages equivalent to the preinjury wage." Section 401.011(16). Since we find the evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain a compensable injury, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. Consequently, the document the claimant has attached to her appeal, but is not in evidence, will not be considered on appeal. See Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. We observe that the document attached to the appeal which was not offered at the hearing does not meet the criteria for newly discovered evidence. Appeal No. 92400. To constitute "newly discovered evidence," the evidence would need to have come to appellant's knowledge since the hearing. It would also have to be that it was not due to lack of diligence that it came no sooner; that it is not cumulative; and that it is so material it would probably produce a different result upon a new hearing. See Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

The claimant argues that the hearing officer erred in admitting three of the carrier's documents. The record reflects that the claimant objected on the basis of untimely exchange, to three of the carrier's exhibits: no. 12, a termination/exit interview form; no. 13, a notice of absence report; and no. 14, a summary of medical reports. The carrier responded that it had exchanged Exhibit Nos. 12, 13 and 14, on June 11, 1999, as soon as they became available asserting that the claimant's response to discovery prompted additional investigation. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1)(E) Rule 142.13(c)(1)(E) provides that no later than 15 days after the benefit review conference, parties shall exchange with one another all documents which a party intends to offer into evidence at the hearing. Rule 142.13(c)(2) and (3) provide that thereafter, parties shall exchange additional documentary evidence as it becomes available and that parties shall bring all documentary evidence not previously exchanged to the hearing and the hearing officer shall determine whether good cause exists to introduce such evidence at the hearing. The hearing officer stated this requirement on the record, however, she failed to make a finding of good cause in admitting the documents.

To obtain reversal of a judgment based on the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was, in fact, an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; see *also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Rule 142.13(c)(3). Even were we to conclude that the hearing officer's admission of these carrier exhibits was error, it falls far short of being reversible error. None of the documents relate to the issue of whether the claimant sustained a compensable occupational disease or had disability, and the hearing officer, in her Statement of the Evidence, makes no reference to the documents. Consequently, even if the hearing officer erred in admitting the

documents, that error was not reasonably calculated to cause and did not cause the rendition of an improper decision.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge