

APPEAL NO. 980191
FILED MARCH 13, 1998

A contested case hearing was originally held on September 18, 1997, under the provisions of the Texas Workers' Compensation Act, TEX. LAB CODE ANN. § 401.001 *et seq.* (1989 Act), with hearing officer. In Texas Workers' Compensation Commission Appeal No. 972181, decided December 4, 1997, the Appeals Panel reversed the decision of the hearing officer and remanded for the hearing officer to determine whether the appellant's (claimant) compensable injury sustained on _____, includes a right shoulder injury. The hearing officer did not hold another hearing, provided the parties the opportunity to present argument, and rendered another decision on January 5, 1998, that the compensable injury does not include a right shoulder injury. The claimant appealed, stated why he disagrees with the certain determinations of the hearing officer and why he thinks the evidence establishes that he sustained a compensable injury to his right shoulder, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he injured his right shoulder in the compensable injury on _____. The respondent (carrier) replied, urging that the evidence is sufficient to support the decision of the hearing officer and requesting that it be affirmed.

DECISION

We affirm

The evidence is summarized in Appeal No. 972181, *supra*, and a summary will not be repeated in this decision. Briefly, the claimant was injured on _____, when the horse he was riding slipped on an icy area, the claimant was slammed against the pavement, and his right ankle was broken. The claimant contended that he roped between 20 and 40 cattle a day prior to this injury, that when he fell his right shoulder hit the pavement, that after the injury he did not use his right arm above his shoulder until February 1997 when he again began roping, that he had pain in his right shoulder when roping, that he did not know that he had a problem with his right shoulder until he again started roping, that (Dr. B) diagnosed right shoulder impingement and explained that he would not have pain when he did not use his arm above shoulder level, and that his right shoulder impingement is a result of the _____ injury.

The burden is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove a claim, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact

judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The claimant stated that Dr. B explained to him that certain muscles controlled a particular movement of his arm and denied making that movement with his right arm until he again started roping in 1997. The hearing officer wrote in his Decision and Order that it is not realistic to believe that in a 13-month period the claimant did not perform any activity at shoulder height or above. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own 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). That a different fact finder could have made a different determination based upon the same evidence is not a sufficient basis to overturn a determination of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. We have again reviewed the evidence and find it minimally sufficient to support the determinations of the hearing officer. The hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or 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, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge