APPEAL NO. 990804

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 24, 1999, a hearing was held. She (hearing officer) determined that the respondent's (claimant) compensable injury extended to both hands and that he had disability from September 4, 1998, through the date of the hearing. Appellant (carrier) asserts that claimant's injury to both hands was not part of the agreement made in October 1997 that stated claimant's injury sustained on _____, to be to the left arm, left shoulder, and neck; carrier also said, while claimant did not work after April 1997, the carpal tunnel syndrome (CTS) first mentioned in September 1997 got worse. Carrier said that disability should not be affirmed because of the video evidence showing claimant moving furniture on September 4 and 5, 1998, adding that medical evidence indicating that claimant could not work is not reliable. The appeals file does not contain a reply by claimant.

DECISION

We affirm.

In stating that we affirm, it must be pointed out that this review is one as to factual sufficiency. That another fact finder may have reached a different conclusion as to both extent of injury and disability is not a basis for overturning the decision.

Claimant worked for (employer) on _____. He testified to moving many five-gallon buckets of paint each day in the mixing and selling process. As stated, the parties agreed in October 1997 that claimant sustained left arm, left shoulder, and neck injuries (repetitious physical trauma). (The agreement did not limit injury to the stated injuries.) The first indication of CTS was in September 1997 when a "very mild right CTS" was found by Dr. B. Claimant was primarily being treated for a neck injury and radiculopathy at that time and had disc surgery at C6-7 in February 1998.

Claimant had ceased working in April 1997, and when Dr. R provided written limitations in April 1998 which would allow claimant to return to light work, employer offered a light-duty position to begin on May 4, 1998. Claimant responded by obtaining a new off-work slip from Dr. R dated May 4, 1998. The hearing officer could choose to give whatever weight she wished to this sequence of events especially since there was no bona fide offer issue and also the period of disability in issue did not even begin until September 4, 1998.

In December 1998, Dr. B reported that claimant now had "mild bilateral [CTS]," as compared to very mild right CTS in September 1997. Obviously, as carrier argues, the question presents itself as to how claimant's CTS got worse, albeit still only mild, while doing nothing. The claimant's treating doctor during this period, Dr. M, does not explain this development; he regularly states that claimant is off work.

There is some evidence of CTS, and there is some evidence of disability from Dr. M. Two other medical opinions, however, could have served as a viable basis for the hearing officer's factual determinations. Dr. E, a designated doctor, examined claimant on February 19, 1999. He not only found evidence of CTS, but stated that it was secondary to repetitive motion and said that he thought the recommended surgery therefore was reasonable and necessary. He found claimant not to be at maximum medical improvement and would not be until after the CTS surgery.

While the carrier has no burden to prove that an injury did not occur, the credibility of the claimant's medical evidence may be given weight by the fact finder, even when it does not explain how an injury occurred (*see* Western Casualty and Surety Company v. Gonzales, 518 S.W.2d 524 (1975)). With the medical evidence providing some basis for determining that injury extended to CTS, even though there was no explanation as to the delay in development of CTS, the opinion of Dr. H, an IME for carrier, could also be considered in reaching the conclusion the fact finder made. Dr. H indicated that lifting the paint buckets could be a cause of CTS, but perhaps the most important thing is what he did not say--he did not say that the passage of time obviated a causal connection to the compensable injury. He stated that it is "not clear" why studies should become worse over a period of time and said one would "expect" the condition to be better over a period of time. He then said it is "difficult to be absolutely certain . . . this CTS is the result of this man's employment." The medical evidence sufficiently supports the determination that the injury extends to CTS.

The videos show claimant moving boxes and other items on September 4 and 5, 1998. They do not show him merely directing and "balancing" items carried by others. This writer was particularly impressed by claimant lifting what appeared to be a heavy box approximately 16 by 16 inches by four or five inches, by lifting it from above by grasping the four to five-inch side between his thumbs and fingers; another worthy feat was carrying a weightlifting bench by the right hand above his head up stairs while holding a drink container in the left hand.

However, the weight to give this indication of claimant's ability provided over a significant period of time was for the hearing officer to determine. She could, as she did, weigh that demonstration against the repeated off-work slips of Dr. M that were given at and after this period of time. Of perhaps more significance (not presumptive weight) in this instance could be the opinion of the designated doctor who found CTS in his examination in early 1999 and recommended surgery for the condition. The determination that claimant had disability from September 4, 1998, to the date of the hearing is sufficiently supported by the evidence.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge