

APPEAL NO. 93947

This appeal arises under 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.*). A contested case hearing was held in (city), Texas, on August 4 and September 3, 1993, (hearing officer), presiding, to determine the following disputed issues: 1. whether the appellant (claimant) sustained a compensable injury on (date of injury); 2. whether claimant timely filed his claim with the Texas Workers' Compensation Commission (Commission) and, if not, whether he had good cause therefor; 3. whether claimant timely reported his injury to his employer; and 4. whether claimant has disability resulting from an injury of (date of injury). The hearing officer determined that claimant did provide timely notice of his alleged injury of (date of injury), and that he did have good cause for not timely filing a claim for such injury. However, the hearing officer found that while claimant had sustained a compensable injury to his right shoulder on (date of injury), when his employer had workers' compensation insurance issued by respondent (Carrier A), claimant did not sustain a new injury nor aggravate his pre-existing injury on (date of injury), when his employer's workers' compensation insurance carrier was respondent (Carrier B). The hearing officer thus concluded that claimant did not sustain a compensable injury on (date of injury), that he therefore did not have disability as a result of an injury on that date, and that his disability after (date of injury) was the result of his injury of (date of injury). Claimant has appealed from the decision as well as a ruling excluding a doctor's report. Carrier B responded to the appeal urging the sufficiency of the evidence to support the decision and the correctness of the complained of evidentiary ruling. Carrier A did not file a response to the appeal.

DECISION

Affirmed.

According to the evidence, claimant, who was employed as a skycap performing curbside baggage handling and checking at a large airport, sustained an injury to his right shoulder on (date of injury), while lifting computer boxes. He obtained medical treatment, was off work until sometime in October 1991, and was paid temporary income benefits (TIBS) by Carrier A. (Claimant is entitled to medical care for his (date of injury), injury "as and when needed" pursuant to Section 408.021 of the 1989 Act.) Claimant once again stopped working because of right shoulder pain on (date of injury), received further medical treatment, and returned to light duty work in October 1992 driving an electric cart. During this period Carrier A paid claimant additional TIBS and also paid impairment income benefits (IIBS) based on an impairment rating with the last such payment being made on January 22, 1993. On May 4, 1993, claimant signed a workers' compensation claim form stating an injury date of (date of injury). Though unexplained in the record the Benefit Review Conference Report stated the injury date as (date of injury), and some confusion was manifest at the hearing as to whether the date of the alleged injury was (date of injury) or (date). However, there was no disputed issue at the hearing nor is there an appealed issue as to the actual injury date and the carriers agreed that on (date of injury) and (date), Carrier B insured the employer. Carrier B's position at the hearing was that on (date of injury) claimant had a continuation of pain and symptoms from his (date of injury), injury but did not

sustain another compensable injury to his right shoulder; and further, that even if he were determined to have sustained another injury he had already received from Carrier A all the income benefits to which he was entitled. Carrier A's position was that claimant had already been paid all the income benefits (both TIBS and IIBS) to which he was entitled under the 1989 Act. Claimant's position was that on (date of injury), he sustained another compensable injury to his right shoulder by having aggravated his pre-existing injury.

Claimant testified that his right shoulder was injured on or about (date of injury), when he picked up a number of computer boxes each of which weighed approximately 45 pounds. He sought care in an emergency room on September 4, 1991, and began treating with (Dr. H), an orthopedist, on September 17, 1991. Dr. H diagnosed shoulder joint pain and treated claimant conservatively. At a follow-up visit on October 11, 1991, Dr. H released claimant to return to work without restrictions but noted "[t]here is the possibility that his symptoms may flare up when he returns to work . . ." Claimant said he returned to work sometime in October 1991, and was able to perform his curbside baggage handling duties.

Claimant further testified that on (date of injury), at about 3:15 p.m., he loaded and unloaded 50 computer boxes and his right shoulder "popped." Claimant stated that he continued working until his shift ended at 4:30 p.m. and the next morning did not go to work but went instead to an emergency room. The emergency room record of (date of injury), reflects that claimant provided a history of his right shoulder being painful for the past month and that his collar bone was "out of place." This report also refers to claimant's having "acute and chronic" shoulder pain, states that claimant came in "because of persistent symptoms," and contains no mention of any incident at work on (date of injury). Claimant said he thereafter returned to Dr. H and told him he had hurt himself lifting luggage, indicating he was informing Dr. H of a new injury to the same shoulder.

Claimant also said that the following day (apparently (date)) he reported to a supervisor, whose name he could not recall, that he was hurt. AM testified that he had been claimant's supervisor in the 1991-92 period and that claimant never mentioned a shoulder problem to him on either (date of injury) or (date). Claimant said he was off work from (date of injury), until sometime in October 1992 when he was given light duty driving an electric cart. He further testified that he was terminated in January 1993 over an allegation that he had falsified his time log, an allegation he said was false.

On April 14, 1992, claimant saw Dr. H who diagnosed shoulder joint pain. Dr. H's report of that visit stated that claimant had been doing better and had gone back to work, that his shoulder started hurting again, and that "he didn't say anything for a while but his pain has increased now." The report did not mention any incident at work on either (date of injury) or 9th, and Dr. H stated: "I have gone over him that I don't know that work makes his situation worse although it may aggravate the pain."

On June 5, 1992, claimant was seen by (Dr. WW), a neurologist, upon referral from Dr. H. In his report Dr. WW stated that claimant reported an injury "which followed a day of heavy work involving unloading computers onto a conveyor belt," and waking up the next

day with neck and right arm pain and weakness. This report did not mention the history of claimant's previous injury.

On September 12, 1992, claimant was evaluated by (Dr. L) who also reviewed his records. Dr. L's report stated that he agreed with Dr. H that "work would not make him worse, although would aggravate the pain." Dr. L further stated: "I agree that he may hurt if he goes back to work, but I don't think that it will give him any objective increase in pathology." There was no mention of any incident at work on (date of injury) or (date).

On September 18, 1992, claimant saw (Dr.GW) who diagnosed "other affectations of the shoulder region, periarthritis." Dr. GW's report of this visit stated that claimant had been working handling luggage, that he had developed sternoclavicular pain, that he had been treated since August 1991, has had physical therapy, and that he continues to have pain around the neck and shoulder. The report contained no mention of an incident at work on (date of injury) or (date).

Dr. H's report of October 9, 1992, reflected a diagnosis of "shoulder pain" and stated that claimant indicated he was pain free except upon waking, that he wanted to return to his skycap duties, and that Dr. H told him he would have to do the lifting in a protected fashion. Dr. H also stated that he did not disagree with the impairment rating claimant was given by Dr. L "under an IME."

During a tape recorded interview by (Mr. LW) on November 19, 1992, claimant was asked what had caused him to start missing work in (month year) and whether his shoulder "got worse or was there a new accident." He responded: "It started hurting . . . I don't have the exact date." He also affirmed that his shoulder "gradually got worse" and stated "it was the old problem." Claimant asserted that these statements were attributable to his "not knowing what was going on," being "put on the spot," and being "under pressure." When offered an opportunity to correct any inaccuracies in the transcription of his interview, however, he declined.

On June 22, 1993, claimant was evaluated by (Dr. DW) whose report of that date indicated that claimant gave a history of having been released to work and stated that "he received a second injury on (date of injury) when he was again doing lifting." Dr. DW opined that it was "within the realm of reasonable medical probability" that claimant had an initial injury on (date of injury), continued to have complaints, "and then had a re-injury (date) while again doing lifting." Dr. DW also indicated he apparently did not have all of claimant's records. In a letter dated August 30, 1993, Dr. DW stated that claimant had given a history of his shoulder hurting after he returned to work, of continuing to have problems, and of doing some lifting which caused him another injury. Dr. DW further stated: "The records tend to denote that this patient had continuing complaints up to that point and do not document well a specific lifting injury. However, the patient tells me he did have a specific injury. The details, however, were very vague."

The hearing officer found that claimant did not sustain a new injury nor aggravate a

pre-existing injury on (date of injury), (year), and concluded that claimant did not sustain a compensable injury on that date. We are satisfied the evidence sufficiently supports these determinations. The hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer also judges the weight to be given expert medical testimony and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Atkinson v. United States Fidelity Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.); Highlands Underwriters Insurance Co. v. Carabjal, 503 S.W.2d 336, 339 (Tex. Civ. App.-Corpus Christi 1973, no writ). We will not disturb the hearing officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust (In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986)) and we do not find them so in this case.

We are also satisfied the hearing officer did not abuse his discretion in excluding from evidence the report of (Dr. S) offered by claimant for the reason that claimant had not exchanged the report with the other parties as required by the 1989 Act and the Commission's Rules. Even were we to have found such evidentiary ruling to have been an abuse of discretion, it would not have resulted in reversible error. Dr. S examined claimant on March 4, 1993, diagnosed a torn rotator cuff and impingement syndrome in claimant's right shoulder, and recommended arthroscopic surgery. However, Dr. S's report contained no opinion respecting whether claimant re-injured the shoulder on (date of injury), and its admission would probably not have resulted in a different decision.

Finding the evidence sufficient to support the challenged findings and conclusions and further finding the absence of reversible error by the hearing officer, we affirm.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge