APPEAL NO. 011476
FILED AUGUST 10, 2001

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 June 7, 2001. With respect to the issues before him, the hearing officer determined that the appellant/cross-respondent (claimant) did not sustain a compensable repetitive trauma injury; that she did sustain a compensable specific event injury on _____; and that she did not have disability as a result of her compensable injury. In her appeal, the claimant asserts error in the determination that she did not have disability. In its response to the claimant's appeal, the respondent/cross-appellant (carrier) urges affirmance. In its cross-appeal, the carrier contends that the hearing officer erred in determining that the claimant sustained a specific incident injury, contending that that issue was not before the hearing officer. In the alternative, the carrier maintains that the determination that the claimant sustained a specific incident injury is against the great weight of the evidence. The appeal file does not contain a response from the claimant to the carrier's appeal. In addition, the claimant did not appeal the determination that she did not sustain a repetitive trauma injury.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant sustained a compensable specific incident injury, namely a strain of her neck, left trapezius muscle, and left shoulder, on _____. The carrier initially contends that because the claimant pursued a repetitive trauma theory at the hearing, the hearing officer exceeded his authority in resolving that issue because it was not before him. We have previously considered and rejected such an argument. As a general proposition, the dispute resolution process is not governed by strict rules of pleading. Where, as here, the carrier was afforded a meaningful opportunity to be heard on the issue, the hearing officer can determine that a claimant has sustained a specific incident injury, if he determines that the evidence establishes that such an injury occurred. This is true even if the claimant pursued a repetitive trauma theory. *See* Texas Workers' Compensation Commission Appeal No. 992343, decided December 6, 1999. We perceive no error.

Alternatively, the carrier contends that the determination that the claimant sustained a strain injury is against the great weight of the evidence. That question presented a question of fact for the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). There was conflicting evidence on the issue of injury. The hearing officer resolved the conflicts and inconsistencies in the evidence and determined that the claimant sustained her burden of proving injury. The hearing officer was acting within his role as the fact finder in so doing. Nothing in our review of the record indicates that the challenged determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb that determination on

appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The claimant contends that the hearing officer erred in determining that she did not have disability. That issue also presented a question of fact for the hearing officer. The hearing officer resolved the conflicts and inconsistencies in the evidence and determined that the claimant did not establish that she had disability as a result of her compensable strain injury. That determination is not so contrary to the great weight of the evidence as to compel its reversal on appeal. Pool; Cain.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I respectfully dissent, and would reverse and remand for reconsideration of the erroneous determination that the claimant had no disability due to her strain injury. Not only is this so against the great weight of the evidence as to be manifestly unfair or unjust, it is based on a wrong legal standard. The claimant was put on modified duty by the company doctor. This is comparable to an admission that she was unable, because of her injury, to perform her previous work. When she sought her own physician within a week, he not surprisingly took her off work entirely. The hearing officer refused to equate this to disability, imposing a legal standard not found within workers' compensation law, i.e. that she had to justify being taken entirely off work by showing a change of some sort had occurred between her injury and the date she was taken off work. The hearing officer appears to have applied a "stealth" bona fide job offer analysis although there was no issue before him on this.

Although often overlooked, the doctrine of liberal construction of the Workers' Compensation Act is alive and well. *See* Albertson's, Inc. v. Sinclair, 984 S.W.2d 958 (Tex. 1999). This doctrine precludes simply ignoring, as this hearing officer has done, treatment

and recommendations by the claimant's treating doctor. It ignores even common experience with even mild cervical or shoulder strains. While reasonable minds might be able to differ as to whether such an injury would result in months of disability, it is patently unreasonable to hold that no disability resulted.

It seems as though we are not sending the right policy message in cases like this, when a worker is essentially penalized for attempting to stay on the job, rather than going out immediately on a work release. To hold that staying on the job "proves" an ability to work, even after the treating doctor takes the worker off work, is to encourage lost time from the very inception of even a mild injury, lest a claim for disability later on be undermined.

Susan M. Kelley
Appeals Judge