

APPEAL NO. 990052

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 14, 1998, a contested case hearing (CCH) was held. With regard to the five issues before her, the hearing officer determined: (1) that appellant (claimant) had not sustained a compensable injury to her left shoulder; (2) that the date of injury for the alleged left shoulder injury was _____; (3) that claimant did not timely report her alleged injury to the employer and did not have good cause for failing to do so; (4) that respondent (carrier) timely contested compensability of the alleged left shoulder injury; and (5) that because claimant had not sustained a compensable injury, claimant did not have disability.

DECISION

Affirmed.

Claimant appeals a number of the factual determinations and the conclusions on which they were based, contending that she had sustained a repetitive injury to both hands and her left shoulder, that she reported her injury to carrier's adjuster in December 1997 and received medical treatment for the injury "in November and December 1997," and that she has disability. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Carrier responds, urging affirmance.

It is undisputed that claimant sustained a compensable right hand and arm injury in (previous date of injury) (not at issue here). Claimant's treating doctor for that injury was Dr. P. Claimant had been employed as a sewing machine operator for a large garment manufacturer (employer) for 19 years. Claimant testified how she used her hand and shoulders and the number of pairs of pants she sewed a day. The injury at issue in this case is a left shoulder injury. Claimant testified that her left shoulder began to hurt in November and December 1997, that she went to Dr. P, who treated her shoulder injury in November and December 1997, and that she reported the left shoulder injury to Mr. S, carrier's adjuster, in December 1997. (This is denied by Mr. S.) The employer stopped operating the plant where claimant was working on January 9, 1998. The employer apparently had some sort of wage continuation program or termination pay because claimant continued to receive paychecks from the employer through June 30, 1998. Claimant went to the plant every Friday to pick up her check and it is undisputed that the plant remained open for retraining and other administrative matters connected with the plant closure.

The hearing officer, in her Statement of the Evidence, recites the treatment claimant received for her (previous date of injury) right hand injury. Dr. P's progress notes of November and December 1997 refer only to the right arm and shoulder (the (previous date of injury) injury); however, a (clinic) note, dated December 4, 1997, while referencing the right arm injury has a diagram indicating bilateral shoulder complaints. Another clinic note of January 6, 1998, also seems to indicate a left shoulder complaint. Dr. P, in a brief report

dated January 13, 1998, first notes "shoulder muscles in the left and right are much improved"; however, Dr. P continues to reference the (previous date of injury) injury. Subsequent reports reference thoracic and lower cervical complaints and "shoulder pain." In a report dated _____ (while still referencing the (previous date of injury) injury), Dr. P states:

[W]e have been able to isolate now where her pain is coming from, which appears to be in the anterior portion of the shoulder. She has pain with compression of the shoulder from the distal humerus pressing up into the shoulder joint and then rotating internally and externally and in flexion. I have shown her on a shoulder model that I think she has anterior impingement syndrome with probably supraspinatus muscle tension fraying. We are going to get an MRI of the shoulder to see if this confirms our diagnosis.

Dr. P ordered an MRI of the left shoulder on _____, noting that he suspected an anterior impingement syndrome. The hearing officer finds _____, to be the date of injury for the alleged left shoulder injury.

By letter dated June 17, 1998, a Texas Workers' Compensation Commission disability determination officer (DDO) writes Dr. P, asking whether the right shoulder injury is related to the (previous date of injury) injury, or whether it is an aggravation or whether it is a new injury. The DDO makes no mention of a left shoulder injury. Dr. P replies by letter report dated July 2, 1998, referencing the right arm and shoulder complaints, and at one point repeating a prior report that the "shoulder muscles in the left and right shoulder areas were much improved." Dr. P does reference his _____, report and repeats the quoted portion above without referencing the order for a left shoulder MRI (which apparently had been denied by carrier). Dr. P concludes by saying, "You asked if an aggravation of a previous injury on (previous date of injury) occurred. It is my opinion that she never resolved from her (previous date of injury) strain." Dr. P does reference an "anterior impingement syndrome" dealing with "over utilization of the upper extremities" but never mentions the left arm or shoulder. The hearing officer, in the Statement of the Evidence, comments:

While [Dr. P's] medical records over the two year period since the (previous date of injury) injury, show by a preponderance of the evidence that Claimant sustained an injury to an upper extremity due to repetitive trauma and use, those records show the injury to be to the right upper extremity, and show that injury to be a continuing injury which began in (previous date of injury). The medical records are insufficient to show that the 1996 repetitive trauma injury includes an injury to the left shoulder, nor are they sufficient to show that a new repetitive trauma injury to the left shoulder has been sustained. As such, Claimant has failed to show that she sustained a left shoulder injury in the course and scope of her employment.

A benefit review conference (BRC) (apparently for the (previous date of injury) injury and not in evidence) was held on August 17, 1998. At that time claimant apparently asserted a left shoulder injury. Claimant then filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) dated August 18, 1998, asserting a cervical and left shoulder injury with a date of injury and date that she knew the occupational disease may be related to the employment as " _____ " and a date of last injurious exposure of "1-9-98." Carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated October 15, 1998, asserting it first received written notice of injury (shoulder without specifying right or left) on October 8, 1998.

Claimant changed treating doctors from Dr. P to Dr. D in September 1998. Dr. D, in a report of September 23, 1998, diagnosed a left rotator cuff tear but stated he did "not think that this is related to her neck at this time." No date of injury or onset of symptoms is noted.

Claimant, both at the CCH and on appeal, is very vague about her theory of a date of injury. Claimant both alleges that her left shoulder began hurting and that she received treatment for the left shoulder in November/December 1997; that she reported the injury to Mr. S in December 1997, while on her TWCC-41 asserts a date of injury as _____, when she was told by Dr. P that she might have a left shoulder impingement syndrome. Mr. S testified that he was on the employee's premises in December 1997, apparently conducting a pre-closing workshop and answering questions how existing claims would be handled after the plant closing on January 9, 1998. Mr. S concedes that he may have answered a question from claimant during the workshop but does not recall claimant reporting a new injury. We find the evidence sufficient to support the hearing officer's determinations that claimant had not sustained a new left shoulder injury, and that the date of injury of such an alleged injury would be _____, when claimant apparently discussed her left shoulder complaints with Dr. P.

Section 409.001 provides that the injury must be reported to "the employer" within 30 days of the date of injury or, in the case of an occupational disease, within 30 days of when the employee knew or should have known that the injury may be related to the employment. In this case, we have affirmed the hearing officer's finding that the date of injury was _____. Although claimant contends that she received treatment for the injury in November/December 1997 and reported it to Mr. S in December 1997, the hearing officer could believe that whatever notice claimant gave at that time was related to the (previous date of injury) injury. Claimant's first notice after _____, of a claimed left shoulder injury was at the BRC on August 17, 1998, and by her TWCC-41 dated August 18, 1998. Consequently, in that that was more than 30 days after _____, claimant's notice was not timely and we affirm the hearing officer's findings on that point. Subsequently, although carrier asserts that it did not receive written notice at the BRC on August 17, 1998, it did timely dispute compensability within 30 days of

that date on October 15, 1998. In that we are affirming that claimant had not sustained a new compensable injury, claimant cannot by definition in Section 401.011(16) have disability.

Although some of the evidence was conflicting and subject to different inferences, we have frequently held 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 as well as the weight and credibility that is to be given 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:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge