

APPEAL NO. 93549

At a contested case hearing held in (city), Texas, on June 2, 1993, the hearing officer, (hearing officer), considered the sole disputed issue, to wit: whether the respondent's (claimant) problems are a result of the injury in (date), or another injury which occurred on (date of injury). The hearing officer concluded that on August 10, 1992, the claimant sustained a compensable left shoulder and upper back injury while in the course and scope of his employment with (employer) and that the preponderance of the evidence did not show that claimant's condition on and after (date of injury) was solely caused by a non-compensable injury that occurred on (date of injury). In its request for review, the appellant (carrier) essentially disputes the hearing officer's treatment of the evidence and seeks reversal and the rendering of a decision for the carrier. The claimant's response urges the sufficiency of the evidence to support the hearing officer's decision and seeks affirmance.

DECISION

Finding the evidence sufficient to support the hearing officer's findings and conclusions, we affirm.

Claimant testified that he worked in the yard of employer's store and that his employment duties included loading customer's purchases into their vehicles at employer's store. He said that on August 10, 1992, he was loading chain link fence into a customer's truck and felt pain in his left shoulder and left upper back area when he threw fencing up onto the stack. He said he complained to his supervisor, (Mr. MK), later that day and again the next day but was just told to "stretch" his arm out. He testified he asked to see a doctor, that on August 12th Mr. MK sent him to employer's doctor, (Dr. M), and that Dr. M released him that day for light duty for one week but that he was put back in the store's yard performing his regular duties. He said he was seen by Dr. M again on or about August 17th and released to regular duty. He said his pain continued after his release to regular work, that he continued to work, and that Mr. MK told him if he valued his job he would not insist on seeing the doctor.

Claimant also testified that while at home on (date of injury), he was going to rotate his truck tires and when he bent down to look at a tire, before doing any tire rotations, he felt a sharp pain in the area of his left shoulder and upper back which radiated further down his back, and he could not straighten up. He went to the emergency room (ER) that same day where he was given an injection. On November 20th, claimant said he saw (Dr. P). Claimant said he gave both ER personnel and Dr. P a history which included his August 10th injury at work, and he could not account for the absence of mention of such in his medical records.

The employer's representative at the hearing presented the testimony of employer's store manager, Mr. MK, and of employer's salesman, (Mr. KK), after the hearing officer sustained claimant's objections to their testifying for the carrier based on the carrier's having failed to comply with the discovery rule (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §

142.13). Mr. MK testified that claimant had said he pulled a muscle in his shoulder and saw Dr. M the day after he said he was injured. It was the carrier's contention that claimant's injury occurred on August 12th and not the 10th, that the injury was limited to claimant's left shoulder and did not include his back, that claimant's back injury occurred on (date of injury) at home while rotating truck tires, and that the (date of injury) noncompensable injury was the sole cause of claimant's problems after that date.

Mr. MK could not recall claimant's having been initially restricted to light duty by Dr. M, recalled that claimant went back to his yard duties after seeing Dr. M, and could not recall claimant complaining of pain thereafter. Mr. KK testified he recalled that claimant, after seeing Dr. M, performed duties involving the stocking of electrical supplies for a few days before returning to his yard duties. He recalled that claimant had said he hurt the muscle across his shoulder and arm when loading the fencing at the store, and that claimant said he hurt his lower back rotating the tires on his truck.

Dr. M's Initial Medical Report of August 13, 1992, stated that when claimant was loading the chain link fence he felt something pinch and burn in between his shoulders. Dr. M prescribed muscle relaxants and light duties. In a later report, Dr. M stated that claimant reached maximum medical improvement (MMI) on August 17th with a zero percent whole body impairment rating. There were no disputed issues regarding MMI and claimant's impairment rating. The ER records of (date of injury) stated that claimant complained of thoracic and lumbar back pain after lifting a tire. X-rays were taken and claimant's diagnosis was dorso-lumbar strain. He was treated with medications, bed rest, and a back brace, and was released to normal duties effective October 27th.

According to Dr. P's initial medical report of November 20, 1992, claimant was seen for evaluation and treatment of injuries "sustained in a work-related vehicle accident which took place on (date)." Claimant could not account for Dr. P's reference to a vehicle accident. The report stated claimant had received treatment from Dr. M without satisfactory results and complained of headache and pain in the posterior neck and middle back, lower back, both shoulders, and left hip areas. Dr. P initiated a course of physical therapy and took claimant off work. In an April 5, 1993, report, Dr. P referred to claimant's August 10th work-related injury and stated that his "current symptom picture is, from all clinical evidence, wholly due to injuries from this work related accident." Dr. P further stated that although claimant had some increased symptoms from the "relatively minor" accident at home, "the symptom picture quickly returned to the baseline seen immediately prior to his sustaining the accident at home," and that claimant had "no permanent sequellae" from the accident at home.

The carrier urged before the hearing officer that claimant's work related injury was a minor injury affecting only his shoulder and that it was the more serious back injury incurred

while rotating tires which resulted in his condition. The carrier also argued that Dr. P, not having seen claimant until November 20th, was in no real position to state what his baseline was just before the (date of injury) accident. Finding, among other things, that claimant's condition on and after (date of injury) was due to both the injury on August 10th as well as the tire incident on (date of injury), and was not due solely to the (date of injury) incident, the hearing officer concluded that claimant sustained a compensable left shoulder and upper back injury on August 10th and that the preponderance of the evidence did not show that claimant's condition on and after (date of injury) was solely caused by a noncompensable injury that occurred on that date.

As we observed in TWCC Appeal No. 91038, decided November 14, 1991, "to defeat a claim for a current injury because of a pre-existing or subsequent injury, the burden is on the carrier to show that the pre-existing or subsequent injury is the sole cause of the present incapacity. (Citations omitted.) And, an injury may be compensable even though aggravated by an existing injury or condition, or by a subsequently occurring injury or condition. (Citations omitted.)." The issues for the hearing officer's determination were issues of fact and the hearing officer is the sole judge of the weight and credibility of the evidence under the 1989 Act (Article 8306-6.34(e)). We will not disturb the hearing officer's factual findings unless we find them against the great weight and preponderance of the evidence. We do not so find in this case. The hearing officer could credit claimant's testimony as well as the information from Dr. P's records. Her findings have sufficient support in the evidence and the findings adequately support the legal conclusions.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge