

## APPEAL NO. 960022

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 18, 1995, in [city], Texas, with [hearing officer] presiding as hearing officer. The issues at the CCH were whether the appellant, [claimant], who is the claimant, sustained an injury to her neck and left shoulder at the same time she injured her back on [date of injury], and whether she had disability. Claimant was employed by [employer] (employer), on the date of injury.

The hearing officer held that claimant did not injure her neck and shoulder in the incident that injured her back. The hearing officer referenced an earlier hearing decision before another hearing officer in which it was determined, on a general issue of whether the claimant had sustained a compensable injury on [date of injury], that she injured her back, and stated that claimant had only been found to have a lumbar back injury pursuant to that decision. The hearing officer held that claimant did not have disability for a period from June 19, 1995, to the date of the CCH.

The claimant has appealed, arguing that she injured her upper back, neck, and shoulder, as well as her lower back, on [date of injury], and was put on light duty for the period of time after June 19, 1995, and thus had disability after that date. The carrier responds that claimant's appeal is not timely filed, that the evidence supports the finding that she did not injure her neck and shoulder in the incident in question but that any such injuries were from previous compensable injuries, and that she voluntarily left work on June 19, 1995, and then returned to work on July 31, 1995.

## DECISION

We affirm the hearing officer's determination that claimant did not injure her neck and shoulder on [date of injury], and his determination that claimant did not have disability after June 19, 1995. Finding that an earlier decision was *res judicata* on the nature of the previous injury as a "back" injury, we reform the hearing officer's characterization of that injury as a "low" or "lumbar" back injury in a manner consistent with the scope on injury found in Texas Workers' Compensation Commission Appeal No. 950617, decided June 5, 1995.

The claimant's appeal is timely. Claimant stated that she received the copy of the hearing officer's decision on December 14, 1995; her appeal is dated and postmarked on the fifteenth day after that date, or December 29, 1995. See Texas Workers' Compensation Commission Appeal No. 92518, decided November 16, 1992.

Briefly, the procedural history of this claim should be set out. In a CCH held on March 17, 1995, another hearing officer of the Texas Workers' Compensation Commission (Commission) considered the broad unresolved issue of "whether the claimant sustained a compensable injury on [date of injury]." A fair review of the transcript and exhibits from the prior CCH indicates that the claimant contended not only that her "back" was injured, but

that she also had pain in her neck, shoulder, hip, left arm, and leg. Evidence was presented at the prior CCH about compensation claims for prior neck and back injuries.

In response to the broadly stated issue, the hearing officer expressly found that claimant sustained a "back" injury on the date in question, and had disability from that injury up to September 20, 1994. The carrier appealed the findings of injury and disability and the Appeals Panel affirmed, in Texas Workers' Compensation Commission Appeal No. 950617, decided June 6, 1995. Claimant did not appeal.

In the present CCH, the claimant testified that she hurt her back, from her neck all the way down her spine when she was pushing a clothing rack. Claimant stated that she was not straining nor turning at an angle, but that she felt sudden pain and a twisting sensation. Her supervisor, [Ms. B], testified that the claimant reported to her that she had injured her back and it was not until later, before the first CCH, that she understood that claimant also contended injury to other parts of her body.

Claimant said that she had been employed up to June 19, 1995, at a golf course, where she prepared food, bussed tables, and ran a cash register. Claimant said she was on her feet up to twelve hours a day, and then went to [hospital], where she was given a light-duty release. According to claimant, the employer would not retain her under a light-duty release, so she left work. Claimant returned to work for a temporary service agency on July 31, 1995, and was working as of the date of the CCH.

On [the day after the date of injury], claimant was treated at [clinic], where she complained of left neck and shoulder pain as well as mid and low back pain; the ultimate diagnosis of [clinic] was musculoskeletal pain. Claimant filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) on July 28, 1994, which claimed injury to her back, neck, shoulder, arm, and legs. On September 20, 1994, claimant was evaluated by a doctor for the carrier, [Dr. S], who found that she had myofascial pain syndrome in the lower back and to lesser extent in the upper back, and possible fibromyalgia. He also noted that claimant had neck and shoulder pain. It is fair to say that claimant's medical records reflect complaints of pain in her neck and her upper mid back, up through May 1995, when she was reexamined by Dr. S and found not to be at maximum medical improvement (MMI). He noted that if he were to give an impairment rating (IR), claimant would receive IR for her lumbar and cervical areas.

On November 16, 1994, claimant obtained a full work release from [medical center], [Dr. RS]. Claimant submitted a work release dated May 10, 1995, by [hospital], stating that she could return to work on May 11th, performing such duties as she was able. Her treating doctor, [Dr. Z], completed a light-duty release for claimant covering the period from May 12 through June 12, 1995. The testimony and records from the March 17, 1995, CCH were admitted at the CCH currently under appeal.

The past injury history of claimant is briefly as follows:

[1982 date of injury] :chronic cervical strain, sprain of lower back muscles/  
settled by Compromise Settlement Agreement (CSA).

[1983 date of injury]: upper back and neck/ settled by CSA.

[1985 date of injury]: Neck and back/ settled by CSA.

[1991 date of injury]:lumbar injury, resulting in surgery.

In addition, claimant said during the previous CCH she had been in a car accident which injured her back, on an unrecalled date in the previous five years.

At the current CCH, the carrier had argued that the prior decision was *res judicata*, and that claimant had contended at the prior hearing that it was only her lower back that was injured, and could not now claim injury to her neck and shoulder. For her part, the claimant argued that she did not appeal because she "understood" that the hearing officer's finding that she injured her back also included the neck. The claimant said that she did not fully understand that the back and neck were two regions of the body.

The record from the prior hearing does not fully support either argument. First of all, it appears that injuries to regions other than the "back" were asserted, and litigated, at the March 1995 CCH. Second, claimant's claim, and her testimony, for the [date of injury], injury indicate an appreciation and identification as separate regions of the body of the "back" and "neck." The previous hearing officer, in response to the broadly-worded issue of whether claimant sustained a "compensable injury," qualified her finding and agreed that the nature of the compensable injury was one involving the "back." Whether or not there was an express issue on "extent" of injury at the previous CCH, we believe that the nature of the contended injury was necessarily litigated in this hearing, especially when there was a sole cause defense of the [date of injury], injury based on prior injuries to some of the same regions of the body. We cannot therefore simply conclude that it was the intent of the previous hearing officer to find the existence of a compensable injury as claimed in total by the claimant. Unfortunately, the claimant did not seek clarification of this apparent qualification of the nature of her injury through an appeal. The carrier appealed based on its defense that no injury occurred at all, and the Appeals Panel's review was not therefore requested as to the scope of the injury found by the hearing officer. The Appeals Panel affirmed, and the case, according to the evidence in this CCH, has been appealed to district court.

In the present decision, the hearing officer, while not expressly invoking "*res judicata*" as to the injury issue, nevertheless states that he is required to follow the prior decision until reversed by the District Court. We agree. As we noted in Texas Workers' Compensation

Commission Appeal No. 950690, decided June 15, 1995, involving a parallel fact situation, a hearing officer is not free to add to or recast the findings of an earlier decision on the nature of a compensable injury. As we stated in that decision:

We are unwilling to conclude that the hearing officer's omission of neck as part of the injury found in the 1993 decision was merely an oversight. We cannot simply assume that by using the terms "left side" or "back" and "upper extremity," that the hearing officer meant to say neck. We believe that the terms "neck" and "back" are commonly understood to involve different regions of the body.

Therefore, the hearing officer's determination against claimant's assertion of injury to her neck and shoulder is affirmed. However, for the same reason, we must reform the hearing officer's recasting of the earlier decision as confined to claimant's "low" back. While we agree that the commonly-understood meaning of "neck" relates to the cervical region of the spine, we do not agree that the term "back" is restricted only to the lumbar spine. The claimant presented evidence at the March 1995 CCH that her middle back, the thoracic area, was injured and treated; as there is no basis to conclude that the first hearing officer intended for "back" to apply to the neck and shoulder, there is likewise no basis to conclude that only the lumbar area was intended. We therefore reform Finding of Fact No. 4 to delete its restriction of claimant's previously-determined back injury to the "low" back or "lumbar" spine.

Temporary income benefits are due when an injured worker has not reached maximum medical improvement and has disability. Section 408.101(a). Section 401.011 (16) defines "disability" as: "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). 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). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). In reviewing the record, we find sufficient evidence to support the hearing

officer's determination that the claimant did not have disability from June 19 through November 18, 1995, because of the compensable back injury or from an alleged neck and shoulder injury. We affirm the decision and order of the hearing officer, as reformed.

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Thomas A. Knapp  
Appeals Judge