

APPEAL NO. 990625

On March 2, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issue at the CCH was whether appellant (claimant) sustained a compensable injury to his neck, back, and leg in addition to his left shoulder on _____. The claimant requests reversal of the hearing officer's decision that he did not sustain a compensable injury to his neck, back, or leg on _____. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

On _____, claimant was riding on a small, battery-operated railcar, which was referred to as a "dinky train," going eight to 10 miles per hour through an underground tunnel 36 inches in diameter when, he said, he was struck on the left shoulder by a protruding pipe. He said his back was swerved off the railcar and onto the wall of the tunnel. He said he came out of the tunnel and told his foreman, LR, about the accident and that he had hurt his shoulder, neck and back. Claimant said that LR said he would get better and did not let him see a doctor. The carrier accepted a compensable injury to claimant's left shoulder, but disputes that claimant injured his back and neck. Although the extent-of-injury issue includes whether claimant injured his leg, claimant did not testify regarding a leg injury.

LR testified that the tunnel itself is a pipe and that a one-inch pipe runs lengthwise through the tunnel at the top of the tunnel. He said that claimant came out of the tunnel holding his shoulder and said he ran into a pipe. He said he looked at claimant's shoulder, saw an abrasion, and asked claimant if he wanted to go to a doctor. He said that he thought that claimant had rubbed his shoulder against the casing of the tunnel wall. He said claimant said that he was going to see if it was going to be all right and that it was claimant's decision not to go to a doctor. Claimant's regular job was to use a jackhammer and shovel underground. LR put claimant on light work above ground the remainder of the day and LR said claimant did not make any complaints the rest of the day. He said that after that day, claimant did his daily routine at work with no complaints. He testified that claimant did not complain about his neck or back. Claimant continued to work until about November 10, 1997.

On or about November 10, 1997, claimant called the employer and asked to see a doctor. Claimant said that he had had neck, back, and shoulder problems since his accident of _____. The employer took claimant to Dr. AG on November 11, 1997, and claimant told Dr. AG that he had twisted his back when his left arm hit the pipe and complained of left shoulder and lower back pain. Dr. AG noted that claimant had normal range of motion of the lumbar spine and that an x-ray of the lumbar spine was normal.

Dr. AG diagnosed claimant as having a mild left shoulder contusion and a mild lumbar sprain and noted that he could return to regular work on November 11th.

After being examined by Dr. AG, claimant then went to Dr. C, D.C., on November 11, 1997, and Dr. C stated in the history section of his report of that date that claimant injured his neck, lumbar region, and left shoulder when he was struck by a pipe protruding from the wall of the tunnel while riding on the railcar. Dr. C diagnosed claimant as having cervical, lumbar and left shoulder strains, lumbar radiculitis, and left shoulder myofascitis, and he took claimant off work. Claimant said he has not worked since November 11, 1997.

Claimant's cervical spine, lumbar spine, and left shoulder were x-rayed on November 11th and Dr. SA reported that claimant had normal x-rays of the left shoulder, unremarkable x-rays of the lumbar spine, and moderate degenerative spondylosis at C5-6 and C6-7 associated with disc space narrowing. Dr. C became claimant's treating doctor and he wrote in January 1998 that the compensable injuries should include the claimant lower back and cervical spine.

Claimant was seen by Dr. EG on November 12, 1997, and Dr. EG noted in the history section of his report that claimant injured his left shoulder, neck, and lower back when he was struck by a pipe while going through a tunnel. Dr. EG diagnosed claimant as having cervical and lumbar strains and left shoulder myofascitis.

Claimant's Employee's Notice of Injury Occupational Disease and Claim for Compensation (TWCC-41) dated November 25, 1997, states that he injured his left shoulder, back, and neck when he was hit by a pipe while riding on a work train on _____.

Dr. S reviewed medical records of claimant at carrier's request and she reported on December 30, 1997, that it is possible that the impact was so strong that it caused referred muscle tenderness to the neck and low back region, that it is possible that the neck and back pain developed some days later and could be related to the initial trauma, that the claimant's diagnoses is muscle strain involving the shoulder with referred muscle soreness to the trapezius and latissimus dorsi musculature, and that it is possible that when claimant hit his shoulder he also twisted his back and strained his latissimus dorsi and lumbar paravertebral musculature.

Dr. K saw claimant on January 22, 1998, for an orthopedic consultation and he reported in the history section of his report that claimant was struck in the shoulder and neck by a protruding pipe in the tunnel, that claimant was knocked from the railcar, and that he twisted his spine violently. Dr. K opined that claimant has a probable disc bulge or herniation at L4-5 or L5-S1 and wrote that, apparently, he had a rather significant injury to his neck and low back and recommended a cervical MRI. Dr. M saw claimant on February 4, 1998, and he states in the history section of his report that claimant told him that he was struck by a protruding pipe while on the underground train and that "he injured his shoulder as well as neck and lower back." Dr. M recommended lumbar and cervical MRIs.

Dr. SA reported that an MRI of claimant's left shoulder done on February 12, 1998, showed a possible minor partial strain or tendinopathy of the supraspinatus tendon, and that an MRI of claimant's cervical spine done on February 26, 1998, showed a disc herniation at C4-5 and degenerative spondylosis at C5-6 and C6-7 associated with mild bulging.

Dr. P saw claimant on March 13, 1998, and noted that claimant told him that ever since his injury in the tunnel he has had pain in his left shoulder and low back. He noted that claimant had had a cervical MRI but not a lumbar MRI because that had been denied.

Dr. CO, D.C., who noted in his report of July 23, 1998, that he is the designated doctor, reported that claimant was not at maximum medical improvement when evaluated on July 23rd; that claimant told him that he was struck in the left shoulder with such force on _____, that he was thrown off the railcar to the ground and had felt pain in his left shoulder, neck, and lower back initially after that accident; and that claimant complained to him of pain in his lower back, neck, and left shoulder. Dr. C diagnosed claimant as having a cervical disc herniation, a lumbar disc herniation, and a rotator cuff sprain.

Claimant changed treating doctors from Dr. C to Dr. D, D.C., when Dr. C relocated, and Dr. D reported in the history section of his report of July 16, 1998, that claimant injured his shoulder, neck, and lower back when he was struck by a protruding pipe in the tunnel and thrown off the railcar to the ground. Dr. D diagnosed claimant as having, among other things, cervical and lumbar strains and wrote that claimant was to remain off work.

The hearing officer found that claimant sustained an injury to his left shoulder in the course and scope of his employment on _____. The hearing officer also found that claimant has sustained injuries to his neck and lower back, but that the evidence did not persuade him that claimant's back and neck injuries resulted from the accident of _____. He found that there was no evidence of any leg injury. He also found that claimant did not injure his neck, back, or leg in the course and scope of his employment and concluded that claimant did not sustain a compensable injury to his neck, back, or leg, in addition to his left shoulder, on _____. Claimant contends that the evidence proves that he did sustain an injury to his back and neck in the accident of _____; that there is no evidence disputing the mechanism of injury to claimant's neck and back; and that the hearing officer's decision that claimant did not sustain compensable back and neck injuries is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

It has been held that under Texas workers' compensation law the immediate effects of the original injury are not solely determinative of the nature and extent of the compensable injury and that "[t]he full consequences of the original injury . . . upon the general health and body of the workman are to be considered." Texas Employers' Insurance Association v. Thorn, 611 S.W.2d 140 (Tex. Civ. App.-Waco 1980, no writ). The claimant had the burden to prove that his back and neck injuries occurred in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The trier of fact may believe that a claimant

has an injury, but disbelieve that the injury occurred as claimed. Johnson, supra. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence, and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. It has been held that the finder of fact is not bound by the testimony of a medical witness where the credibility of that testimony is manifestly dependent upon the credibility of the information imparted to the medical witness by the claimant. Rowland v. Standard Fire Ins. Co., 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.).

An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Dorian E. Ramirez
Appeals Judge