

APPEAL NO. 990176

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 6, 1999. The issue at the CCH was whether the compensable injury of the appellant (claimant) extended to “the claimant’s thoracic and lower back injury and bilateral de Quervain’s syndrome.” The hearing officer determined that claimant’s compensable injury did not extend to these claimed injuries. Claimant appealed, contending that the hearing officer’s determination is not supported by the evidence. Claimant also asserts that his attorney did not offer certain evidence into the record. The respondent (carrier) replied that the Appeals Panel should affirm the hearing officer’s decision and order.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that claimant’s compensable injury did not extend to claimant’s thoracic and lower back injury and bilateral de Quervain’s syndrome. Claimant asserts that he did sustain the claimed injuries and that he told the doctors about the symptoms.

The Employer’s First Report of Injury or Illness (TWCC-1) in this case lists the injury as “shoulder-unknown.” Without objection, claimant’s attorney stated that carrier “accepted” and was “paying on” a neck and shoulder injury. Claimant testified about his compensable injury and said that he was working as a meat cutter on _____. He testified that he and a coworker were sliding a block of ice that was two feet high across a wet floor. He said the ice lodged on something, that they stopped and claimant put his hands face down on top of the ice trying to add pressure to move it, his feet slipped and he fell forward, “somersaulting” onto his backside.¹ He said he felt immediate pain in his neck and shoulder. An MRI report includes a statement that claimant has a “4 mm, right posterolateral focal disc protrusion/herniation” that “mildly indents the right anterior cervical cord.” Claimant indicated that he also felt pain in his hands and “throughout [his] body” on the day of the accident. Claimant testified that he went to the emergency room where he told personnel that he had numbness in his fingers but that he might have denied back pain at the time because he felt the pain in his neck and shoulder. He said that, about three weeks after the fall, his back was treated with ice and heat packs at (clinic). Claimant said that as time passed, he began to have numbness and stiffness in his left leg and foot and pains in his wrist, fingers, and low back. He testified that he underwent shoulder surgery in December 1998 and that the sling he wore at the CCH was due to the shoulder surgery. An MRI of the shoulder stated that the findings suggested that claimant had a “recent Hill-Sachs fracture” of the shoulder.

¹Claimant also indicated that he was pulling on the ice block either at the time of the fall or just before they stopped and he fell.

There was medical evidence from Dr. C dated in June, July, and August 1998 mentioning pain in, or range of motion, regarding claimant's thoracic spine. There is medical evidence from Dr. E dated in August and November 1998 indicating that claimant was diagnosed with bilateral de Quervain's syndrome. However, Dr. E indicated this syndrome may be related to overuse in addition to the fall. There is medical evidence from Dr. E dated in August 1998 that claimant complained of lumbosacral pain. In November 1998, Dr. E noted that claimant complained of left leg weakness and stated that two doctors have recommended a lumbar MRI. Medical records indicate that claimant had a prior right shoulder injury.

Under the 1989 Act, the claimant has the burden of proving that he or she sustained a compensable injury and the extent of the injury. Texas Workers' Compensation Commission Appeal No. 950537, decided May 24, 1995. The 1989 Act defines injury, in pertinent part, as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Existence and extent of injury are fact questions for the hearing officer. Texas Workers' Compensation Commission Appeal No. 951959, decided January 3, 1996. The hearing officer is the sole judge of the weight and credibility to be given to the evidence and the relevance and materiality to assign to the evidence. Section 410.165(a). As the fact finder, the hearing officer is charged with the responsibility to resolve the conflicts 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). The hearing officer may believe all, none, or any part of any witness's testimony and may properly decide what weight he should assign to the evidence before him. Campos. We will not substitute our judgment for the hearing officer's where his determinations are supported by sufficient evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this case, the hearing officer weighed the evidence and determined that claimant's injury did not extend to his thoracic spine, low back, or bilateral de Quervain's syndrome. This issue regarding extent of injury involved a fact question for the hearing officer, which he resolved. Appeal No. 951959, *supra*. The hearing officer could decide to believe all, none, or any part of the evidence and decided what weight to give to the evidence. Campos, *supra*. Although claimant contends that he did immediately complain of leg pain and thoracic pain and about numbness and tingling in this hands, the hearing officer could consider as a factor the fact that these symptoms were not mentioned in the medical reports created soon after the injury. He could also consider the medical evidence showing that claimant initially denied that he had back pain. The lack of prompt onset of symptoms is a factor the hearing officer may consider in making determinations regarding extent of injury. After reviewing the evidence, we conclude that the hearing officer's determinations regarding extent of injury and the thoracic spine, lower back, and bilateral de Quervain's syndrome are not so against the great weight and preponderance of the evidence as to be wrong or manifestly unjust. Cain, *supra*.

Claimant complains that his attorney did not offer certain evidence into the record and did not ensure that witnesses to the fall testified at the CCH. The evidence, attached

to claimant's brief, consists of medical records dated in March, June, July, and August 1998. The injury took place on _____, and the CCH was held on January 6, 1999. Claimant did not explain why he did not take steps to ensure that the evidence was offered at the CCH and that witnesses were to appear to testify. An attorney acts as the agent of the claimant, and the attorney's action or inaction within the scope of employment is attributable to the claimant. Texas Workers' Compensation Commission Appeal No. 93664, decided September 15, 1993.

Regarding whether we may consider the evidence attached to claimant's appeal, we note that we do not normally consider new evidence for the first time on appeal. We may, however, in very limited circumstances, remand a case when new evidence is presented if that evidence came to the party's knowledge after the CCH, if it is not cumulative of the evidence presented, if it was not through lack of diligence that the evidence was not presented at the CCH for the hearing officer to consider, and if the evidence is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. In this case, the documents were dated before the date of the CCH, there is nothing to show that claimant could not have obtained them at an earlier time, and we do not find that this evidence is so material that it would probably have produced a different result. We decline to consider the evidence submitted on behalf of the claimant for the first time on appeal.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge