

APPEAL NO. 950419

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB CODE ANN. § 401.001 *et seq.* (1989 Act). On February 17, 1995, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues were:

1. Is the Claimant's injury of (date of injury), a producing cause of her neck problems, or due solely to the subsequent, non-compensable accident on May 4, 1993?
2. Are the Claimant's back, inner ear, stomach, and brainstem injuries a result of the compensable injury sustained on or about (date of injury)?

The hearing officer determined that claimant sustained right side neck problems, but no other medical conditions, due to her (date of injury) (all dates are 1993 unless otherwise noted), compensable injury and that a May 4th motor vehicle accident (MVA) was not the sole cause of claimant's neck problems. Appellant (carrier) contends that the hearing officer's decision is not supported by the evidence and requires reversal. Carrier does not appeal the hearing officer's determinations regarding claimant's other alleged injuries and those determinations have become final (See Section 410.169). Respondent's (claimant's) response was not timely filed and therefore cannot be considered (See Section 410.202(b)). Furthermore, claimant in her response, requests that we review the hearing officer's determinations regarding her other medical conditions. That portion of the response that requests a review constitutes an appeal and also was not timely filed pursuant to Section 410.202(a).

DECISION

The decision and order of the hearing officer are affirmed.

It was undisputed that claimant was a receptionist for, the employer. On (date of injury), claimant slipped on a marble floor as she was opening a door to leave work and grabbed the door handle to keep from falling down completely. Claimant testified that in this accident she injured her right shoulder, right arm, hand and wrist as well as the right portion of her neck and thoracic area of her spine. Claimant testified that she went to work the next day, reported her injury and consulted (Dr. Mc) for her injuries. Dr. Mc's progress note dated (date) gives a history of a fall "yesterday & hurt (R) arm. Hurting up into her neck & fingers on (R) hand, feels [sic] numb & tingling." The note indicated Dr. Mc examined claimant, took x-rays, and prescribed medication "Ice [symbol unclear] Elevated." Another progress note on the same page [dated the 9th of some month which is not clear] refers to follow-up of the injury to "(R) shoulder & arm - still having pain in arm & shoulder." The doctor notes that claimant apparently had missed an appointment. Claimant received physical therapy in April with notations regarding claimant's right shoulder and wrist. A physical therapy note dated (date of injury) (the date of injury),

refers to "Head." Claimant filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) dated May 12th. Claimant listed as the nature of the injury "Tendinitis & Carpal Tunnel Syndrome." In an Incident/Accident Report attached to the TWCC-41, in claimant's description of the incident, claimant states: "I felt something pull in my arm & neck and was in pain all night and the next day till now." The incident report is dated (date).

Claimant was involved in a MVA on May 4th when the car she was in was rear ended (hit from behind) by another vehicle. The hearing officer, in his discussion, comments:

The medical evidence indicated that the Claimant's inner ear, low back and cervical spine problems and dizziness appear to have been caused by the Claimant's subsequent car accident on May 4, 1993. The Claimant has a third party lawsuit pending in which the allegations are made that the May 4, 1993, car accident caused her cervical sprain, inner ear concussion, brainstem injury, and low back injury, and TMJ. The Claimant clearly reported neck problems prior to the auto accident.

There are voluminous medical records from some ten other doctors (in addition to Dr. Mc) in the record, however, none appear to make any reference to a neck injury before claimant's "whip lash" injury of May 4th. One of the doctors, (Dr. O) in several reports states "I cannot tell the percentage of injury due to the slip and fall versus the auto accident" (report dated December 14, 1994). Dr. O seems to indicate the MVA of May 4th "is most significant." In another report dated December 16, 1994, Dr. O stated "I do not think that anyone can determine the direct, specific cause of the injury when there were so many traumas within months." (Claimant was also involved in another MVA in November 1993).

Carrier disputes the following determinations of the hearing officer:

FINDING OF FACT

7.The claimant's compensable injury was the producing cause of her right side neck problems existing prior to the auto accident of May 4, 1993.

CONCLUSION OF LAW

3.The Claimant's injury of (date of injury), is a producing cause of her right side neck problems but not her cervical sprain, and the right side neck problems other than the cervical sprain are not due solely to the subsequent, non-compensable car accident on May 4, 1993.

Carrier in its appeal, and at the CCH, points to numerous medical reports which would indicate that claimant's neck complaints were related to the May MVA. Carrier acknowledges that in Dr. Mc's report claimant did complain of neck pain before the May MVA but argues that "Mere pain, without damage or harm to the physical structure of the body, is not compensable," citing Appeals Panel decisions. We agree that different interpretations could have been made on the evidence presented, however, when there is conflicting or contradicting evidence, as there is in the instant case, it is the hearing officer's responsibility to reconcile it. St. Paul Fire & Marine Insurance Co. v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). Claimant testified that her compensable injury, included a neck injury; Dr. Mc's note of (date) supports claimant's testimony and the hearing officer made a factual determination that the claimant reported neck problems ("pain in her arm up into her neck") prior to the May MVA. Although the claimant's testimony, being that of an interested witness, only raises an issue of fact, Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ), the hearing officer could nonetheless accept claimant's testimony as evidence of an injury. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

While the record in this case contains evidence which would support different conclusions, that fact alone is not a sufficient basis upon which to overturn the decision of the hearing officer. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). We will reverse the hearing officer's decision only where it is so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Based upon our review of the evidence, we decline to take that step in this case.

Accordingly, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge