

APPEAL NO. 94126

At a contested case hearing held in (city), Texas, on January 4, 1994, the hearing officer, (hearing officer), considered the evidence and reached the conclusion that the appellant (claimant) did not sustain an injury to his right shoulder in the course and scope of his employment at the time he sustained a compensable left shoulder injury on (date of injury). Claimant has appealed the decision pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 410.202(a) (1989 Act), challenging the sufficiency of the evidence to support the hearing officer's conclusion as well as certain factual findings upon which it is based. The respondent (carrier) filed a response pointing out the sufficiency of the evidence and urging affirmance.

DECISION

Affirmed.

Claimant, testifying through a translator, said that sometime in (month year) he ascended a ladder at work to do some welding, that the ladder slipped and he was left hanging from a beam for several minutes, and that he did not consider that incident to be an "accident" and did not report it. He said that on (date of injury), while using an iron bar with both hands as a lever to move a heavy diesel motor a few inches so he could weld the muffler, the bar slipped, he heard a "pop," and felt the loss of strength in his left arm. Claimant's claim form, signed on August 23, 1991, described the accident and stated his injury as being to his "left shoulder and body in general." As regards the date of his right shoulder injury claimant testified: "I don't know if it was injured already. All I know is that my left shoulder was what was injured. . . ."

Claimant stated that he first sought medical treatment on May 30, 1991, that he saw both (Dr. P) and (Dr. A) on several occasions, and that both spoke Spanish. The medical records indicated that both doctors practiced at the (Center). Claimant testified, variously, that he did and that he did not mention having right shoulder pain and problems to Dr. P, that he did mention having right shoulder problems to Dr. A, and that Dr. A did examine both shoulders. An Initial Medical Report of claimant's May 30, 1991, visit to the Center, signed by Dr. A, reflected a diagnosis of "traumatic injury to left shoulder" and recited a history of claimant's stating that he "hurt his left shoulder at work on (date of injury). . . ." Dr. A's report of claimant's June 5, 1991, visit stated that an MRI revealed a torn rotator cuff of the left shoulder, that claimant had not complied with treatment, and that claimant was changing to Dr. C) as his treating doctor.

Dr. C's Initial Medical Report of claimant's June 11, 1991, visit reflected a history of sudden abduction of claimant's left arm and shoulder, a diagnosis of a left rotator cuff rupture and bursitis, and physical exam findings of pain and limited range of motion (ROM) of claimant's left shoulder but full ROM of his right shoulder. According to his records, Dr. C started claimant on a course of physical therapy (PT) on July 12, 1991, and performed surgery on claimant's left shoulder on or about August 30, 1991. In a Report of Medical Evaluation (TWCC-69), Dr. C certified that claimant reached maximum medical

improvement (MMI) on January 31, 1992, with a six percent impairment rating (IR) for his left arm. Claimant acknowledged he had no medical treatment between February and June 1992. Dr. C's records showed that claimant returned on June 29, 1992, with left shoulder complaints and that Dr. C performed an arthrogram which revealed a leak in the rotator cuff. According to Dr. C, the leak could be attributed to either a "non-watertight repair" of the rotator cuff or to a recurrent tear.

Claimant indicated that Dr. C at some time referred him to (Dr. K) and that he told Dr. K he was having problems with his right shoulder. No records of Dr. K were in evidence. Claimant also testified that he saw (Dr. S) in June 1992 and advised him that he had problems with both shoulders. Dr. S's report of a June 18, 1992, visit diagnosed left shoulder ligament repair and chronic left shoulder pain, and stated that claimant's right shoulder ROM was within normal limits.

Claimant testified that his right shoulder was first treated in September 1992. Dr. C's September 16, 1992, report stated that claimant "now also has complaints in his right shoulder;" that he has had right shoulder pain for the past two weeks; that he related that his right shoulder pain started with the physical therapy (PT) in which he lifted two pound weights; that the therapist advised Dr. C that claimant had been complaining of right shoulder pain during his last two therapy visits; and that Dr. C then discontinued the therapy. The physical therapist's records of numerous visits in 1991 and 1992 made no mention of claimant's right shoulder, but an entry of September 10, 1992, stated that claimant reported that his right shoulder "is now also beginning to hurt. . . ." Dr. C's report further recited that claimant "now relates an incident that happened to him a month before the accident in which he sustained an injury to the left shoulder;" that claimant indicated he hurt both shoulders in the first incident; and that those problems resolved "until his accident in which he sustained an injury to the left shoulder for which he had to undergo surgery."

Claimant further testified that he has most recently been treating with (Dr. M), that Dr. M performed additional surgery in July 1993, and that Dr. M found he had a right shoulder problem, thought it may have been affected by the same leverage he used moving the motor, and is recommending surgery on that shoulder. Dr. M's records indicated that on May 13, 1993, claimant discussed his right shoulder and related it "to the injury prior to the injury that is reported." Dr. M's records of May 13 and June 7, 1993, state that Dr. C had examined claimant's right shoulder, that it (the right shoulder) had not been reported, that Dr. M could not give an opinion in that the right shoulder was not reported, and that claimant mentioned both his (date of injury), accident as well as the prior incident asserting that although his left shoulder was hurt the most, he had also hurt his right shoulder. According to Dr. M's records, he operated on claimant's left shoulder on July 9, 1993, and in August and September 1993 claimant again discussed his right shoulder with Dr. M, indicated that both shoulders were involved in the accident, and said he was going to try to get approval for treatment of his right shoulder through workers' compensation. In his TWCC-69 of September 3, 1993, Dr. M stated that claimant reached MMI on "8-31-93" and assigned an IR of five percent for claimant's left upper extremity. In a note of December 9, 1993, Dr. M stated: "[Claimant] began complaining of right shoulder pain sixteen months after the (date

of injury) injury. In my opinion after sixteen months it was probably not related to the specific injury of (date of injury)."

The hearing officer found that there was no medical evidence of claimant's complaining of his right shoulder before September 1992, that there was no medical evidence linking his right shoulder problem to either his (date of injury), injury or to treatment for that injury, that there was no medical evidence that claimant's reliance on his right arm during the time his left shoulder was injured caused a secondary injury to his right shoulder, that Dr. M found that claimant's right shoulder injury was probably not connected to his (date of injury), injury, that claimant's right shoulder problem is not a prior injury that was aggravated by his (date of injury), accident, and that claimant's right shoulder was not injured at the same time claimant suffered his left shoulder injury on (date of injury). Claimant challenges these findings as well as the conclusion that he did not suffer a compensable injury to his right shoulder at the time he injured his left shoulder on (date of injury).

Claimant intimated that his right shoulder could have been injured in the unreported injury of (April year) and aggravated by the compensable injury of (date of injury); that it could have been injured initially on (date of injury); and that it could have been injured during the course of his PT. In any event, claimant had the burden of proving that his right shoulder was compensably injured. In reviewing this case we are mindful that in Texas Employers Insurance Association v. Thorn, 611 S.W.2d 140 (Tex. Civ. App.-Waco 1980 no writ), the court stated that "[u]nder our workers' compensation law, the immediate effects of the original injury are not solely determinative of the nature and extent of the compensable injury." And, in Western Casualty and Surety Company v. Gonzales, 518 S.W.2d 524 (Tex. 1975), the court stated that "[t]he full consequences of the original injury, together with the effects of its treatment, upon the general health and body of the workman are to be considered." It seems apparent that the hearing officer, in determining that claimant failed to meet his burden of proof of the disputed issue, was persuaded by the lack of reference in claimant's medical records to his having a right shoulder injury before the late summer of 1992.

We cannot say that the challenged findings are so against the great weight and preponderance of the evidence as to be unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Under the 1989 Act the hearing officer is the trier of fact at the contested case hearing and is the sole judge not only of the relevance and materiality of the evidence but also of its weight and credibility. To this end, the hearing officer, as the fact finder, may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder and normally does not pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v.

Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Consequently, there is no sound basis in this case to disturb the hearing officer's decision.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge