APPEAL NO. 000120

This appeal is brought 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 May 11 and November 8, 1999. The appellant (carrier) and the respondent (claimant) stipulated that on _____, the claimant sustained a compensable injury, a ganglion cyst on her right wrist. The hearing officer made 10 findings of fact and the following conclusions of law to resolve the disputed issues:

CONCLUSIONS OF LAW

2. Claimant's bilateral carpal tunnel syndrome [CTS] is a result of the compensable injury sustained on _____.

3. Carrier has waived the right to contest compensability of the claimed injury, bilateral [CTS], by not contesting compensability within 60 days of being notified of the injury.

4. Claimant has had disability resulting from the injury sustained on _____ since April 1, 1998.

5. The Commission [Texas Workers' Compensation Commission] did not abuse its discretion in approving [Dr. LG] as an alternate doctor.

The carrier appealed, argued that the hearing officer erred in reopening the case to obtain additional information from Dr. S, contended that the hearing officer committed reversible error by not admitting two medical reports from Dr. K, advocated that the hearing officer erred in not indicating an ending date for disability, contended that the Commission abused its discretion in approving Dr. LG as an alternate doctor, urged that the determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor on each of the issues. The claimant responded, contended that the hearing officer did not err in not admitting the reports from Dr. K, and the Commission did not abuse its discretion in approving the change of treating doctors, stated evidence favorable to her position, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We reform the finding of fact, conclusion of law, and the decision concerning disability. We affirm the decision, as reformed, and the order.

The claimant testified that she began working for the employer in June 1997; that she used laptop and desk top computers, a typewriter, and a calculator in her work; that she worked eight hours a day and also worked some at night and on weekends; and that in

January 1998 she started experiencing problems with her hands. She said that in February 1998, she saw Dr. F, a bone specialist; that she used her health insurance; that her health insurance did not have a copayment amount for her to pay; that she was seen by Dr. GG, a hand specialist; that Dr. GG told her she had a ganglion cyst and bilateral CTS that was caused by her work; and that Dr. GG first treated her conservatively and later said she needed surgery. The claimant stated that she was terminated by the employer on March 15, 1998, and was paid until the end of the month; that she was told she was terminated because she could not keep up with her work; that immediately after she was terminated, she received unemployment compensation benefits for six months; that she can do some things with her hands; that her right hand is worse than her left hand; that she could not use her hands to do the things she was doing when she worked for the employer; and that she has not looked for work and has not worked since she was terminated. Videotapes of the claimant show her wearing a wrist brace on one day and not on another. They show her shaking and rubbing her right hand, and doing some things with her hands, but do not indicate whether she could use her hands to operate a computer or other office machinery.

An Employer's First Report of Injury or Illness (TWCC-1) dated April 23, 1998, states that the date of injury was in mid-January 1998; that the nature of the injury is CTS in both hands; that it resulted from repetitive typing for extended periods of time at work and at home; that the treating doctor is Dr. GG; and that the claimant had not lost any time from work. The TWCC-1 in the record does not indicate if and when it was received by anyone. In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated September 22, 1998, the carrier indicated that it received first written notice of the claim on June 16, 1998, and that the carrier disputed the CTS as not being related to the _____, injury.

In a note dated February 2, 1998, Dr. F said that the claimant would need to be off work for several days due to bilateral hand/wrist symptoms and was referred to a neurologist for further evaluation. In a report dated February 4, 1998, Dr. GG stated that the claimant used a keyboard extensively; that her discomfort in her hands was activity related; that she has right tendinitis with associated ganglion; that electrodiagnostic tests were negative, but she had bilateral CTS; that her activities would be limited; and that conservative treatment would be tried. In a letter to Dr. F dated February 10, 1998, Dr. B, a neurosurgeon, stated that the claimant had wrist pain on flexion and extension; that she had a small cyst over the right wrist; that no sensory changes were noted; that EMGs were performed on that day; that they failed to reveal median nerve entrapment neuropathy or a radiculopathy; that he suspected her pain was mainly mechanical in nature; and that his impression was mechanical wrist pain. A March 4, 1998, note from Dr. GG indicates that the claimant had some diminution in her symptoms with splints and anti-inflammatories, but not enough to make a significant difference; that aspiration of the cyst was performed; that injections of the tendon sheath and bilateral carpal tunnels were performed; and that he would check her in six weeks. On August 3, 1998, Dr. GG recorded that he had not seen the claimant for about five months; that she had received good relief on the left; that she received temporary relief on the right, but numbness, tingling, tenderness, and the cyst had

returned; and that he recommended a carpal tunnel release and excision of the cyst on the right.

On October 6, 1998, the claimant requested a change of treating doctors from Dr. GG to Dr. LG, a chiropractor. The stated reason on the Employee's Request to Change Treating Doctors (TWCC-53) is:

> I have been treating with [Dr. GG]. I don't feel that I've received appropriate medical care. I've tried to discuss this. I need a new doctor who understands this system who can help me obtain the appropriate care and help me get well.

A Commission employee approved the request on October 12, 1998. In a letter to the attorney representing the claimant dated November 23, 1998, Dr. LG stated that his impression was CTS bilaterally, cervical brachial radicular syndrome, and ganglionic cyst in the right wrist region; that he recommended the claimant be referred to an orthopedic surgeon for removal of the cyst; that he recommended further diagnostic studies to determine if surgery was necessary for the right CTS; and that treatments had been limited because of the dispute by the carrier.

In a letter dated November 12, 1998, to the claimant with copies to the attorney representing her, the carrier, and Dr. MGB, a Commission benefit review officer stated that a medical examination had been scheduled with Dr. B on December 2, 1998, and wrote:

> The purpose of this exam:
>
> 1. Do appropriate and necessary testing?
>
> 2. Is the claimant's condition of bilateral [CTS] causally related to the January 1, 1998 [sic] injury? Please explain.
>
> 3. Does the claimant need surgery? Please explain.
>
> 4. Would the claimant's condition bilateral C & T [sic, should be CTS] prevented [sic] the claimant from returning to work? If so, for what periods from January 1, 1888 [sic] to present.

A letterhead from "The Hand Center, Dr. MGB" indicates Dr. S works there. In a narrative summary dated December 4, 1998, Dr. S wrote:

> Physical exam today showed positive Phalen's sign, bilateral positive Tinel's sign at the carpal tunnel. The patient had a small ganglion cyst on the ulnar surface adjacent to the FCR. Her Allen's test showed filling with the radial and ulnar arteries. Two point discrimination was normal as was motor exam. X-rays were normal.

> My impression is the patient has severe bilateral [CTS] and a volar wrist ganglion, which is symptomatic. The patient has failed splints and anti-inflammatories as well as Intra-tunnel steroid injections. I feel it is worthwhile repeating a nerve conduction study, which was originally diagnosed as normal on 02-08-98, but I do feel this patient is a candidate for endoscopic carpal tunnel release as we [sic] as ganglion cystectomy.

On July 12, 1999, the hearing officer wrote to Dr. S. She said that his report did not indicate whether the claimant's condition was causally related to the _____, injury and whether her condition rendered her unable to perform her job duties at any time. She requested a response that could be used at an August 3, 1999, CCH. In a narrative addendum dated October 5, 1999, Dr. S wrote:

> This addendum [is] to address the most likely cause of [claimant's] condition. My diagnosis of bilateral [CTS] is based on clinical criteria, as electrodiagnostic testing has yet to be approved by the insurance carrier. Although the exact etiology of CTS has not been established, it is closely associated with the activities required as part of [claimant's] employment. Also the temporal relationship is consistent with her work being the causal factor. It is my considered professional opinion that this is a compensable, work-induced condition.

The record does not indicate that another attempt was made to receive the opinion of Dr. S on whether her condition rendered her unable to perform her job duties.

Both the request for review filed by the carrier and the response filed by the claimant contain information that is not in the record of the CCH. More than one attorney represented the carrier during the handling of the claim. One of them wrote a letter to the hearing officer and requested that it be made part of the claim file and be made a part of the CCH record. But it was not offered into evidence at the CCH. Information not in the record will not be considered in rendering this decision. Section 410.203(a)(1).

We first address the determination that the carrier did not timely contest the compensability of the claimed CTS. The TWCC-1 dated April 23, 1998, states that the nature of the injury includes CTS of both hands. The copy in the record does not indicate that it was received by anyone. But the TWCC-21 in which the carrier contested the compensability of the claimed CTS as not related to the injury of _____, is dated September 22, 1998, and states that the carrier's first written notice of the injury was received on June 16, 1998. The TWCC-21 does not state that the information concerning the CTS was received later than June 16, 1998. The evidence is sufficient to support the determination that the carrier did not timely contest the compensability of the claimed injury.

Review of the evidence available to the Commission at the time the request for change of treating doctors was approved is sufficient to support the hearing officer's determination that the Commission did not abuse its discretion in approving the request to change treating doctors.

The carrier complains that the claimant should not have been seen by Dr. S. It is clearly appropriate for the Commission to have a claimant examined by a neutral doctor to recommend a resolution of a dispute as to the medical condition of an injured employee. Section 401.011(15) and Texas Workers' Compensation Commission Appeal No. 950475, decided May 11, 1995. In the statement and discussion of evidence in her Decision and Order, the hearing officer states that Dr. MGB and associates was appointed as the independent medical examination doctor. The record does not so indicate. Dr. MGB was appointed to perform the examination and render opinions. Dr. S was not so appointed. The record indicates that Dr. S practiced medicine in the same office as did Dr. MGB and does not indicate that Dr. S was associated with either party in this case. The Commission had difficulty having Dr. S respond to questions asked of him. But it was not error for the hearing officer to consider responses obtained from Dr. S.

We next address the contention that the hearing officer erred in not admitting the records of Dr. K dated in August and September 1999. In a letter dated August 19, 1999, attached to an Initial Medical Report (TWCC-61) dated August 20, 1999, Dr. K provided a brief history and wrote:

> She exhibited marked subjective limitation to move the right arm and kept it in a very protected posture. She shook all over as I took her history and examined her. She however ended up with a normal active range of motion in the elbow, wrist, and all digits bilaterally. Allen test showed good blood circulation bilaterally. Motor nerve function was satisfactory as evidenced by strong contradiction of all of the intrinsic muscles against resistance. On testing sensibility, she first denied vibratory sensation in all of the digits of the right hand but a repeat examination of these were normal. Her hands are not swollen. They are somewhat cool and there is a slight increased moisture.
>
> It was my suggestion that we obtain a nerve conduction study to rule out the possibility of a nerve compression problem.

In a report dated September 15, 1999, Dr. K reported that the claimant said that she still had tingling and weakness, that he reviewed her nerve study which was completely normal, that she became upset when he could not identify an explanation for her problem or suggest a treatment program, that he could not identify a ganglion cyst, that he did not recommend surgical treatment, and that she became upset when he advised her that he thought it would be reasonable to try to return to her regular duties and see what happened. His report does not identify the nerve study he reviewed. The addendum from Dr. S dated October 5, 1999, states that the carrier has not approved electrodiagnostic

testing and the only report of diagnostic testing in the record is dated February 3, 1998, and is attached to a letter from Dr. B dated February 10, 1998.

In Texas Workers' Compensation Commission Appeal No. 93323, decided June 9, 1993, the Appeals Panel had reversed the decision of the hearing officer and remanded for the hearing officer to obtain additional information from the designated doctor. The hearing officer obtained the additional information from the designated doctor, did not advise the parties of the information, and rendered another decision. The Appeals Panel cited a court of appeals decision that stated that administrative litigants must be given a full and fair hearing on all disputed fact issues; stated that a court of appeals case involving an administrative agency held that the basic notion of a fair hearing required that a party "be appraised of the evidence contrary to his position so that he may refute, test, and explain that evidence"; referred to provisions in the 1989 Act; and held that litigants in CCHs must be afforded due process. Since the Appeals Panel had used its one remand, it reversed the decision of the hearing officer and rendered a decision that a proper and sufficient determination of maximum medical improvement and impairment rating had not been made. It was error for the hearing officer not to admit the reports from Dr. K. In Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992, the Appeals Panel cited Hernandez v. Hernandez, 611 S.W.2d 932 (Tex. App.-San Antonio, no writ) and stated that to obtain reversal the party must show error in admitting or excluding evidence and that the error was reasonably calculated to and probably did cause the rendition of an improper decision. A review of all of the evidence does not establish that the error was reasonably calculated to and probably did result in the rendition of an improper decision.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). We have held that the record did not establish that the exclusion of reports from Dr. K were reasonably calculated to and probably did cause the rendition of an improper decision. The Appeals Panel had previously commented on a carrier not approving requested tests and

arguing that the evidence is not sufficient to establish that an injury occurred in the course and scope of employment. In addition, using injury sustained on a specific date for a claimed repetitive trauma injury is not helpful. The hearing officer's determination that the claimant's bilateral CTS is a result of the compensable injury sustained on _____, is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support that determination of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The hearing officer also includes in her findings of fact, conclusions of law, and decision that the claimant had been unable to obtain and retain employment at wages equivalent to the preinjury wage and had disability since April 1, 1998. The carrier complained that those determinations have no ending date. In Texas Workers' Compensation Commission Appeal No. 950381, decided April 25, 1995, the Appeals Panel reversed a determination that disability continued until the date of the decision of the hearing officer and rendered a decision that disability continued through the date that evidence was received, noting that there was no evidence of disability after that date. The Appeals Panel stated that it did not say disability may not be shown at a future proceeding for periods beyond the CCH, but only that there is not sufficient evidence to sustain a finding of disability after the CCH closed and no further evidence was produced. In the case before us, the last evidence concerning disability was produced at the session of the CCH held on May 11, 1999. The claimant did not testify at the session held on November 8, 1999, and Dr. S did not answer the question about disability in the reports admitted on that date. We reform the finding of fact, conclusion of law, and decision concerning disability to state that the claimant had disability beginning on April 1, 1998, and continuing through May 11, 1999, the date of the first session of the CCH. The 1989 Act contains provisions concerning payment of benefits without an order to do so and for stopping temporary income benefits, and we will not repeat them in this decision.

We affirm the decision, as reformed, and the order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge