

APPEAL NO. 010260

Following a contested case hearing (CCH) held on January 10, 2001, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by finding that the appellant/cross-respondent (claimant), did not sustain a compensable injury in the form of an occupational disease on _____, and therefore had no disability. The claimant appeals, asserting that the evidence established that she did have a compensable injury in the form of an occupational disease, carpal tunnel syndrome (CTS), with an injury date of _____, and that she had disability because of the CTS from _____, until the present. The respondent/cross-appellant (self-insured) urges that the Appeals Panel affirm the hearing officer's decision and order on the issues of compensable injury and disability. However, the self-insured filed a conditional appeal raising the issues of *res judicata* and a procedural error involving a unilateral request for a change of hearing officer. There is no response from either party to the other's appeal in the file.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant did not sustain a compensable injury in the form of an occupational disease on _____. The claimant introduced into evidence a medical report diagnosing her with CTS in her left wrist only on _____, and testified that her doctors told her, and that she believed, her CTS was a result of her employment. The self-insured introduced medical records and personnel records supporting the hearing officer's finding that the claimant did not sustain a compensable injury in the form of an occupational disease.

The hearing officer noted that the date of injury was more than three months after the claimant's employment was terminated on February 5, 2000, and observed that the claimant's testimony lacked "probative evidence of any constant, repetitive, or physically traumatic activity required of her" while she worked at one of the self-insured's health care facilities.

The hearing officer determined that while the claimant did "sustain damage or harm to the physical structure of her body, to-wit: left wrist," she did not show that the injury occurred while in the course and scope of her employment.

Further, a determination of disability must rest upon an affirmative finding on the issue of compensable injury, and there was no such finding here.

Pursuant to Section 410.165(a) of the 1989 Act, the hearing officer is the sole judge of the weight and credibility of the evidence. The hearing officer resolves the conflicts and inconsistencies in the evidence and determines what facts have been established from the conflicting evidence. Garza v. Commercial Insurance Company of Newark, New Jersey,

508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). This 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. 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). We do not find them so here.

We now address the self-insured's conditional appeal regarding two issues: application of the doctrine of *res judicata* and an alleged procedural error. With respect to the *res judicata* issue, it was not reported from the benefit review conference (BRC), it was not requested to be added at the CCH, and it was not agreed upon by the parties to be added as an issue at the CCH. The self-insured did discuss the issue and entered evidence it claimed was related to the *res judicata* argument, over the objection of the claimant.

Section 410.151(b) of the 1989 Act provides that an issue not raised at the BRC may not be considered at the CCH unless the parties consent to the additional issue or the hearing officer finds good cause for adding the issue. See *also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7). Rule 142.7 also provides that an issue may be added for consideration at the CCH if an additional dispute is raised in writing, no less than 15 days prior to the scheduled CCH, and, even then, the hearing officer may only consider the newly raised issue "on a determination of good cause." Rule 142.7(e).

The Appeals Panel has written that an appropriate way to bring forward a new issue at the CCH is in a written response to the benefit review officer's report. Texas Workers' Compensation Commission Appeal No. 992070, decided November 4, 1999; Texas Workers' Compensation Commission Appeal No. 961423, decided September 3, 1996; and, Texas Workers' Compensation Commission Appeal No. 91007, decided August 28, 1991. Moreover, the Appeals Panel has written that if the newly raised issue is actually litigated at the CCH, it may be considered on appeal. Appeal No. 992070, *supra*; Texas Workers' Compensation Commission Appeal No. 992343, decided December 6, 1999; and Texas Workers' Compensation Commission Appeal No. 952144, decided January 22, 1996. The self-insured utilized none of the methods allowed by the 1989 Act and rules to add the *res judicata* issue to the statement of disputed issues and the hearing officer made no findings on the issue. Accordingly, the Appeals Panel will not consider this issue for the first time on appeal.

The self-insured also asserts that the Texas Workers' Compensation Commission (Commission) made a procedural error in changing hearing officers. The self-insured claims that the claimant could not properly request a change in hearing officers and that only the hearing officer first assigned was authorized to reset the CCH pursuant to Rule 142.10(c) because the case was "basically a continued case." We do not find merit in this contention. The authority cited does not support the self-insured's argument nor has the self-insured shown impropriety or abuse of discretion on the part of the Commission in the selection of the hearing officer.

For these reasons, we affirm the hearing officer's decision and order.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge