

APPEAL NO. 030059
FILED FEBRUARY 24, 2003

This case returns following our remand to reconstruct the record in Texas Workers' Compensation Commission Appeal No. 021905, decided September 16, 2002. A contested case hearing (CCH) on remand was held on October 1, 2002, and continued with the record closing on December 12, 2002. With respect to the issue before him, the hearing officer determined that the compensable injury of _____, does extend to and include the respondent's (claimant) neck and/or cervical spine. The appellant (carrier) appealed the hearing officer's extent-of-injury determination, and asserts that the hearing officer erred in his evidentiary rulings and admitting the medical records without expert testimony. The claimant responded, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that she worked as a nurse at a senior citizen center and that she injured herself when she attempted to prevent a patient from falling to the ground with her right arm. The claimant contends that her compensable injury extends to her neck and cervical spine.

The carrier contends on appeal that the hearing officer erred by: admitting Claimant's Exhibit Nos. 1, 4, 5, and 13; excluding Carrier's Exhibit Nos. 25 and 26; and, overruling the carrier's objections to a portion of the claimant's testimony. Our standard of review regarding the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; see also Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). Given the bases that the hearing officer provided for his rulings, we do not find the hearing officer's evidentiary rulings to be an abuse of discretion, as the hearing officer acted with reference to guiding rules and principles. We would further note that conformity to the legal rules of evidence is not required. Section 410.165(a) of the 1989 Act specifically provides that "[c]onformity to legal rules of evidence is not necessary." Nor did the

carrier establish that the evidentiary error it asserts probably caused the rendition of an improper judgment.

As to the carrier's contention that the claimant made an improper closing argument, our review of the record does not indicate that the hearing officer committed reversible error. Again, there is no showing that even were there error that it amounted to anything more than harmless error.

The carrier contends that the hearing officer failed to apply the requirements of expert evidence when admitting medical documentation and cites Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and E. I. du Pont de Nemours & Co., Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995) to support its contention. Section 410.165(b) provides that a hearing officer "shall admit" a signed report from a health care provider. In view of Section 410.165(b), we have held that Daubert and Robinson do not provide a basis for excluding opinions in an administrative workers' compensation proceeding. Texas Workers' Compensation Commission Appeal No. 991964, decided October 25, 1999. See also Texas Workers' Compensation Commission Appeal No. 012099, decided October 18, 2001 and Texas Workers' Compensation Commission Appeal No. 000623, decided May 11, 2000. We perceive no error.

With regard to the carrier's contention that the hearing officer erred in not rephrasing the extent-of-injury issue and that the hearing officer's determination is vague and ambiguous, we note that at the unanimous request of the parties at the CCH on June 25, 2002, the issue was rephrased to state "[D]id the compensable injury of _____ include an injury to the neck and/or cervical spine?" pursuant to Section 410.151(b). This case was remanded for the sole purpose of reconstruction of the record and not to relitigate the disputed issue as agreed to by the parties. The hearing officer resolved the disputed issue by deciding that the compensable injury of _____, does extend to and include an injury to the neck and/or cervical spine in accordance with the disputed issue. As to the carrier's contention that the hearing officer's extent-of-injury finding is vague and ambiguous because of the conjunction "and/or," we note that the hearing officer's Finding of Fact No. 2 specifically states that "there is a casual connection between the compensable injury of _____, and the Claimant's injury to her neck and cervical spine." We perceive no error.

Conflicting evidence was presented at the hearing regarding the extent of the injuries sustained by the claimant on the date of injury. Extent of injury is a question of fact. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of 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, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer noted that the medical evidence reflects that the claimant's "symptoms reflect a manifestation of pain not only from the

median nerve or ulnar nerve problems, but also from the radiculitis of the neck.” Based on the evidence presented at the CCH, the hearing officer could conclude that the compensable injury does include the neck and cervical spine and nothing in our review of the record indicates that this decision is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer’s decision and order is affirmed.

The true corporate name of the insurance carrier is **NATIONAL SURETY CORPORATION** and the name and address of its registered agent for service of process is

**DOROTHY LEADERER
1991 BRYAN STREET
DALLAS, TEXAS 75201.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Panel
Manager/Judge

Edward Vilano
Appeals Judge