

APPEAL NO. 001520

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 18, 2000. With respect to the issues before him, the hearing officer determined that the appellant's (claimant) _____, compensable injury does not extend to her cervical spine or her right shoulder and that the respondent (carrier) did not waive its right to contest compensability of the cervical or right shoulder injuries under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3(c) (Rule 124.3(c)). In her appeal, the claimant asserts error in each of those determinations and asks that we reverse the hearing officer's decision and render a decision in her favor on both issues. In its response to the claimant's appeal, the carrier urges affirmance.

DECISION

Affirmed.

The hearing officer's decision and order contains a detailed factual recitation which will not be repeated here. Rather, we will focus on those facts most germane to the issues before us. It is undisputed that the claimant sustained a compensable injury on _____. The issue before us on appeal is whether the compensable injury extends to the cervical spine and right shoulder. The claimant testified that she had pain in her neck and right shoulder from the outset and that she told all of the doctors with whom she treated about her neck and right shoulder pain.

The claimant initially sought medical treatment at a clinic on February 5, 1999. The records from that visit reflect complaints of bilateral hand/arm pain. There is no mention of complaints of neck or shoulder pain. On February 22, 1999, the claimant sought medical treatment from Dr. D, a chiropractor, to whom she had been referred by her attorney. Dr. D's records from the February 22, 1999, visit reflect complaints of right hand/arm pain and do not mention additional complaints. The claimant next sought medical treatment on April 6, 1999, from Dr. P, a chiropractor. Dr. P diagnosed sub-acromial bursitis in the claimant's right shoulder at that visit. In a May 5, 1999, preauthorization request, Dr. P added a diagnoses of cervical strain/sprain. In an August 17, 1999, report, Dr. H, an orthopedic surgeon who examined the claimant at the request of the carrier, opined that the claimant had a "chronic cervical strain on the basis of repetitive actions on the job."

The claimant had the burden to prove the causal connection between her cervical and right shoulder injuries and her compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Ins. Ass'n v. Campos,

666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. 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 manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The claimant argues that the hearing officer's determination that her compensable injury does not extend to the cervical spine and right shoulder is against the great weight of the evidence. As noted above, there was conflicting evidence on that issue. The hearing officer was acting within his province as the fact finder in deciding to resolve that conflict against the claimant. In making his determination, the hearing officer noted that there was no mention of neck and right shoulder pain in the claimant's medical records until April and May 1999, respectively. The hearing officer was free to consider that factor in making his credibility determination. Our review of the record does not reveal that the hearing officer's extent-of-injury determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse it on appeal. Pool; Cain.

The claimant also contends that the hearing officer erred in finding that the carrier did not waive its right to contest compensability of the neck and right shoulder injures because the carrier had no duty to contest the extent of injury within 60 days under Rule 124.3. The claimant contends that the hearing officer erred in applying Rule 124.3 retroactively. We find no merit in this assertion. In Texas Workers' Compensation Commission Appeal No. 000784, decided May 30, 2000, we determined that the Texas Workers' Compensation Commission (Commission) cannot impose a waiver in an extent-of-injury case given the essential rationale expressed by the Commission in the preamble to Rule 124.3 to the effect that the Commission construes Section 409.021 as not providing for waiver of extent of injury. Accordingly, we perceive no error in the hearing officer's application of Rule 124.3 in this case.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Philip F. O'Neill
Appeals Judge