

APPEAL NO. 001046

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 April 18, 2000. With regard to the issues before her, the hearing officer determined that the compensable injury sustained on _____, extends to an injury to the respondent's (claimant) left elbow; and that claimant had disability beginning October 22, 1999 (all dates are 1999 unless otherwise noted), and continuing through the date of the CCH. The appellant (carrier) appealed, pointing to evidence that supports its argument that claimant did not sustain an injury to her left elbow as a result of an incident on _____. Carrier also appeals the hearing officer's findings on disability, contending that claimant continued to work after _____ until she took herself off work for other reasons unrelated to this injury. Carrier contends that a finding of disability seven months after the injury, when claimant's salary continuation expired, is against the great weight and preponderance of the evidence. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The claimant responded, urging affirmance.

DECISION

Affirmed.

This case is somewhat confused by several side issues not related to this case. Claimant had been employed as a quality control inspector for the employer and it is undisputed that on _____ an incident occurred where claimant pulled on a chair which had caught on a table and sustained a compensable injury to her left shoulder and low back. The parties stipulated that claimant sustained a compensable injury to the low back and left shoulder, but carrier, nonetheless, kept emphasizing that claimant had a prior back injury and how the designated doctor said claimant's lumbar injury was minimal. The issue before the hearing officer was whether the _____ incident also caused an injury to claimant's left elbow and whether claimant had disability due to the compensable injury, not just the disputed elbow injury.

It is also undisputed that claimant was alleging some kind of mental stress/psychological injury (not directly at issue here) before the _____ chair incident. After the _____ chair incident, claimant testified that she reported the incident and an injury to RS (notice is not an issue either). Claimant said that she reported an injury to her elbow, which is denied by RS. The employee injury report completed by claimant on April 5th reports "a sharp pain from [the] left shoulder blade to [the] lower back" and a notation that the "[e]mployee does not want to seek treatment at this time." Claimant agrees that she did not mention the elbow because of her mental stress condition and that she forgot. Claimant continued to work until either April 14th (claimant's version) or April 20th (employer's version), when she either took herself off work or was taken off work because of her psychological condition. It is undisputed that claimant was continued in some kind of salary continuation until either mid-August (claimant's version) or October 19th (employer's version). The best evidence is that the salary continuation, at 100% of salary,

continued until August 10th, when some kind of short-term disability coverage kicked in at two-thirds of claimant's salary until October 19th. Claimant's condition from April 20th to October 19th is subject to varying inferences, ranging from total incapacity (due to the noncompensable mental condition) to evidence that claimant, on occasions, would go to carrier's adjuster's office and argue with the adjuster. Claimant testified that during this period she changed psychiatrists and Dr. K became her treating psychiatrist; that he changed her medication; and that her mental condition improved. In evidence is claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated September 17th which indicates in the section dealing with what portion of body parts were affected "[s]harp pain on back down to left shoulder." The word "shoulder" is marked out and underneath is written the word "elbow" with claimant's initials.

Claimant sought treatment for the chair incident injuries for the first time with Dr. P on October 22nd. In a report of a November 1st visit, Dr. P diagnoses a "traumatic lumbar spine strain with probable disc injury [not at issue] [and] traumatic left shoulder strain." There was no mention of an elbow injury. Dr. P took claimant off work (in a "Doctor's Work Note," which indicates Dr. P first saw claimant on October 22nd) and subsequent MRI and diagnostic testing showed a torn left rotator cuff injury for which Dr. P recommended surgery in a report dated November 9th, and which carrier eventually authorized surgery for in March, 2000. Claimant was seen by Dr. S, carrier's required medical examination (RME) doctor, who, in a report dated November 23rd, reviewed claimant's history and the chair incident, including that claimant felt a "pop" in her left shoulder "and towards her left elbow." Dr. S notes complaints of left elbow pain, found no crepitus, dislocation or subluxation of the elbow on examination and diagnosed a "[l]eft elbow strain/sprain by history." Dr. H was appointed as the Texas Workers' Compensation Commission RME doctor and, in a report dated March 14, 2000, reviews claimant's history and remarks:

There is no medical documentation which supports that she has an elbow injury with this becoming noted by [Dr. P] on 11/9/99. The patient does claim that she has amended her original Workers' Compensation forms. . . .

* * * *

There is no medical documentation to support that her elbow was injured. It is appropriate to note that the mechanism of injury which she describes and which is documented by [Dr. P] could in fact injure one's elbow. However, an unreasonable period of time has passed, in my opinion, to allow for a patient to make a claim of a new body region in the time elapsed from March to November, 1999. Based upon the available documentation, I do not believe that the elbow is included in this injury. . . .

The hearing officer made the following disputed findings:

FINDINGS OF FACT

8. Claimant had not sustained an injury to her left elbow anytime prior to the _____, compensable injury and did not sustain a left elbow injury after the _____ compensable injury.
9. The mechanism of Claimant's described _____ compensable injury is consistent with one that would produce a left elbow injury.
10. During the course and scope of her employment on _____ while pulling on a chair, Claimant sustained an injury to her left elbow.
11. Due to the injuries sustained on _____ Claimant was unable to obtain or retain employment at wages equivalent to Claimant's preinjury wage beginning on 10-22-99 and continuing through the date of this hearing.

Carrier, in its appeal, urges that claimant did not initially reported an elbow injury; that claimant "amended" her TWCC-41 to show an elbow injury; that Dr. H did not believe claimant sustained a compensable elbow injury; that Dr. S's assessment of an elbow injury is by history; and the coincidence that claimant only sought treatment for her injuries, including the disputed left elbow injury, when claimant's salary continuation and other income benefits stopped. All of those arguments were made to the hearing officer and the hearing officer clearly considered all the reports and still found that claimant sustained an injury to her left elbow on _____ in the chair incident. The hearing officer apparently accepted claimant's testimony that she verbally complained to RS about her left elbow and that she forgot to include it on the accident report because of mental stress. The hearing officer apparently accepted claimant's argument that her mental condition precluded her from seeking treatment for the chair incident injuries prior to October 22nd and that new medication allowed her to attend to those injuries at that time. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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). We find the hearing officer's decision on this issue is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Although another fact finder may have drawn other inferences or reached other conclusions on the same evidence that is not a basis for us to reverse the hearing officer's factual determination. Salazar, et al. v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The issue on disability is much simpler. Although carrier argues claimant's activities between April and October and what the various psychiatrists opined in some detail, the uncontroverted facts are that carrier has accepted liability and stipulated to a left shoulder injury that, subsequently, objective medical evidence established included a partially torn left rotator cuff injury which requires surgical intervention and carrier has, in fact, authorized such surgery. While the starting date of disability on October 22nd, after almost seven months of no treatment, might be subject to disagreement, the evidence, including Dr. P's off-work certification on October 22nd, supports the hearing officer's finding on this point. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The hearing officer did not find, and was not required to find, that claimant's inability to obtain and retain employment at her preinjury wage was due to the disputed elbow injury; rather, the question was whether the compensable injury, which included the accepted and stipulated-to left shoulder injury, caused the claimant's disability as defined in Section 401.011(16). The fact that claimant displayed symptom magnification in a functional capacity evaluation and in Dr. H's report does not constitute evidence which requires a reversal of the hearing officer's decision on disability, given the objective evidence of a torn rotator cuff for which carrier has authorized surgery.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are 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, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge