APPEAL NO. 990275

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 12, 1999, a contested case hearing (CCH) was held. With respect to the sole issue before him, the hearing officer determined that the appellant's (claimant) compensable right shoulder and C6-C7 cervical injury of _____, did not include a C5-C6 herniated nucleus pulposus (HNP) injury.

Claimant appealed (on a response form), pointing to certain medical evidence he believes supports his position, contending that all the medical documents were not reviewed and attaching two medical reports (one of which was admitted as part of Claimant's Exhibit No. 4). Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Claimant testified that on _____, while working on a bridge, some forms fell on his head and shoulders. The parties stipulated that claimant sustained a compensable right shoulder and C6-C7 cervical injury on that date. Dr. L was claimant's treating doctor at that time. In a report dated July 12, 1991, Dr. L commented on an MRI which had been performed:

> An MRI of the cervical spine . . . has shown what appears to be a disk herniation at the right of the C6-C7 level. At least that is how I see it although there is a report that the disk may be at the C5-C6. There are some motion artifacts on this MRI, so the interpretation is not absolutely clear and the detail is less than optimal because of the movment [sic] artifacts. The patient says that he was hurting so bad that he could barely stand it and that is why he moved.

Claimant testified, and subsequent medical records confirm, that claimant apparently had a discectomy or fusion at the C6-C7 level by Dr. L. The hearing officer comments that "[Dr. L] must have concluded the disc herniation was a C6-C7 and not C5-C6."

Claimant had returned to work in 1991 after the injury, apparently had surgery sometime in latter 1991 and was terminated by the employer in the spring of 1992. Claimant testified that he last saw Dr. L in 1992. Claimant apparently had no other medical treatment for the next five or six years. Claimant testified that during this time his neck occasionally felt "a little stiff." (The hearing officer believed that to be not unusual if claimant had a fusion at the C6-C7 level.) Claimant worked for several other employers between 1992 and the end of 1997, including at least one job which required fairly

extensive overhead ceiling work. Claimant testified that he quit that job after about a year and one-half because it was "uncomfortable." Claimant testified that in December 1997, while at work for another employer, he sneezed and felt an immediate "pop" or "crack" in his neck, followed by numbness and tingling in his right arm. This event eventually led claimant to see Dr. M, who, in a handwritten report dated February 12, 1998, noted "Back Pain" upper (something illegible) and multiple trauma. The personal history seems to indicate a fusion at "C5,6" and that "[p]t was injured @ work 1992." In some handwritten progress notes, dated May 27, 1998, Dr. M notes that "[p]t has hx of broken neck," has abdominal pain and that Dr. M has been unable to get claimant's old medical records. Dr. M diagnosed "Chronic Neck pain Past fusion."

What happened next is unclear. Apparently, claimant was in some kind of "altercation" with another male and was incarcerated as a result of that altercation. During his incarceration, there was apparently another event where claimant stated his neck and back "locked up." Claimant was taken to a hospital emergency room (ER) on July 2, 1998. The ER report indicates "no physical altercation tonight," the history of claimant's neck getting "locked up," a social history of alcohol abuse and an assessment of "exacerbation of chronic neck and shoulder pain." The ER recommended followup by a neurosurgeon and returned claimant to jail.

Apparently, at some time, claimant associated his medical problems with his compensable injury and the parties agreed to have Dr. B examine claimant as an independent medical examination doctor. In a report dated July 22, 1998, Dr. B noted "complaints of neck and upper cervical pain which [claimant] states began approximately 6 months ago when he sneezed." Dr. B noted the jail "altercation," claimant's "working on ceilings and upper walls" and diagnosed "status post cervical discectomy C6-C7 with subsequent anterior decompression with evidence of obvious fusion, 2) degenerative changes in the cervical spine above the level of fusion at C5-C6." Dr. B indicated that he believed the degenerative changes at C5-C6 have "a relationship to the underlying fusion mass at C6-C7." Dr. B recommended further testing. The testing was performed and, in a note dated August 17, 1998 (which claimant also submits with his appeal), Dr. B states:

> [Claimant] returns today post MRI Scan demonstrating a fairly large [HNP] at C5-C6. This is the level above the fusion site. Review of medical documentation indicates the presence of previous degenerative changes at this level however with the fusion at the C6-C7 level we are well aware that the mechanics of this process will increase the stress loads above and below the fusion level. In that I feel the current premature disc herniation and the failure level cephalad to the fusion is associated in fact with the sequella of the operative process.
>
> As such I feel the fusion level at C6-C7 aggravated mechanically the level above which subsequently resulted in failure of the annulus.

In a letter dated October 16, 1998, a benefit review officer ask Dr. B for his opinion on causation. Dr. B replied by letter dated October 26, 1998, stating:

> It is impossible to determine whether or not the disc herniation which has been demonstrated at C5 and C6 is a direct result with any particular incident or process including the sneeze or the subsequent altercation. It could be related to the sneeze, it could be related to the altercation, it could be related to both, or related to an incident which we are unaware of.
>
> It is not uncommon for a disc to undergo progressive degeneration and subsequently herniate as a result of a previous operative procedure which [claimant] had undergone in association with the injury date of _____.
>
> From a mechanical standpoint I feel the injury of _____ and its subsequent surgical intervention also played a role in the causation of the disc herniation of C5 and C6.
>
> In terms of specific causation there is insufficient medical data to attribute the current or diagnostic changes at C5 and C6 to a specific process.

The hearing officer found that the probative medical evidence did not establish a causal relationship between claimant's employment in 1991 and claimant's claimed injury of a HNP at C5-C6. An element the hearing officer could, and perhaps did, consider was the time element between the _____ injury, claimant's return to work for both the employer and several other employers, including doing overhead and ceiling work, the December 1997 sneeze incident, one or more altercations in the summer of 1998 and the eventual opinion by Dr. B in October 1998 that there was "insufficient medical data to attribute the current or diagnostic changes at C5 and C6 to a specific process."

Claimant appeals, contending that the original 1991 MRI showed a herniated disc at C5-C6 and that all the medical documents were not reviewed. The hearing officer, in his Statement of the Evidence, and we, in this opinion, have recited, and quoted, at some length from all the medical records admitted into evidence at the CCH. We have frequently 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). Further, Section 410.165(a) provides that the hearing officer, as the 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). In this case, the hearing officer found that Dr. L had concluded that claimant's herniation in 1991 was at the C6-C7 level because that is the level that he was operated on. Although the MRI at that time was apparently not clear and possibly could have supported a finding of a C5-C6 herniation, the hearing officer's conclusion that the herniation was at C6-C7 is sufficiently supported by the evidence. Further, Dr. B's comments make clear that there is insufficient medical evidence to attribute the current C5-C6 herniation to any specific process.

Regarding the other 1991 report claimant submits with his appeal, we have frequently noted that we generally do not consider evidence submitted for the first time on appeal nor does that report lead one to conclude that had it been before the hearing officer it would have likely resulted in a different decision. *See* Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

Finding the hearing officer's decision supported by sufficient evidence and not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust (Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986)), we affirm the hearing officer's decision and order.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge