APPEAL NO. 94273

This appeal arises under the Texas Workers' Compensation Act of 1989 TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 28, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) injured his neck and shoulders in the course of his work on (date of injury). Appellant (carrier) asserts that the decision of the hearing officer is against the great weight and preponderance of the evidence, primarily because of the claimant's credibility and statements he made prior to the alleged injury. Claimant replies that the evidence is sufficient to uphold the decision.

DECISION

We affirm.

Claimant had worked as a "material handler" for (employer) for several years when he injured his right shoulder in . He returned to work from that injury in June 1993. After a few weeks back at work, claimant requested a transfer to another work area, called "specialty tubing." Under an employer-union contract, claimant could request such a transfer and the receiving unit would take him if a vacancy existed; the receiving unit then had 30 days to decide whether to keep the new arrival or not. In August, claimant was rejected by the "specialty-tubing" supervisor and returned to his former duties as a "material handler."

Claimant on October 7, 1993, informed the employer of injuries he received on September 15, 1993, to his low back, and either (date) or (date of injury), to his neck and shoulders. The only issue at the hearing was whether claimant injured his neck and shoulders on (date of injury). Claimant acknowledged that he was not pleased to have to return to his prior duties. In dispute was the meaning of claimant's statements to others that if he returned to his old job, an injury was likely to occur.

Claimant's doctor, in June 1993, stated that he could return to full duty, but he could not say whether claimant would be able to do the work. Claimant testified that a large part of his work involved the placing of 4 x 4 pieces of lumber eight to 10 feet long between levels of pipe for shipment. In some situations, as stacks became high, the timber could be thrown upward to lie across the pipe. Claimant testified that he threw the timbers. One witness for the carrier, (TM), testified that she worked in the same job for several years and lifted the timbers by one end, leaning them against the stacked pipe in question, and then pushed the lower end of the timber up onto the stacked pipe; TM is 5 feet 2 inches tall and weighs 120 pounds.

Claimant testified that he did not tell anyone that he intended to indicate he was hurt again in order to start workers' compensation again, but he feared that having been hurt in his demanding, heavy labor job, it could happen again. He said that on (date of injury), while throwing a 4 x 4 timber he felt a "sharp, stabbing pain" in his left shoulder. Medical records from October 8, 1993, of (Dr. L) indicated that claimant had "onset of lower back

pain and left shoulder pain especially after throwing 4 x 4's repeatedly." Dr. L surmised that claimant probably had a muscle strain. Later reports from (Dr. G) indicated that claimant had numbness and tingling and "may have reinjured his spine." (Dr. R), a chiropractor, diagnosed that claimant had left shoulder impingement syndrome.

Carrier called two witnesses, who were co-employees of claimant, who testified that claimant talked of having another accident if he had to return to being a material handler. Employer's chief of safety testified that he counseled claimant prior to the injury in question because he had reports of claimant's assertions about future injury. On the other hand, the supervisor of "specialty tubing" who rejected claimant, testified that he detected no intent on claimant's part "to perpetuate or fake any kind of injury."

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. While some of claimant's testimony at the hearing varied from a statement he provided on October 15, 1993, such as the date he was injured ((date) as opposed to (date of injury)), the hearing officer could choose to believe that claimant told the truth about the way his injury occurred. Once the hearing officer believed that the injury occurred as claimant described, it made no difference what the hearing officer believed about what claimant said about future injury. While findings of fact concerning claimant's statements do not control this decision, such findings are sufficiently supported by the claimant's testimony, the ambiguity of the statements, and the testimony of claimant's supervisor in "specialty tubing." More importantly, there was sufficient evidence in the claimant's own statement, if believed, to support the finding that claimant injured his neck and shoulders on (date of injury), in the course and scope of employment. Medical records provide some corroboration to the injury and sufficiently support the finding of fact that addresses the medical evidence as being sufficient to establish an injury.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge