

APPEAL NO. 992032

On August 18, 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 issues at the CCH were whether respondent (claimant) sustained a compensable injury on _____, and whether she has had disability. Appellant (self-insured) requests that the hearing officer's decision that claimant sustained an injury to her cervical spine on _____, and that she had disability from April 2, 1999, to August 1, 1999, be reversed and that a decision be rendered in its favor. Claimant requests affirmance.

DECISION

Affirmed.

Claimant testified that she worked as a pharmacy technician in the pharmacy of one of self-insured's stores for 11 years and four months; that she worked 9:00 a.m. to 5:30 p.m. Monday through Friday; that she was using the telephone in connection with work-related calls for six to seven hours a day at work; that she did not have a telephone headset; that while she was on the telephone, she would also be typing information into a computer or operating a register and thus would cradle the telephone between her shoulder and head; that she had had some neck pain four to six months before _____; that she noticed that when she cradled the phone between her head and shoulder while working with her hands her neck would hurt; that the week of _____, she had headaches and the neck pain would not go away; that _____, was the last day she worked as a pharmacy technician; that she went to Dr. L, D.C.; that Dr. L told her she had a work-related neck strain and has treated her; that _____, was when she first became aware that her neck pain may be related to her employment; that Dr. L took her off work; that she returned to part-time stocking work with self-insured on June 4, 1999; and that she began full-time stocking work for self-insured August 2, 1999.

MK, testified that he was the pharmacist in charge at the store claimant worked at; that he worked with claimant; that there were also two part-time pharmacy technicians; that the pharmacy is not a high-volume pharmacy and fills between 100 to 120 prescriptions per day; and that claimant was not using the telephone for more than 45 minutes a day at work. TH testified that he has a master of arts degree in rehabilitation counseling and is a licensed professional counselor and a certified rehabilitation counselor. TH said that he reviewed records in this case and a two-hour videotape taken on an unspecified date at the pharmacy claimant had worked at and opined that telephone calls at the pharmacy were not repetitious in nature. He said that the pharmacy technician in the videotape would occasionally cradle the telephone with her neck and shoulder. The videotape was in evidence and it shows what appears to be a pharmacy technician cradling a telephone

between her head and shoulder on several occasions while using her hands to work on a computer or at the cash register.

In a report dated April 14, 1999, Dr. L diagnosed claimant as having a neck sprain/strain and noted a date of injury of _____. On May 17, 1999, Dr. L wrote that claimant's employment activity of being on the phone approximately eight hours daily caused her neck to be laterally flexated. Dr. L took claimant off work. Dr. S examined claimant at carrier's request on June 14, 1999, and he noted claimant's history of spending a great deal of time answering telephones at work and that in the process of doing that she would hold her head cocked to the side so that she could hold the telephone while keeping her hands free to write down prescriptions. Dr. S diagnosed claimant as having a neck sprain and degenerative disc disease of the cervical spine. TH wrote that Dr. F had reviewed claimant's job analysis and that it was Dr. F's opinion that no causal factors could be identified between claimant's job duties and her injuries, including, among other things, a neck sprain. Dr. F wrote that he had reviewed documentation and that there is no causal connection between claimant's work activities and the possibility of carpal tunnel syndrome. An editorial on cumulative trauma disorders was in evidence.

The hearing officer found that claimant's work involved using a telephone while performing other duties, which required her to bend her neck to pin the phone on her shoulder, and that claimant suffered an injury to her cervical spine in the form of a cervical sprain on _____. The hearing officer decided that claimant sustained an injury to her cervical spine on _____. We infer from the hearing officer's findings and from his conclusion that claimant had disability from April 2, 1999, to August 1, 1999; that the cervical sprain was a compensable injury because Section 401.011(16) defines "disability" as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage."

Self-insured contends that the hearing officer erred in his decision on injury and disability. The Appeals Panel decision cited by self-insured, Texas Workers' Compensation Commission Appeal No. 941018, decided September 12, 1994, involves a claim of a foot injury from merely standing at work. In the instant case, the claimant claimed a repetitive trauma injury to her neck from cradling the telephone at work while doing other work with her hands. The hearing officer incorrectly states in his decision that claimant was not claiming an occupational disease, but he correctly notes that claimant contended that extensive telephone usage while holding the telephone with her head while performing other duties caused her problem. The self-insured incorrectly states in its appeal that claimant stated that she was not alleging a repetitive trauma injury. In Texas Workers' Compensation Commission Appeal No. 982478, decided December 4, 1998, and Texas Workers' Compensation Commission Appeal No. 990085, decided March 1, 1999 (Unpublished), the Appeals Panel affirmed hearing officers' decisions that neck injuries resulted from cradling a telephone with the shoulder or neck while typing on a computer.

The 1989 Act makes the hearing officer the sole judge of the weight and credibility of the evidence. Section 401.011(16). 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. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact. Appeal No. 950084. 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 is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge