APPEAL NO. 990824

This appeal is brought 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 29, 1999. The appellant/cross-respondent (claimant) and the respondent/cross-appellant (carrier) stipulated that the claimant sustained a compensable injury on _____, and that on September 25, 1998, the carrier first contested the compensability of a claimed injury to the left shoulder. The hearing officer made the following findings of fact and conclusions of law:

FINDINGS OF FACT

4. Claimant did not injure his left shoulder on _____ or at any relevant time.

5. A chart note for an August 21, 1997 visit, which is at Page 72 of Claimant's exhibit 2, records an injury to Claimant's face and right arm and a diagnosis of possibly active tuberculosis, but does not mention a left shoulder complaint.

6. Documentation of a left shoulder complaint does not appear in the medical records until months after the _____ incident at the earliest.

7. If Claimant had sustained a left shoulder injury on _____, he would have complained of the left shoulder injury at the time he complained of the injury to his right shoulder or within a few days afterwards.

8. The medical records include references to left shoulder complaints on December 11, 1997 (Claimant's exhibit 2 at 52), December 23, 1997 (Id. at 47), January 21, 1998 (Id. at 39), January 30, 1998 (Id. at 14), February 24, 1998 (Id. at 12), and March 25, 1998 (Id. at 9).

9. Carrier received notice that Claimant's injury allegedly extended to his left shoulder on or before March 25, 1998.

10. There is no relevant newly discovered evidence that could not reasonably have been discovered at an earlier date.

CONCLUSIONS OF LAW

3. Claimant did not sustain a compensable injury to his left shoulder on _____ or at any relevant time.

4. Carrier did not contest compensability of Claimant's left shoulder on or before the 60th day after being notified of the injury.

5. Carrier's contest is not based on newly discovered evidence that could not reasonably have been discovered at an earlier date.

In his order, the hearing officer wrote "[b]ecause Carrier did not contest compensability on or before the 60th day after being notified of the injury, Claimant's left shoulder condition is compensable."

The claimant appealed; contended that the determination that he did not injure his left shoulder on _____, is so clearly contrary to the great weight and degree of credible evidence as to be manifestly unjust; and requested that the Appeals Panel reverse that determination and render a decision that he received an injury to his left shoulder on _____. The carrier responded; urged that the evidence is sufficient to support the determination that the claimant did not sustain a compensable injury to his left shoulder on _____; and requested that that determination be affirmed. The carrier appealed the determination that it waived the right to contest compensability, contended that the determination that it waived its right to contest compensability of the left shoulder injury is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, and requested that the Appeals Panel reverse that determination and render a decision that the carrier owes no benefits to the claimant. The claimant responded, urged that the evidence is sufficient to support the determination that the carrier did not timely contest compensability of his left shoulder injury, and requested that the Appeals Panel affirm that determination.

DECISION

We affirm.

The proceedings were translated for the claimant, who said that he spoke and wrote very little English. He testified that on _____, he was on top of a railroad tank car testing it for leaks with high air pressure; that a bracket was not properly repaired; that the lid broke loose; that he was hit by the escaping air and the lid; that he was knocked out; that the rails on the tank car kept him from falling to the ground; that he hurt all over; that he was taken to an emergency room; that he was in tremendous pain and told the people there where he hurt; that they could see bruises on his face and right arm; that he was numb all over; that his body was warm and it was difficult to tell exactly where he was hurting; and that x-rays were taken and he was told that nothing was broken. He stated that he later saw Dr. G; that Dr. G did not speak Spanish, but that his nurse did; that some people where he received physical therapy spoke Spanish; and that he had difficulty communicating with the medical personnel. The claimant said that he had no problem with his left shoulder before the day of the accident; that his left shoulder hurt the day he was injured; that he began having more and more pain; that in November 1997, he indicated on a drawing that he had pain in both shoulders; that he told medical personnel about the pain in his left shoulder many times before that; that he does not remember the date that he first told them about the pain in his left shoulder; that he injured his left shoulder when he fell on the tank on

_____; that he had not injured his shoulder since that day; and that he had surgery on his left shoulder on March 7, 1999.

Both parties introduced numerous medical records. A diagram showing areas of pain dated September 17, 1997, shows right shoulder pain but does not show left shoulder pain. Another diagram dated November 25, 1997, shows both right and left shoulder pain and appears to be the first medical report indicating left shoulder pain. A third diagram dated December 11, 1997, shows both left and right shoulder pain. The other medical records listed in Finding of Fact No. 8 do indicate complaints related to the left shoulder.

We first address the determination that the claimant did not injure his left shoulder on _____. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove an injury, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. 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). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). That a different factual determination could have been made based upon the same evidence is not a sufficient basis to overturn a factual determination of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. The hearing officer's determination that the claimant did not injure his left shoulder on _____, is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support that determination of the hearing officer, we will not substitute our judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We next address the determination that the carrier did not timely contest the compensability of the left shoulder injury. In its appeal, the carrier cited Texas Workers' Compensation Commission Appeal No. 980177, decided March 13, 1998. In that case, the

hearing officer determined that the carrier waived the right to contest compensability of the thoracic and lumbar injury. The claimant was injured on January 2, 1995, and the history section of a medical report dated January 17, 1995, mentioned "later interscapular pain" and "some low back pain." Low back pain was not included in the diagnosis. For the next two years, the claimant was treated for cervical and shoulder injuries. The hearing officer determined that the January 17, 1995, report placed the carrier on notice of the low back and thoracic injury. The Appeals Panel reversed and wrote:

> To waive the right to contest an injury, a carrier has to be notified of the injury. In this regard, Section 409.021 generally provides that if a carrier does not contest the compensability of an injury on or before the 60th day after written notification of injury, it waives the right to contest compensability. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(3) (Rule 124.1(a)(3)) provides that written notification can be satisfied by "any other notification regardless of source, which fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability." Notification in this regard can be satisfied by a medical report. Texas Workers' Compensation Commission Appeal No. 952010, decided January 16, 1996. And while a concrete diagnosis is not necessary for good notice to be effected by a medical report (Texas Workers' Compensation Commission Appeal No. 950522, decided May 11, 1995), a carrier is not required to go on a treasure hunt through medical records to find some reference to possible other symptoms or pain and thereby be held to be on notice that such pain reflects specific injuries outside of those specifically diagnosed and subsequently treated over a lengthy period of time. To invoke waiver, the "other notification" must "fairly" inform the carrier of facts showing compensability. Texas Workers' Compensation Commission Appeal No. 960584, decided May 6, 1996. Under the circumstances presented and from the evidence of record, we cannot conclude that there is sufficient evidence to support the determination that the carrier waived its right to contest compensability of the thoracic and lumbar injuries. Texas Workers' Compensation Commission Appeal No. 971634, decided October 6, 1997; Texas Workers' Compensation Commission Appeal No. 970675, decided June 2, 1997; and Texas Workers' Compensation Commission Appeal No. 962569, decided February 5, 1997. *Compare* Texas Workers' Compensation Commission Appeal No. 950954, decided July 26, 1995. The finding and resulting conclusion that Dr. W's report of January 17, 1995, was sufficient written notice of a thoracic and lumbar injury and that the carrier waived its right to contest compensability since it did not do so within 60 days from Dr. W's January 17, 1995, report, is reversed as being so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

In the case before us, in addition to indicating that the claimant had pain in his left shoulder; one report states the diagnosis is contusion and strain of the cervical spine and both shoulders and an off duty slip states that the diagnosis is contusion of chest wall and shoulders. The facts in the case before us are distinguishable from those in Appeal No. 980177, *supra*. The hearing officer did not improperly apply the law and his determinations concerning timely contest of compensability are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. We affirm his determinations concerning timely contest of compensability.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge