

APPEAL NO. 990004

Following a contested case hearing held on December 3, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent (claimant) sustained a compensable left shoulder injury on _____, and that he had disability from May 18, 1998, to the date of the hearing. The appellant (carrier) has appealed these determinations for insufficiency of the evidence. Claimant's response urges the sufficiency of the evidence to support the challenged determinations.

DECISION

Affirmed in part; reversed and remanded in part.

Claimant testified that on _____ (all dates are in 1998 unless otherwise stated), while driving a tractor-trailer on a run for (employer), the trailer was found to be overweight at a (state) truck weighing station and he was given one hour to remedy the problem or be ticketed. He explained that the trailer wheels and axles were in a frame which can slide forward and backward inside the chassis when locking pins are pulled out and that there is a handle beneath the trailer that has to be used to pull out the locking pins. Claimant said he had great difficulty pulling the handle out to release the pins and keeping it out, because of a weld on it; that he repeatedly had to bend over and reach under the trailer and pull hard on the handle and also sometimes knelt down to pull on the handle; and that while repeatedly struggling with the handle, which would not stay out and keep the pins released, he felt a sharp pain in his left shoulder which went away.

Claimant further stated that upon awakening in his sleeper cab the next morning, he heard a loud popping sound in his left shoulder and that he later began to experience left shoulder pain which became increasingly severe; that he drove the rig to the terminal in (city 1) and was seen at an emergency care department and later at an occupational health center and was told to see an orthopedic specialist; that he was in such pain that he could not complete the run and had to take a bus back to (city 2); and that he was seen in city 2 by Dr. U. The emergency department record of May 16th reflected that claimant had denied "any injury" and had stated that the pain started Wednesday and had progressively worsened; that x-rays revealed calcification in the bursa; and that the diagnosis was acute bursitis with calcification in the bursa. The health center records of May 18, 1998 reflect that claimant was diagnosed with left shoulder bursitis and released to modified duty with restrictions against lifting and using his left arm. Claimant said that after commencing treatment with Dr. U, he was not able to return to work until May 29th when he then commenced light duty. According to claimant's May 28th statement to an adjuster, he was working eight hours a day at light duty but when driving a truck, his regular duty, he would drive from approximately 7:00 a.m. to 8:00 p.m. or 9:00 p.m., seven days a week for three weeks at a time before being home for a week.

The carrier's Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) of June 1st stated that the carrier denied an injury in the course and scope because the incident occurred "in claimant's room," there was no evidence of an injury at work, and the condition was an ordinary disease of life. Claimant said he referred to the sleeper cab as his "room."

In evidence is an Initial Medical Report (TWCC-61) from Dr. S dated June 3rd which stated the diagnosis as shoulder tenosynovitis/bursitis and gave the history as claimant's having pulled his shoulder while pulling and tugging on "leg down" when adjusting the trailer weight. Dr. S, who, apparently, examined claimant at the request of the carrier, also certified that claimant had reached maximum medical improvement on June 10th with an impairment rating of "0%."

Dr. U's record of May 27th states that claimant had a four-month history of left shoulder pain which progressively worsened and is excruciating and that the impression is calcific tendinitis. Dr. U reported on June 11th that claimant was responding to treatment and can return to work on June 15th.

Dr. RH, a chiropractor, testified that he has been treating claimant's left shoulder since July 13th, and that notwithstanding the presence of calcification in the shoulder joint, it was his opinion, based on his examination of claimant, his review of the medical records, and claimant's explanation of the mechanism of injury, that claimant's pulling on the handle under the trailer, a specific incident, caused his injury which was then aggravated by his repetitious turning of the truck's large steering wheel and shifting its gears. He assumed that the calcification was present before _____ but said that, according to claimant, it was asymptomatic before _____. He also opined that the _____ injury resulted in claimant's having disability.

The October 5th report of Dr. C stated that the findings in both of claimant's shoulders, referring to films, definitely indicate pathology and in no way represent a normal variant.

Dr. H reported on November 17th that he had reviewed the available information on claimant and that within reasonable medical probability, claimant has preexisting rotator cuff pathology as well as a possible underlying instability of the shoulder. Dr. H further stated that while sleeping in his truck claimant's asymptomatic shoulder became symptomatic, that there does not appear to have been "any true 'injury,'" and that "the carrier should have no responsibility for his future care."

Claimant was cross-examined at length about indications in the medical records that he had been seen for shoulder pain in April and references to his having a history of shoulder pain for about four months prior to _____, and also about seeming inconsistencies between the statement he gave the adjuster on May 28th and his testimony. Concerning the prior complaints of shoulder pain, claimant explained that he used to work out and lift weights and would experience muscle soreness in both shoulders

and that he mentioned this pain but he insisted that this pain was very different and distinguishable from the severe and progressive pain in his left shoulder which began after pulling on the handle on _____. As for any inconsistencies between his testimony and his May 28th statement, claimant said that when he gave the statement he was taking Hydrocodone three times a day and prescription strength Ibuprofen four times a day, pain medications which made him drowsy. He also conceded denying trauma or injury to his left shoulder at the emergency department but explained that to him, trauma meant some very serious problem such as being hit by a car or having broken a shoulder. He also conceded that he did look back to his work activities in an effort to reconstruct what strenuous activities he had undertaken on the job, if any, which could account for his left shoulder injury.

Claimant had the burden of proving injury in the course and scope of employment and disability by a preponderance of the evidence. It is well-settled that, as a general rule, injury and disability may be proven by the testimony of the claimant. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As the fact finder, the hearing officer determines what facts have been proved by the evidence and the Appeals Panel, as an appellate reviewing tribunal, does not disturb a hearing officer's factual findings unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Concerning the injury issue, the hearing officer could credit claimant's testimony about the mechanism of the claimed injury and the medical evidence indicating that claimant did have a shoulder injury and may also have aggravated his preexisting bursa calcification. We find the evidence sufficient to support the hearing officer's findings and conclusion on the injury issue and affirm that portion of the decision and order.

Concerning the disability issue, the hearing officer made the following findings of fact and conclusion of law:

FINDINGS OF FACT

5. Claimant has worked at light duty work since May 18, 1998. Claimant's doctors have not given Claimant a full duty release as of December 3, 1998 because of the physical limitations from Claimant's left shoulder injury.
6. Claimant's _____, left shoulder injury caused Claimant to be unable to obtain and retain employment at wages he earned before _____ beginning May 18, 1998 until December 3, 1998.

CONCLUSION OF LAW

4. Because Claimant has shown by a preponderance of the evidence that his _____ injury caused him to be unable to obtain and retain employment at his preinjury wages from May 18, 1998, until December 3, 1998 he has disability for such periods, and is entitled to temporary income benefits.

Disability is defined in Section 401.011(16) to mean "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. [Emphasis supplied.]"

The May 18, 1998 health center record reflects a release to modified duty; claimant stated that upon his return to city 2 he could not return to work until May 29th when he commenced light duty; and Dr. H testified that he prescribed light duty for claimant. However, the Appeals Panel has stated that "[w]here the medical release is conditional and not a return to full duty status because of the compensable injury, disability, by definition, has not ended unless the employee is able to obtain and retain employment at wages equivalent to his preinjury wage." Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. Because the hearing officer has made no finding concerning whether claimant, after his injury, was employed by the employer at his preinjury wage, we must reverse these findings and the conclusion on disability and remand for further consideration and findings of fact on disability, based on the evidence of record.

So much of the decision and order that determines that claimant sustained a compensable injury on _____ is affirmed. So much of the decision and order as determines that claimant had disability from May 18, 1998 to December 3rd is reversed and remanded.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge