

APPEAL NO. 990726

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 March 12, 1999. With regard to the issues before him, the hearing officer determined that respondent's (claimant) left acromioclavicular joint separation is a result of the compensable injury of _____, and that appellant (carrier) waived its right to contest compensability of the left shoulder injury and carrier's later Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) was not based on newly discovered evidence that could not reasonably have been discovered earlier.

Carrier appeals, contending that the hearing officer "improperly identified and improperly phrased the disputed issues"; that claimant "voluntarily and unilaterally terminated his employment" with the employer and did not seek further treatment for his injury for the next year; that claimant's injury resolved; that claimant subsequently injured his shoulder working for another employer which was the sole cause of claimant's current injury; and that the hearing officer "failed to list and/or address the sole cause defense raised . . . by the carrier." Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds urging affirmance.

DECISION

Affirmed.

First, regarding the procedural aspects of carrier's appeal, while the hearing officer did not specifically recite the issues at the CCH, the hearing officer did offer and admit without objection Hearing Officer's Exhibit No. 1, which was the benefit review conference (BRC) report. The BRC report contained the issues raised but not resolved and those are the issues the hearing officer listed in his decision. Carrier did not file a response to the BRC report and raised no objection to the issues stated therein at the CCH. While carrier did argue a subsequent injury as being the sole cause of claimant's current condition in its stated position at the BRC and at the CCH, the hearing officer impliedly rejected that argument. The hearing officer made it amply clear that he believed the left acromioclavicular separation to have been caused by the compensable _____, injury, rather than some subsequent event. We find no merit in carrier's contentions regarding the hearing officer's failure to properly address the issues before him.

Before _____, claimant had been employed by (Employer I) but was terminated because of an inaccuracy in his employment application with apparent eligibility for rehire with Employer I after 90 days. During that time, claimant applied for and obtained employment with (employer in this case) on September 2, 1997. Claimant testified that he injured his left shoulder pulling boxes off a conveyor line on _____. Carrier has acknowledged a compensable shoulder injury on _____; however, there is some dispute whether claimant reported a left shoulder or right shoulder injury. In any event, claimant was seen in the hospital emergency room (ER) on September 11, 1997.

The ER record of that date has an assessment of "Pain - Lt shoulder. Pt states he injured arm/shoulder 2 days ago at [employer] pulling boxes off conveyor belt." Some edema around the clavicle was noted. Other references in the ER report definitely identify the left shoulder and clavicle. The diagnosis was "suspect (L) AC separation or sprain vs tear of rotator cuff." X-rays of the left shoulder were normal but a repeat study was recommended. Claimant was given a prescription for 15 days of pain medication. What happened next is in dispute, but claimant testified that he returned to work with his left arm in a sling, that the employer's nurse treated the shoulder with ice packs, and that he was placed on medical leave, apparently without pay. Claimant testified that he had been living in a motel and, because he had no income, he moved back to another city around October 1, 1997, where he hauled scrap iron "to keep money coming in until I got hired back on to [Employer I]." Claimant reapplied with Employer I, took a physical, and was rehired by Employer I on November 18, 1997, as a mechanic. Although the record is not entirely clear, claimant apparently sustained a compensable crush injury to his right forearm in March 1998 and was treated by Dr. T. Apparently, there was no mention of any shoulder injury at that time.

Claimant saw Dr. T again on September 10, 1998, with complaints of left shoulder pain, giving a history and bringing the ER records and x-rays of the _____, injury. Dr. T had an impression of "left acromioclavicular joint separation." In a note dated September 22, 1998, Dr. T repeats the impression as a "Grade I acromioclavicular joint separation of the left shoulder." In a note dated September 11, 1998, Dr. T records a communication with carrier's adjustor, stating:

I spoke with [adjustor] from the insurance company today. [Adjustor] states that [claimant's] injury was reported as a right shoulder injury on _____. I went over the facts from the ER record dated 9/11/97. The pt complained of left shoulder pain and was diagnosed with a left acromioclavicular joint separation. The ER record indicates this in the nurses notes and in the attending physician's notes as well as the radiology report which shows a left shoulder and left clavicle x-ray performed at the . . . Hospital in (city 1), Texas.

Also in evidence is an "Employer's Report of Occupational Injury or Illness," dated September 14, 1998, which indicates that claimant reported "a pop then pain to his left shoulder" while using a hand fuel pump on _____. Another nurse's report of the same incident notes "pain swelling to L superior shoulder/lateral clavicle area," and that claimant had seen a doctor on September 10, 1998. Employer I is a nonsubscriber to the 1989 Act. Carrier's position is that claimant's shoulder injury of _____, had resolved, as evidenced by claimant's subsequent employment after passing Employer I's preemployment physical in November 1997 and that the sole cause of claimant's current complaints is a new injury on _____, while working for Employer I using a hand fuel pump.

Carrier received notice of a right shoulder injury on September 30, 1997, and disputed compensability of a left shoulder injury on failure to give timely notice grounds on

September 16, 1998. The testimony was that apparently the employer had mistakenly reported a right shoulder injury instead of a left shoulder injury.

Dr. T testified at the CCH, stating that he was unaware of any _____, injury, that claimant gave a history of the _____, injury, that claimant reported a history "of continual pain since the initial injury," and that, based on the history, his examination, and the medical records, claimant's present complaints are due to the _____ injury where he was correctly diagnosed as having a left acromioclavicular joint separation. Dr. T testified that it would be possible to work for a year with such an injury and that it would only manifest itself as a dull achy shoulder pain; that, in his opinion, "There was no repeat trauma or event that re-aggravated the pain"; and that the normal x-ray is not inconsistent with his diagnosis because the x-ray would not necessarily show a Grade I separation, rather, one would need "weight-bearing clavicular x-rays." Dr. T stated that Employer I sent claimant to him because of continuous shoulder complaints, rather than a new injury.

Regarding carrier's failure to timely contest compensability, the hearing officer comments:

A cursory review of the medical records indicates that the Claimant complained of his left shoulder. The records also contain a working diagnosis indicating that the Claimant had a left AC separation. Subsequently, the Carrier received a bill for medical services from the hospital and paid the bill. The Carrier made no attempt to obtain the hospital records. The Carrier also failed to make any reasonable attempt to determine the extent of injury. In this case the Carrier acted as a "passive repository of information" and made little or no effort to determine the facts of the case.

The Carrier prepared their first Notice of Refused or Disputed Claim on September 16, 1998, approximately one year after the injury. The Carrier failed to take appropriate and reasonable action in a timely manner and waived any right they may have had to contest compensability.

Carrier appeals the facts, arguing that there "is very little evidence" that claimant sustained a left acromioclavicular joint separation on _____ (carrier does not address that diagnosis in the September 11, 1997, ER report), that any injury claimant had was resolved before being rehired by Employer I, that claimant failed to seek or receive medical care for the shoulder for a year, and that claimant sustained a new injury on _____, while working for Employer I.

The evidence was clearly in conflict and would have supported either position. However, as we have stated many times, 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). The hearing officer found claimant's and Dr. T's testimony credible and accepted their versions of events. Those findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). On the issue of timely contest of compensability, the evidence is clear that the _____ ER report dealt with a left shoulder injury and carrier failed to adequately investigate the Employer's First Report of Injury or Illness (TWCC-1) reporting a right shoulder injury along with the medical records of a left shoulder injury. Consequently, the carrier did not demonstrate that it had "newly discovered" evidence allowing it to reopen compensability. Although carrier raised a sole cause defense, it presented no medical evidence to show that whatever, if anything, happened on _____, was the sole cause of claimant's present diagnosed condition, nor did carrier counter Dr. T's testimony that there was no new injury or new trauma. The hearing officer's decision is supported by the evidence.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge