APPEAL NO. 93621

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq*. (1989 Act), a contested case hearing was held in (city), Texas, on June 25, 1993, (hearing officer) presiding as hearing officer. He determined that the respondent (claimant) injured her cervical spine in the course and scope of her employment on (date of injury). Appellant (carrier) urges error in the hearing officer's findings of fact, one of his conclusions of law and in his discussion of the evidence, and asks that we reverse. The carrier also asks for clarification of temporary income benefits (TIBS). The claimant requests that the decision be upheld.

DECISION

Determining that the findings of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, and that there is a sufficient evidentiary basis, we affirm his decision.

The issue at the contested case hearing was whether the claimant sustained an injury to her cervical spine at the time she injured her right shoulder on (date of injury). According to the testimony of the claimant, her injury resulted from moving a bundle of wool jackets at work at which time she felt a pull in her right shoulder and experienced pain in her shoulder that ran up into her neck. Although she did not miss work, she was examined and treated by several doctors over the ensuing months. The medical reports are consistent with an injury but do not specify that the claimant complained of pain in her neck. She stated that she told the doctors about the pain in the general area of her shoulder up to her neck but did not specifically state she had pain in her neck. In any event, she states she continued to have pain and was not getting any relief. Diagnostic tests of the shoulder did not show any objective causes for the pain. In October she began treating with a chiropractic doctor who told her the pain came from her neck and took her off work. She was subsequently returned to work but states she continued to suffer pain in the shoulder and neck area. In November, 1992, an MRI of her cervical spine resulted in the following impression:

> There is a small posterior central disc herniation at the level of C5-6 compressing the anterior thecal sac with slight anterior indentation of the central spinal cord with no significant central spinal stenosis or neural foramina narrowing.

The findings of fact and conclusion with which the carrier takes exception are:

FINDINGS OF FACT

4.Claimant suffered an injury while at work on (date of injury), that caused pain in her right shoulder which ran up to into (sic) her neck.

5.Claimant has consistently complained that she has had pain in her neck as well as in her shoulder.

6.Claimant has a ruptured disc at C 5-6 in her cervical spine that causes pressure on the thecal sac with indentation of the central spinal cord.

CONCLUSIONS OF LAW

3.Claimant injured her cervical spine in the course and scope of her employment on (date of injury) (Article 8308-1.03(27) and Article 8308-3.01)).

The thrust of the carrier's argument is that the evidence does not support a finding that the cervical injury was incurred on (date of injury), given the great length of time between the incident of (date of injury), and the ultimate diagnosis involving the disc's herniation, the absence in the various earlier medical records of any noted complaints of neck pain by the claimant, and inconsistency in the claimant's statements of the area and scope of pain and injury. Carrier also complains that two comments in the hearing officer's Discussion of Evidence are not supported by the evidence of record: (1) that claimant "continuously" complained of pain, and (2) that "[t]he nerve roots emanating from C5-6 directly affect the muscles of the shoulder in the area included in claimant's original and continuing complaints." With regard to the second comment, we agree with the carrier and find no basis for the comment in the evidence before the hearing officer. It is not a part of the report of the cervical MRI and there is no medical treatise or other information in the record or of which official notice was taken to support the comment. However, under the circumstances, we do not find this to be reversible error and note that it did not become part of the hearing officer's ultimate findings or conclusions in the case. The claimant testified that she described general areas where she felt the pain and that she did not know from where it emanated. She states she described areas in her shoulder and "going up to the neck area." We do not believe it is required that a lay person be precise in stating the source or exact in pinpointing the area of pain manifestation. If the claimant's testimony is believed by the hearing officer, as it apparently was, the claimant suffered pain in a generalized area of her shoulder to the neck and attempted to so articulate. With regard to the first comment, it is arguable whether the claimant "continuously" complained of pain through out the full period of time involved in this case and perhaps it could more accurately be termed intermittent. The important factor is, however, that there was a distinct course of complaints and the seeking of medical treatment for the complaints although it was broken by periods when the claimant would return to work. She stated, nonetheless, that she did not get relief from the pain in the shoulder to neck area from the inception of the injury on (date).

Although not necessarily compelling, we believe there is sufficient evidence in the record from which the hearing officer could arrive at his findings and conclusion. Under Section 410.165(a), the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. As the fact finder he resolves any conflicts in the testimony before him (Garza v. Commercial Insurance Co.

of Newark N. J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ), and resolves conflicts in medical evidence. Texas Employers' Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist] 1984, no writ. A claimant's testimony, as an interested party, only raises an issue of fact (Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ), and his or her testimony may be believed to the exclusion of others, even experts. Texas Employers' Insurance Association v. Thompson, 610 S.W.2d 208 (Tex. Civ. App.-Houston 1981, no writ.

Carrier asks for "clarification of the periods for which [TIBS] are due" although this was not an issue before the hearing officer and is a matter first raised on appeal. We have held that we cannot consider such matters, and note that there is no record developed if indeed there is a dispute as to any TIBS period. Texas Workers' Compensation Commission Appeal No. 93580, decided August 26, 1993, Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. The hearing officer's decision states, in accordance with the determination that a cervical injury was sustained within the course and scope of employment, that TIBS will be paid for any appropriate periods of time until disability ends or maximum medical improvement (MMI) is reached. Under Section 401.011(30), MMI is defined and a specific time limit of 104 weeks is set forth as measured from "the date on which income benefits begin to accrue." The accrual of income benefits is provided for under Section 408.082 and is tied to disability. As stated, the hearing officer's decision only provides for the payment of TIBS to which the claimant is entitled under the statute. If a dispute arises as to amounts or times for the payment of TIBS, this can become the subject of the dispute resolution process.

For the reason set out above, the decision of the hearing officer is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge