APPEAL NO. 93860

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq.* (1989 Act) (formerly V.A.C.S, Article 8308-1.01, *et seq.*). On August 23, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issue determined at the contested case hearing was whether claimant's left shoulder condition was causally related to his injury of (date of injury), sustained while claimant, SS, was working for (employer). The hearing officer determined that the shoulder condition was caused by the injury, and that the carrier was liable for necessary and reasonable medical treatment for that shoulder.

The carrier has appealed, arguing first that the hearing officer had no jurisdiction over the dispute because it was really a dispute over whether the medical treatment for the shoulder was necessary and reasonable. Secondarily, the carrier argues that the evidence was insufficient to prove that claimant's shoulder condition developed as a result of the work-related injury. The claimant responds that the issue was properly heard by the hearing officer in that it involves claimant's right to obtain essential medical treatment, and further that the evidence supports the finding that the work-related injury was causally related to the current shoulder condition.

DECISION

We affirm the hearing officer's decision, finding no reversible error in the record.

The claimant stated that he was injured on (date of injury), as he picked up and turned a fuel pylon. He felt his left shoulder pop, as well as a strain in his back. After an initial visit to a minor emergency center, claimant consulted with several doctors, but his primary treating doctor was identified as (Dr. J). Evidence in the file in the claimant's medical history indicated that claimant has not worked since March 26, 1991.

On July 1, 1991, Dr. J performed diagnostic arthroscopic surgery on claimant's shoulder. His post-operative diagnosis was "intact left glenoid labrum with inferior and middle glenohumeral ligaments intact. Mild chondromalacia." The rotator cuff area was specifically inspected and no tear was evident. Some trimming and debridement and irrigation of various points in the claimant's shoulder were performed.

Dr. J's notes on October 31, 1991, indicate that claimant had good range of motion and no further tenderness in his shoulder. This note also stated that claimant was ready for discharge from treatment. It appears from Dr. J's notes that the next examination of claimant was on July 29, 1992, when claimant complained of recurrence of pain in his arm. Dr. J. stated that he had primarily a left bicipital tendinitis and impingement syndrome. He was referred into therapy.

A designated doctor certified that claimant reached maximum medical improvement (MMI) on August 8, 1992, with zero percent impairment. His shoulder was included as part of that rating. This report was adopted by the hearing officer in another hearing where MMI

and impairment were in issue. The designated doctor noted in his report that one of claimant's hobbies at the time of his examination in August 1992 was weight lifting, and that this was claimant's "only routine physical activity" at that time. There was no direct or cross-examination testimony concerning claimant's weight lifting activities, however.

On January 12, 1993, an MRI examination of the left shoulder indicated to the reporting doctor, (Dr. B), the presence of "increased signal" that would "tend to indicate" at least a partial tear at the myotendenous junction. Although the decision of the hearing officer indicated that this area was not explored during the July 1991 arthroscopic surgery, there is no medical evidence on this point one way or the other. (Indeed, the arthroscopic surgery report indicates that the "remainder" of the shoulder was viewed). A May 17, 1993 letter from Dr. J to claimant states that claimant has continued to complain of shoulder pain notwithstanding previous arthroscopic surgery and the letter recommends a referral to (Dr. W), an orthopedic surgeon. Claimant's other records indicate that claimant was found to have normal range of motion in his left shoulder in December 1992 (per examination reports of (Dr. M) and (Dr. BL)). There is no medical opinion in the file that states that claimant's shoulder condition diagnosed through the MRI is connected to his (date of injury) injury. Claimant testified that his shoulder continued to hurt from (date of injury), with only temporary relief afforded by medical treatment.

WHETHER THE CONTESTED CASE HEARING OFFICER HAD JURISDICTION OF THE DISPUTE CONCERNING THE EXTENT OF THE SHOULDER INJURY

The carrier properly preserved its error as to the hearing officer's authority to hear the case by objecting to the hearing at the beginning. The hearing officer overruled the objection. We believe this was proper. As the carrier's appeal itself reveals, and as the record supports, the crux of the carrier's defense is not that the medical services weren't reasonable and necessary, but that the claimant was seeking treatment for a condition that was not work related.

Section 413.031(d) (formerly Article 8308-8.26) ultimately provides for a hearing in accordance with the Administrative Procedure Act of Texas (APA) for medical disputes. The hearing process may be invoked to address the following circumstances:

A party . . . is entitled to a review of a medical service provided or for which authorization of payment is sought if a health care provider is:

1)denied payment or paid a reduced amount for the medical service rendered;

2)denied authorization for the payment for the service requested or performed if authorization is required by the medical policies of the commission; or

3)ordered by the division to refund a payment received for a medical service rendered. [Section 413.031(a)]

A hearing may also be held to adjudicate disputes over the amount charged by the health care provider or the entitlement of the provider to payment. Section 408.027. This section makes clear that it is the carrier, however, who initiates the hearing process after following certain clear steps to inform the provider and the injured employee of the protest of billed services and reasons therefore. This section also provides for partial payment of the disputed amounts, pending hearing. We do not read this section as authorizing from the medical review dispute resolution process an advisory opinion on services that have neither been rendered nor billed.

Although the carrier attempts in its appeal to "fall on its sword" by stating that it did not timely controvert the shoulder injury and has thus effectively admitted liability for reasonable and necessary medical benefits as part of the compensable injury, this argument was not raised at the hearing nor were any facts proven to demonstrate that the dispute involved payment or authorization for medical services, as opposed to threshold questions of compensability of the condition (i.e., did the shoulder condition arise out of work performed within the course and scope of employment). Aside from the fact that this dispute was essentially about the compensability of the shoulder condition, the hearing officer also had jurisdiction to hear matters that involve liability for essential medical treatment. Section 410.025(d). In summary, we believe the issues in this case were properly before the hearing officer, given the state of the record and lack of proof that the dispute was one within the exclusive province of Section 413.031.

WHETHER THE SHOULDER INJURY OCCURRED AS A RESULT OF THE COMPENSABLE INJURY OF (DATE OF INJURY)

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). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). A carrier that wishes to assert that a pre-existing (or subsequent) condition is the sole cause of an incapacity has the burden of proving this. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992.

A claimant's testimony alone is sufficient to establish that an injury has occurred. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's

determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

While there is an indication of an activity (weight lifting) that could have arguably caused a new shoulder injury after the claimant left work, this was left unexplored. The carrier's sole theory of defense appeared to be that because the July 1991 arthroscopic surgery did not detect a possible tear, it did not result from the injury. However, the hearing officer evidently surmised that it had been overlooked.

Although there were conflicting portions of the evidence, these were for the trier of fact to weigh. His determination that a compensable injury to the shoulder occurred is sufficiently supported by the record, and we affirm.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge