APPEAL NO. 93014

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8309-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on September 25, 1992, with the record left open until October 30th for receipt of further evidence. The hearing officer, (hearing officer), held that the claimant's neck problems are a part of the compensable injury he suffered on (date of injury), and that he has suffered disability since March 2, 1992. The hearing officer accordingly ordered the self-insured governmental entity (hereinafter "employer/carrier"), who is the appellant in this action, to pay medical benefits and temporary income benefits in accordance with these determinations. The carrier has requested our review of this decision, contending that the hearing officer's determination regarding the claimant's neck injury is against the great weight and preponderance of the evidence.

DECISION

We affirm the decision and order of the hearing officer.

The claimant was employed by the employer/carrier as a laborer. On (date of injury), he testified that he was at a remote site painting gates. He had driven to the site in employer/carrier's pickup truck, which had a history of jumping out of gear from park to reverse. He said this problem had been reported but no action had been taken to fix the truck. On the day in question, claimant got out of the truck to shut the gate when the truck jumped out of gear and started rolling. The open door of the truck struck the claimant in the right upper arm, just below his shoulder. At the time, the pain was mostly in his arm. The same day, he reported the incident to his supervisor and filled out an accident report. He did not see a doctor until nearly a month after the incident, although he said he suffered pain in his arm and the area between his shoulder and neck during that time.

Claimant was first treated by (Dr. T), who ordered x-rays, gave him medication, and sent him to physical therapy. She released him to return to work on December 11, 1991, the same day she initially saw him. In an August 24, 1992 letter Dr. T said when she first saw claimant he was complaining of right upper arm pain, some neck pain and numbness to his hand. When she first examined him, Dr. T found spasms in the muscles of his upper back, but said his x-rays of the shoulder and arm were within normal limits. When the claimant on a follow-up visit complained of more pain radiating down his arm and increasing pain to his upper shoulder muscles, she ordered cervical x-rays which showed more straightening of the normal lordotic curve with some very mild degenerative changes. She stated that at that point she felt his diagnosis was cervical radiculopathy or pinched nerve in the neck. A later MRI scan of the neck in February 1992 showed minor defects at several cervical spinal levels, but no herniated discs or other lesions.

Dr. T in her letter concluded, "[b]ased on all of these events and findings, it is my belief that [claimant] did not develop the cervical radiculopathy as a result of his injury on (date of injury). The injury was trivial, he worked for a month prior to seeing a physician,

and his symptoms seem to worsen after seeking treatment. Furthermore, the changes that were found in his MRI scan that would result in these symptoms would not occur as a result of a traumatic injury, such as a herniated disc." She stated she would defer to the opinion of an orthopedist or a neurosurgeon. When asked about Dr. T's opinion that his neck problems were not linked to his injury, the claimant said that he was still having neck pain, and "whether it is related to the injury or not, I don't know." Claimant stated he had never had any neck problems prior to his injury, only tension in his neck occasionally.

The claimant also was seen several times by (Dr. Co), to whom he went on his own without referral. In an Initial Medical Report dated March 17, 1992, Dr. Co diagnosed tenosynovitis right shoulder, and released claimant to limited work as of March 30th and to full time work on May 30th. Dr. Co also referred claimant to (Dr. Ge). On April 1, 1992, Dr. Ge assessed a normal shoulder examination, and said Dr. Co's x-rays revealed a diagnosis of cervical spondylosis. However, Dr. Ge said he could not treat claimant without authorization to examine the neck, which authorization had been denied. He also said he had no objection to the claimant returning to work.

Claimant saw (Dr. Ga) who on August 10, 1992 noted the claimant's initial complaints of right arm pain only, and the later findings of some spondylitis at the 4/5 level in the neck, although he said there had been "no x-rays taken all the way down to C7." He recommended an EMG and NCV of the right upper extremity to see whether or not there was a nerve root difficulty traceable to the neck, arm, or some other place.

Dr. T referred claimant to a neurosurgeon, (Dr. Ca), who on September 3, 1992 reported that the claimant had undergone electrophysiological testing because of pain and numbness over the right upper extremity. He stated that on nerve conduction velocity testing, the indices for the right median and ulnar nerves were normal; however, on electromyography, denervation potentials were observed in the C8 distribution on the right side. He stated his impression that this may indicate intraspinal pathology in the cervical region. The claimant testified that he saw Dr. Ca only once.

During his medical treatment, the claimant continued to work, taking time off for doctors' appointments. When Dr. Co took him off work in March he said he used his accumulated sick leave and vacation leave until it was used up. He did not return to work thereafter, and he was fired in late May for failing to keep in contact with the county commissioner to whom he reported. He said he has not applied for any other jobs because he is still in pain from his accident.

Claimant's supervisor, (Mr. R), testified that he considered claimant to be a friend, but that in his opinion claimant had poor work habits. Mr. R did not dispute the fact that claimant had been injured as he stated on November 11th, but said he thought claimant was malingering. Although claimant reported the incident with the truck to him on the day it occurred, Mr. R said claimant did not mention his shoulder hurting until about three weeks

later, when another employee started kidding claimant about his having to dig post holes in rocky soil. Before any holes were dug, Mr. R said claimant told him for the first time that he needed to see a doctor about his shoulder. He said that before that he did not notice claimant having any problems with his neck or arm.

The hearing officer admitted into evidence employer/carrier's employee manual, which states in part that loss of work due to accident or injury received in the performance of duty is not time which shall be charged against sick leave of any employee. In determining claimant had disability since March 2nd, and ordering employer/carrier to pay any unpaid TIBS accrued since that date, the hearing officer also ordered the employer/carrier to pay TIBS for any periods which were compensated only because of claimant's accrued leave.

Employer/carrier's request for review contests only that part of the hearing officer's decision and order which determines that claimant's neck injury arose from the compensable injury he suffered on (date of injury), and that he is accordingly entitled to medical treatment to his neck. Employer/carrier points to Dr. T's opinion that claimant did not develop cervical radiculopathy as the result of that injury, and that any changes found in his MRI scan would not occur as a result of a traumatic injury. It also says that Dr. T's return to work slip does not mention any problem with claimant's neck.

In the discussion section of his decision and order the hearing officer states his reasoning as follows: "Claimant says he had tingling in his fingers and numbness in his fingers and arm. He was unable to get treatment for the neck until an interlocutory order was issued in his favor. The diagnostic testing done since the order was entered indicates denervation indicating possible intraspinal pathology in the cervical region. Claimant says he did not have these problems until the truck door hit him. I believe him."

Upon review of the record in this case, we cannot say that there is insufficient evidence in the record to support this determination, nor that it is against the great weight and preponderance of the evidence. It is clear in this case that the hearing officer found claimant's testimony regarding his pre- and post-injury condition to be credible evidence. The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e); Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). A claimant's testimony, where accepted by the finder of fact, may serve as the basis of a finding of injury even where there is medical evidence to the contrary. Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.) In this case, claimant's testimony raised a fact issue as to whether his neck problems were an extension of his original injury from contact with the pickup truck door, which the hearing officer was entitled to believe. Texas Workers' Compensation Commission Appeal No. 92184, decided June 25, 1992. The hearing officer could also choose to rely on the medical evidence indicating cervical pathology, over Dr. T's opinion that claimant's neck problems could not be the result of trauma. Houston General

Insurance Co. v. Pegues, *supra*. A decision of a hearing officer should not be set aside because difference inferences and conclusions may be drawn on review even though the record contains evidence of or gives equal support to inconsistent inferences. Texas Workers' Compensation Commission Appeal No. 91021, decided September 25, 1991, citing Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

We are satisfied that the decision of the hearing officer is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. Civ. App.-San Antonio 1983, writ ref'd n.r.e.). We affirm the hearing officer's decision and order.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge