APPEAL NO. 93812

Pursuant to the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. art. 8308-1.01 *et seq*.), a contested case hearing was held in (city), Texas, on August 6, 1993, (hearing officer) presiding as hearing officer. On the single issue of what the respondent's (claimant) correct impairment rating was, she determined, in accordance with the certification of the commission selected designated doctor, that the correct rating was 20%. The appellant (carrier) urges error in that there is no evidence to support any neck injury for which a three percent impairment rating was given because of cervical range of motion (ROM) deficits, and complains that the burden of proof on the issue of impairment was improperly placed on the carrier. Claimant posits that the hearing officer was correct in her determinations and asks that the decision be affirmed.

DECISION

Concluding there is sufficient evidence to support the determinations of the hearing officer and not finding an incorrect application of law, we affirm the decision.

The claimant sustained a compensable injury on (date of injury), when he fell into a deep hole while carrying some heavy sheetrock. The most serious aspect of his injury was to the lower back for which he subsequently had surgery and was considered, at one time, for a second surgery. In any event, he saw a number of doctors over the ensuing months including second opinion doctors concerned with the surgery aspect. He testified that he told the doctors about the pain he was having in his neck and his continuing headaches and did not know why it was not reflected in many of the various medical records and reports other than the main concern at the time was the surgery. In his notice of injury made out by his wife (he apparently has difficulty reading and writing) the incident and his injury is described thusly: "Fell in hole in floor at construction site while making a delivery. Slipped disk in lower back." A number of the medical reports offered into evidence by the carrier do not mention a neck injury or complaint. From the exhibits offered into evidence by the claimant, it is apparent that he did complain of pain in his neck and shoulders and having headaches both shortly after the incident and later on. A physician's report dated "(date)" reflects complaints of low back pain radiating into both legs, shoulder, and neck, and another report dated "9-3-91" lists under diagnosis "L5-S1 disk herniation S/P excision R hip pain HA Neck & Shoulder pain." A physician's report dated "3/21/91" states under IMPRESSION:

> Historically a relatively recent onset of headaches, which he temporally relates to his low back injury which he sustained in mid-February. This along with the fact that he describes posterior neck pain radiating up into his occiput and then extending pancranium is somewhat suggestive of cervical spine disease and headache secondary to this.

The claimant disputed his then treating doctor's impairment rating of 10% for "lumbar spine" signed on "12/07/92" and a commission selected designated doctor was appointed.

The designated doctor rendered his report on "02-23-93" and assigned a 20% impairment rating which included three percent for loss of ROM for the neck. In his report the designated doctor noted that the claimant had immediate back and neck pain following his accident and that his examination revealed diffuse cervical tenderness. The doctor sets forth his measurements and methodology in arriving at the three percent impairment involving the neck. The claimant's wife indicated at the hearing that the designated doctor had the various medical reports and tests on the claimant at the time of his evaluation and a report from the designated doctor dated February 15, 1993, to Crawford & Company, indicated that he had reviewed the claimant's medical records.

The carrier argues that the evidence does not establish a neck injury and that mere pain is not a compensable injury. While there is authority that "mere pain is not compensable" under workers' compensation as stated in National Union Fire Insurance Co. of Pittsburgh v. Janes, 687 S.W.2d 822 (Tex. Civ. App.-El Paso 1985, writ ref'd n.r.e.), that case involved a situation where there was no underlying injury. All the evidence established in that case was that a temporary metal plate used to repair a fractured right femur had been broken (the fibrous union in the leg continued intact) and that the leg was the same both before and after the breaking of the metal plate (no bone was broken in the incident). We recognized that mere pain was not compensable in and of itself in Texas Workers' Compensation Commission Appeal No. 92058, decided March 26, 1992, a case where we observed that the evidence from the time period prior to the incident leading to the claim showed that similar complaints and pain existed prior to the slip and fall in that case. Although recognizing that mere pain is not compensable, pain nonetheless can be a rather convincing circumstance of a potential underlying injury. And where there is evidence to support an injury, as there is here, it is appropriately considered in an overall impairment evaluation. The designated doctor found not only diffuse tenderness over the cervical spinous processes but medically determined that the claimant suffered ROM deficits in the area. Loss of ROM comes within the definition of injury which "means damage or harm to the physical structure of the body . . . ." Section 401.011(26). The claimant's testimony concerning the immediate and continuing pain in the cervical area from the time of the incident together with the notations in some of the medical reports during the course of the claimant's treatment concerning neck, shoulder and head pain and the absence of any evidence or indication of prior or subsequent potential causes of the cervical area pain combined with the specific medical findings of the designated doctor form a sufficient basis to support the hearing officer's finding and conclusion that the correct impairment rating, as determined by the designated doctor, was 20%. The claimant's testimony constituted evidence from which the hearing officer could infer that he also sustained a neck injury as a result of the accident on (date of injury), particularly with the findings and opinion of the designated doctor, and this showed a sufficiently strong, logically traceable connection between the neck condition and the accident. *See* Texas Employers Indemnity Company v. Etie, 754 S.W.2d 806 (Tex. App.-Houston [1st Dist] 1988, no writ); Texas Workers' Compensation Commission Appeal No. 92538, decided November 25, 1992.

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. Section 410.165(a). And, where there is sufficient evidence to support the hearing officer's determinations and they are not

so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, there is no sound basis to disturb them. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); Texas Workers' Compensation Commission Appeal No.92232, decided July 20, 1992. This is so even if the hearing officer, as fact finder, may have drawn inferences and conclusions different from those we might, on review, have deemed more reasonable and the record contains evidence of, or even gives equal support to, inconsistent inferences. *See* Texas Workers' Compensation Commission Appeal No. 91037, decided November 20, 1991.

We have reviewed the record and the hearing officer's decision concerning the assertion that the hearing officer "erred in placing the burden of proof on the carrier on the issue of impairment." The hearing officer stated at the inception of the hearing that the "burden is on the carrier to prove that the relief it seeks is allowable under the applicable statutes and regulations." It is apparent that, within the context of the issue stated, i.e., the correct impairment rating, and the fact that a commission selected designated doctor had rendered a certification of impairment rating which carried presumptive weight and which the carrier disputed and wanted disregarded, that the hearing officer determined that the carrier had to come forward with evidence that amounted to "the great weight of the other medical evidence" contrary to the report of the designated doctor. Section 408.125. We concluded this is the correct procedure and do not find any basis to hold that the claimant, armed with a designated doctor's report that he does not dispute, must somehow also disprove that there is any medical evidence contrary to the designated doctor's report that amounts to the great weight of other medical evidence. *In* Texas Workers' Compensation Commission Appeal No. 92543, decided November 23, 1992, cited by the carrier as authority for its position, we stated, as we have consistently, that in a workers' compensation case the burden is on the claimant to prove that he was injured in the course and scope of his employment. In accordance with the findings of the hearing officer, he met that burden here once the carrier presented evidence attacking the designated doctor's report. *See* Texas Workers' Compensation Commission Appeal No. 92127, decided May 15, 1992, where we rejected the carrier's assertion that the hearing officer had improperly placed the burden of proof on the carrier to establish that maximum medical improvement (MMI) had been reached where the claimant successfully established a compensable injury and his entitlement to

benefits and a valid certification of MMI had not been accomplished. As stated above, the evidence is sufficient to support the findings and conclusions of the hearing officer and the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge