

APPEAL NO. 990714

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 2, 1999. With respect to the single issue before him, the hearing officer determined that the respondent's (claimant) compensable injury of _____, extended to include a lumbar spine injury. In its appeal, the appellant (carrier) argues that the hearing officer's extent-of-injury determination is against the great weight of the evidence. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____, when in the course and scope of his employment with a dairy, he was struck by a bull and thrown into the air. The claimant testified that the bull struck him in the low back, knocking him some 10 feet in the air. He stated that he landed on his right shoulder and that the bull struck him five or six more times when he was on the ground. The claimant was taken to the emergency room. The emergency room records reflect that the claimant complained of pain on the right side of his head, his neck and his right shoulder and that "[p]alpation and percussion of dorsal and lumbar spine was nontender." X-rays of the skull, cervical spine, chest, and right elbow were negative and an x-ray of the right shoulder revealed a fracture near the acromioclavicular joint. The aftercare instructions from the emergency room indicated that the claimant had injuries to his head, back, neck, and a clavicle fracture.

The claimant sought follow-up treatment with Dr. S, an orthopedic surgeon. At the hearing the claimant testified that he had difficulty getting an appointment with Dr. S and that he believed that a month passed before Dr. S performed surgery on his right shoulder. Records indicate that Dr. S actually performed an open reduction and internal fixation on the claimant's right clavicle fracture on July 17, 1997, and that he removed the pin from the claimant's shoulder on August 27, 1997. Following his surgery, the claimant underwent physical therapy. The claimant testified that he complained to Dr. S and to the physical therapist repeatedly about the pain he was having in his low back; however, neither Dr. S's records nor the physical therapy records reflect complaints of low back pain. In a report of October 22, 1997, Dr. S released the claimant to return to light duty. He continued the claimant in physical therapy and noted that the claimant would return in four weeks at which time Dr. S stated he would obtain a "final x-ray of his shoulder. . . ."

On November 18, 1997, the claimant had his initial appointment with Dr. B. The claimant testified that he changed to Dr. B because Dr. S would only treat his shoulder. In his Initial Medical Report (TWCC-61), Dr. B diagnosed internal derangement of the right shoulder; a fractured right clavicle, status post-surgery; rib contusions; lumbar disc disease; lumbar facet arthropathy; sacroilitis; and lumbosacral radiculopathy. Dr. B performed EMG

and NCV testing, which he interpreted as being "suggestive of an abnormality in the L5/S1 nerve root distribution."

On March 23, 1998, Dr. H examined the claimant at the request of the carrier. Dr. H certified that the claimant had reached maximum medical improvement with an impairment rating of eight percent, considering only the right upper extremity injury. The carrier requested that Dr. H provide an opinion as to whether the claimant's compensable injury extended to his low back. In a letter of January 5, 1999, Dr. H stated:

On review of the records, it is certainly possible that he may have injured his back, but there is no strong documentation of that. If he did, it certainly did not appear to be a major concern or complaint, until he saw [Dr. B] several months after the actual event; therefore, I believe that the probability of the back condition as being associated would be low.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury and the nature and extent of such injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. Generally, injury may be proven by the testimony of the claimant alone, if it is believed by the hearing officer. Gee v. Liberty Mutual Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In this instance, the carrier argues that the hearing officer's extent-of-injury determination is against the great weight of the evidence. The carrier emphasizes the delayed references to low back pain in the medical records and the incredibility of the claimant's testimony and the medical records from Dr. B. The carrier made the same arguments to the hearing officer. As the fact finder, it was solely the hearing officer's responsibility to determine the significance, if any, of those factors in determining whether the claimant's compensable injury extended to a low back injury. The hearing officer resolved the conflicts and inconsistencies in the evidence in favor of the claimant and he was acting within his province as the fact finder in so doing. Our review of the record does not demonstrate that the hearing officer's determination that the compensable injury extends to a lumbar injury is so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse his determination on appeal. Pool; Cain.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge