APPEAL NO. 94127

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On December 27, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine whether claimant TH, who is the respondent, who was injured on (date of injury), in the course and scope of his employment with (employer), also sustained a cervical spinal injury on that date.

The hearing officer determined that claimant's injury included his cervical spine, in addition to his right wrist and elbow. (Although no findings were made by the hearing officer, it was also undisputed during the hearing that claimant sustained an injury to his right shoulder as well).

The carrier has appealed, arguing that claimant's testimony was against the great weight and preponderance of the evidence with respect to the occurrence of an injury. The primary argument made by carrier is that earlier medical records for claimant fail to document complaints related to his neck. The carrier further argues that claimant had a whiplash injury in a 1987 auto accident, and that medical records indicated he complained of neck pain roughly 11 months before his work-related accident. Claimant asks that the decision be affirmed, and recites the evidence in favor of the decision.

DECISION

We affirm the hearing officer's decision.

The accident that occurred to claimant on (date of injury), was consequential. He was working with a grip crane when it collided with an overhead crane and threw claimant a distance he thought at the time was about 12 feet, but which proved upon later measurement to be closer to 25 feet. The claimant said he was pulled and thrown by the impact, landing on his right side against the concrete floor. Although his pants were not torn, the force of the fall caused a contact "burn" to his right hip. A die being carried by the overhead crane fell and landed on his wrist, crushing it. Claimant said he kept thinking he was not in pain to avoid crying, but that he had extreme pain in his right elbow. Claimant said the paramedics who attended him put a cervical collar on him. He was taken to the emergency room; his elbow was fractured and dislocated. Claimant required inpatient emergency hospitalization and surgical repair to his wrist and arm. He had a full length cast on his arm that he estimated weighed from 5-10 lbs.

The claimant said that the staff doctor who treated him was (Dr. D). He was scheduled upon his Monday release from the hospital for a follow-up appointment with Dr. D the next week. Claimant said Dr. D released him to light duty effective that following Friday. However, he was unable to work because his arm and wrist were swollen tightly inside his cast. With his employer's help, he scheduled an appointment with Dr. D that next Monday and more x-rays were taken. Claimant said he was dissatisfied with Dr. D after

this because it had been hard to see him when he felt he had an urgent condition. He went to see (Dr. E) on October 1, 1992. Dr. E had treated him for a previous work-related injury (a crush injury to the foot).

Claimant agreed he had been in an automobile accident in 1987 in which he sustained a whiplash injury. He agreed that in October 1991 he sought treatment from Dr. E for neck and shoulder pain, but indicated this resulted from a strain at work. Dr. E's medical report from this visit stated an opinion that claimant had intermittent cervical radiculopathy. There are no other medical records after this, and prior to (date of injury), indicating treatment to claimant's neck. Claimant said that his neck had not been bothering him before, but that after the accident he continued to have right shoulder and neck pain. He stated that Dr. E prescribed physical therapy for his shoulder and neck along with that for his arm and elbow, but that the carrier denied such treatment.

During the hearing, the attorney for the carrier asked that the record clarify that the carrier did not dispute, and had not denied, medical treatment or therapy for the shoulder. There was conflicting testimony about whether claimant mentioned to the doctors he had seen, including the carrier doctor, that he had cervical pain. Claimant insisted that he had. The carrier did not contend, or prove, that claimant sustained any injury subsequent to the (date of injury) accident, and claimant testified that he had not.

Claimant said his therapy to straighten his elbow began around November 1, 1992, after he was in a "short cast." Therapy and the motion of his arm caused his shoulder and neck to hurt more. He stated that the part of his neck that hurt was at the lower part where it connected to the shoulder. Medical records indicate that claimant took pain medication and anti-inflammatory medication for several months after his accident.

Claimant's wife testified that she had been with him the majority of the time he had seen Dr. E. She testified to her impression that Dr. E initially thought claimant's neck pain was related to his cast, but that it persisted even after the cast was taken off.

Medical records indicate that claimant complained of shoulder pain at the hospital on (date of injury); several subsequent records don't mention the shoulder but comment primarily on his arm, elbow, and wrist. However, a prescription slip from Dr. E dated November 2, 1992, for physical therapy also calls for cervical range of motion exercises. Physical therapy notes for November 13, 1992, indicated that claimant complained of neck and shoulder pain; the note of November 16th indicated that the therapist was awaiting approval from the insurance company to treat the neck and shoulder areas. Dr. E took claimant off work entirely until March 1993, was temporarily put on a light duty release, and then taken off work again. Therapy to include the neck was also prescribed May 26, 1993. Claimant was examined by (Dr. H), for the carrier, on May 19, 1993. Dr. H's recorded history describes the accident as being pulled in a "jerking motion." He stated claimant's neck was supple. Dr. H issued a report finding MMI and impairment relating to the fracture aspect of claimant's injury only. On June 7, 1993, Dr. E wrote to the adjuster that claimant

continued to have cubital tunnel syndrome and cervical radiculopathy attributable to his injury, and related immobilization of the upper right extremity.

The logic of the claimant's contention that his neck was injured in the same accident that the carrier agrees injured his right arm, elbow, and shoulder underscores what the Appeals Panel has stated many times before; an aggravation of a pre-existing condition can be a compensable injury in its own right. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ). The fact that claimant may have had a whiplash injury in an automobile accident five years before (date of injury), does not prevent him from ever claiming a work-related injury to his neck. The hearing officer also could have believed that medical treatment for the injury (the cast) caused cervical problems to develop or become exacerbated, which we have held is also compensable. Texas Workers' Compensation Commission Appeal No. 92538, decided November 25, 1992.

The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). 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 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.).

Whether the medical reports do, or do not, note neck complaints early on is merely another fact for the trier of fact to weigh. Even if medical reports from the very beginning had noted claimant's neck injury, claimant would still have to prove his case. The hearing officer evidently regarded claimant's explanation, that his pre-occupation with his severe arm injury overrode his concern about his neck, as plausible, and she may also have considered the fact that he took pain medication for several months after (month year). There was also conflicting evidence as to whether Dr. E's records indicate an early awareness of neck injury. The hearing officer evidently considered claimant's version of the injury as logical. The carrier accepted liability for the shoulder. The hearing officer evidently was unwilling to conclude that his injuries ended at a magical boundary somewhere between the shoulder and the lower neck.

In summary, we do not agree that the great weight and preponderance of the evidence is against the decision of the hearing officer, and the decision and order of the hearing officer are accordingly affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge