

## APPEAL NO. 000663

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 March 6, 2000. The issues at the CCH were whether the appellant (claimant) sustained a closed head injury on \_\_\_\_\_, in addition to her compensable injury to her right shoulder, neck, low back area, and knee, and whether her seizures are a result of the compensable injury. The hearing officer concluded that claimant did not sustain a compensable closed head injury on \_\_\_\_\_, in addition to her compensable injury to her right shoulder, neck, low back area, and knee, and that her seizures are not a result of her compensable injury of \_\_\_\_\_. The claimant challenges these legal conclusions as well as certain findings of fact, asserting that the hearing officer did not objectively review the evidence and that he misconstrued information from a medical reference. The respondent (carrier) urges the sufficiency of the evidence to support the challenged determinations.

### DECISION

Affirmed.

The parties stipulated that on \_\_\_\_\_, claimant sustained a compensable injury to her right shoulder, neck, low back area, and knee. Claimant, who testified by telephone from another state, stated that on the injury date, she was struck on her right side by heavy bolts of fabric tumbling off a platform in the store where she worked and was knocked to the floor; that she had right side injuries and hit her head and had a momentary loss of consciousness; that she went home afterwards and saw Dr. L the next day; and that she had her first seizure within a week. Claimant further testified that she had a family history of epilepsy; that she herself had epilepsy with petit mal seizures as a child but never had convulsions; that the frequency of the seizures slowed as she aged; that she had one in her late thirties; and that she had no seizures between 1993, when she was tapered off medication, and 1996. She further stated that Dr. R diagnosed a closed head injury and seizures in October 1996; that Dr. R referred her to Dr. B; and that Dr. K diagnosed the grand mal seizures.

Claimant=s Employee=s Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) signed by her former attorney on October 17, 1996, did not specifically claim a closed head injury and seizures in addition to her other specified injuries.

Dr. R=s October 17, 1996, report states a history of an enlarged heart and embolic strokes in 1994 as well as childhood seizures, and claimant=s having been off Dilantin for one year and seizure free for four years. In the impression section of the report Dr. R noted that claimant has right facial numbness and a possible right homonymous resolving hemianopia which claimant feels are new symptoms and which Dr. R said could be due to the previous stroke. Dr. R planned to order an MRI scan of the brain.

Dr. B=s January 20, 1997, report states that the MRI of the brain was read as unremarkable; that claimant has been off her anti-seizure medications for two years; that she had a stroke in 1994 and two since then; and that she complains of pain in her head, neck,

right shoulder, arm, and hand. Dr. B further stated that with claimant's entire right side symptomatology including right-sided facial weakness, he is very concerned that she might have had a left cerebral stroke since the injury occurred when she was twisted trying to catch rolls of upholstery, and that she has a clearly documented history of prior strokes. Dr. B reported on February 14, 1997, that testing revealed that claimant has a 50% lesion of her left carotid artery indicating that this is very possibly the cause for multiple small strokes.

Dr. K's initial report is not in evidence. Dr. K's follow-up report of July 22, 1997, states that claimant had passed out; that she has not had seizures for two and one-half years; that "possibly she has partial complex seizures, but no seizures for 2-1/2 yrs." Dr. K's impression included "closed-head injury" and "R/O partial seizures versus partial complex seizures." Dr. K wrote on August 30, 1999, that claimant was seizure free for two years prior to her injury on \_\_\_\_\_, and that since the injury she claims to have had multiple seizures on a weekly basis. Dr. K's report of September 21, 1999, states that claimant is under his care for seizures, cervical pain, overstretched brachial plexus injury, post-traumatic migraine, closed head injury, lower back injury, and right knee injury; discusses separately, the mechanism of injury, claimant's history of seizures with recurrence and her history of headaches; and concludes that "[a]ll other above-mentioned problems were directly or indirectly related to the accident of 9-17-1996." Dr. K wrote on November 8, 1999, that claimant was seizure free for two and one-half years and off medication since 1993; that following this closed head injury of \_\_\_\_\_, claimant started having seizures again; and that since this accident her headaches have increased in frequency and intensity.

The carrier introduced the unsigned July 7, 1997, report of a review of claimant's records by an unnamed neurologist which concluded that Dr. K's care and requested testing relating to transient ischemic attacks, stroke, seizures, and headaches are not related to the injury of \_\_\_\_\_, and represent a preexisting condition which does not correlate with that injury.

In addition to the dispositive legal conclusions, claimant challenges a stipulated finding of fact that on \_\_\_\_\_, claimant sustained a compensable injury to the right shoulder, neck, low back area, and knee. Claimant is bound by this stipulated fact which, the record reflects, is accurately stated in the hearing officer's findings of fact. See *generally*, Section 410.166; Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 140.1; and Texas Workers= Compensation Commission Appeal No. 92109, decided May 4, 1992. Claimant also disputes the sufficiency of the evidence to support findings that on \_\_\_\_\_, she did not sustain a closed head injury that arose out of and in the course and scope of her employment; that while she again suffered from epileptic seizures beginning in 1997, in the grand mal form, the cause of these seizures is medically unknown; and that her seizures are not a natural and direct result of her compensable injury.

Section 401.011(26) defines injury to mean damage or harm to the physical structure of the body and a disease or infection "naturally resulting from the damage or harm." The question of the compensability of a subsequent or follow-on injury is generally one of fact to be

decided by the hearing officer. Texas Workers= Compensation Commission Appeal No. 94067, decided February 28, 1994.

In the hearing officer=s discussion of the evidence he comments that claimant has no corroborating evidence, aside from being included among the several diagnoses in Dr. K=s reports, that claimant actually sustained a closed head injury on \_\_\_\_\_. The hearing officer notes that the first mention of such an injury in claimant=s medical records appears approximately ten months after the accident. The hearing officer, who took official notice of The Merck Manual, 16th Edition, also states some information found in Chapter 121 of that publication about the variety of causes for seizures and the phenomenon of seizures recurring after some period of dormancy.

We cannot agree with claimant=s assertions that the hearing officer failed to objectively consider the evidence and misconstrued information in The Merck Manual. Claimant contends that the hearing officer erred by "extrapolating and manipulating information from The Merck Manual, Chapter 121, in favor of the insurance carrier," and that "[t]he information in the Merck is general reference information and not direct evidence involved with the particular facts of this case." Notwithstanding that Rule 142.2(11) authorizes a hearing officer to take official notice of "facts that are judicially cognizable, and generally recognized facts within the commission=s specialized knowledge," the hearing officer, without objection by either party, took "official notice" of the entirety of The Merck Manual and neither party requested to be advised by the hearing officer of the precise information he would rely on. Under these circumstances, any objection to the use of The Merck Manual by the hearing officer would appear to have been waived. In Texas Workers= Compensation Commission Appeal No. 960795, decided June 3, 1996 (Unpublished), the Appeals Panel stated that such publications should not be used by a hearing officer to establish causation, citing Texas Workers= Compensation Commission Appeal No. 93577, decided August 18, 1993. In Texas Workers= Compensation Commission Appeal No. 971296, decided August 28, 1997 (Unpublished), a similar complaint was made against the same hearing officer. The Appeals Panel said in that case that since the medical evidence was sufficient to support the decision and order without reference to passages in The Merck Manual if "it was error to use The Merck Manual in the way recited, it was not reversible error." The hearing officer clearly was not persuaded by the medical evidence that claimant sustained a closed head injury, let alone that her seizures were caused by the compensable injury.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies 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 Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King=s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill  
Appeals Judge

CONCUR:

Alan C. Ernst  
Appeals Judge

Judy L. Stephens  
Appeals Judge