APPEAL NO. 990026

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On November 12, 1998, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer determined that appellant's (claimant) compensable left shoulder injury does not extend to an injury to the neck and cervical area and that claimant did not have disability beginning on May 13, 1998, through the CCH or "for any other time period."

Claimant appeals, contending that the hearing officer's findings are not supported by the evidence, that it is undisputed that claimant sustained a compensable injury (to the left shoulder), that an early report mentions pain "up into the neck" and that later reports support the extension of claimant's injury to the neck. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, first urging that claimant's appeal is not timely and otherwise urging affirmance.

DECISION

Affirmed.

First addressing the timeliness of the appeal, the decision of the hearing officer was forwarded by cover letter dated December 17, 1998, and distributed that same date. Claimant does not state when he received the decision, therefore, the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) provide that the deemed receipt date is five days after the date mailed, in this case being Tuesday, December 22, 1998 (we are unaware by what authority carrier recites the deemed receipt date to be December 20, 1998). Section 410.202 provides that the appeal shall be filed within 15 days of the date the decision was received, in this case being Wednesday, January 6, 1999. Claimant's appeal is dated, postmarked and was sent and received by facsimile transmission on January 6, 1999, and hence is timely. Further, claimant also makes amply clear the thrust of his appeal.

On the merits, claimant was employed at (employer) as a cook. It is undisputed (and was stipulated) that on _____, claimant sustained a compensable left shoulder injury when a box or bag of frozen strawberries fell off a shelf striking claimant on the left shoulder and neck. At issue is whether the compensable left shoulder injury also extended to the neck or cervical area and whether claimant had any disability from the _____, injury. Claimant testified that he continued work on _____, but the pain in his shoulder got worse. Claimant said that his employer sent him to see a doctor and that he saw Dr. G.

In a report of a July 8, 1997, office visit, Dr. G notes the left shoulder injury, makes no mention of neck complaints and assesses a contusion to the left scapula. Claimant was released to work "modified work" for four days and prescribed medication. Claimant continued to work at modified duties but testified that his hours changed from a preinjury 40 hours a week working five days to 35 hours a week working six days. Employer's

"operator" testified that the hours were modified at claimant's request due to some remodeling claimant was doing at his house and/or some outside catering claimant was doing. Claimant says the hours were modified because of the injury. In a July 14, 1997, report, Dr. G notes claimant has been doing his normal activities "without limitations" and gave an assessment of a "resolving contusion to the left shoulder." Claimant was released to "normal duties" for two weeks with no "overhead work." Dr. G saw claimant again on July 17, 1997, with a complaint of awaking "yesterday morning after a full day's work with pain over the left shoulder into the neck and into the front of the chest." (It is this note that claimant contends showed that he was complaining of neck pain all along.) Dr. G's examination was of the left shoulder with an assessment:

> Contusion to the left scapula, slow resolution. I still find no evidence of any serious intramuscular or articular pathology. This still has the appearance of a slowly resolving contusion.

Claimant was cleared "to do everything at work except no lifting above his head or holding objects above his head for the next week." In a report of July 2, 1997, Dr. G commented claimant is better but not pain free, noted an incident where claimant kept a coworker from falling, and continued to assess a resolving left shoulder contusion. Claimant subsequently saw Dr. S, D.C., apparently one time on August 13, 1998, for a right shoulder injury. Claimant continued to work the modified duty schedule at his preinjury wage.

The hearing officer notes, and is supported by the record, that there is no evidence that claimant received any medical treatment between August 14, 1997, and May 12, 1998. Claimant either quit or was terminated on March 3 or 4, 1998. Employer's operator testified that claimant clocked out on break and never came back. Claimant contends that the pain from his injury became so severe that he was unable to work anymore.

On April 24, 1998, claimant requested a change of treating doctors from Dr. G to Dr. B, D.C., which was approved on May 4, 1998. Dr. B, in a report of a May 13, 1998, visit, diagnoses a lumbar facet syndrome, lumbar sprain/strain, neck sprain/strain, left rotator cuff strain/sprain, myalgia and myositis. Daily physical therapy was prescribed and claimant was taken off work. Claimant claims disability beginning May 13, 1998. The same diagnosis was made in a report of a May 27, 1998, office visit. Progress notes indicate treatment of claimant's left shoulder and low back. In a report of an August 3, 1998, evaluation, Dr. B diagnoses a neck sprain/strain, left rotator cuff sprain/strain, myalgia and myositis. The hearing officer commented, in his Statement of the Evidence, that "[Dr. B] did not articulate as to why he changed Claimant's diagnosis when he first examined Claimant on May 13, 1998, and the diagnosis of August 3, 1998." We note that there is not so much a change of diagnosis as there is a change of the exclusion of lumbar complaints in the latter diagnosis. The hearing officer found a lack of "probative medical evidence" to establish a causal relationship between claimant's employment and the claimed neck and cervical injury.

Claimant alleges basically that the hearing officer's findings are contrary to the "undisputed facts and common sense." Claimant stresses the mechanics of the box falling on his left shoulder and the notation in Dr. G's July 17, 1997, report (quoted above) that claimant had "pain over the left shoulder up into the neck" as well as later reports from Dr. B. Claimant contends that there "is really no evidence to the contrary on these elements."

The hearing officer could, and apparently did, consider the lack of any treatment for claimant's neck in _____, and claimant's total lack of any medical treatment at all between August 13, 1997, and May 13, 1998, a period of some nine months, during which claimant continued to perform his duties, until at least March 3, 1998.

The Appeals Panel has many times stated that the claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). A claimant may meet his or her burden to establish the extent of the injury by one's own testimony alone, if the hearing officer finds the testimony credible. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In this case, the hearing officer obviously was bothered by the unexplained length of time that the claimant went without medical attention and Dr. B's subsequent change of focus from the low back to the neck. In any event, we have frequently noted that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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 trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are 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). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge