APPEAL NO. 990835

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 5, 1999, a hearing was held. He determined that respondent (claimant) sustained a compensable injury to his left arm, left shoulder, and neck on _____. Disability was found from December 10, 1998, through January 7, 1999. Appellant (carrier) takes issue with certain findings of fact and conclusions of law, indicating that claimant was not credible and that no injury occurred. Claimant replied, stating that the findings of fact and conclusions of law were sufficiently supported by the evidence.

DECISION

We affirm.

Claimant worked for (employer) on _____. He testified that on that date he was using a 36-inch or 42-inch wrench to loosen a bolt on an underground storage tank being removed; when the bolt gave way, the tension ceased and claimant's arm and shoulder jerked, with claimant describing a popping in his shoulder area. He continued working that day. He first sought medical care on December 14, 1998.

The initial medical records show he gave a history of "pulling a pipe wrench when he hurt his left arm, shoulder and neck" and that he felt something pop in the left shoulder area. A past history of carpal tunnel syndrome (CTS) was also noted. The diagnosis at that time, after noting restricted range of motion, was cervical spine strain and left shoulder strain. An MRI was conducted on February 1, 1999, which showed a C5-6 disc bulge anteriorly and a disc herniation posteriorly. Claimant was taken off work by a doctor whose signature is illegible. Claimant was returned to modified work on January 21, 1999, but had already found a job with another employer beginning on January 9, 1999.

While the above facts show a certain degree of consistency between claimant's testimony, the history provided to medical personnel, and medical findings based not just on symptoms, the hearing was basically litigated as to whether claimant was filing a spite claim over a disagreement with employer as to pay and as to whether claimant quit his employment (employer's account) or was fired (claimant's account). While credibility was in issue, we note that this was not the normally alleged spite claim which usually finds the carrier stating that a claim only resulted because an employer had fired a worker; the allegations as to whether claimant was terminated were reversed in this case.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. While another fact finder could have concluded from claimant's testimony that he was not credible, the areas in which his testimony was questionable were primarily outside the area of evidence relating directly to the injury. We observe that carrier states in its appeal that:

the hearing officer clearly misunderstood and misquoted the evidence.

Examples were then given of claimant having said that he told (Mr. Mc), on page 23 and 24 of the transcript, that his arm was hurting, but that claimant said he did not mention using a pipe wrench. Nothing was said in this part of the appeal about page 55 of the transcript wherein claimant was being questioned by the hearing officer, who asked if claimant had talked to Mr. Mc at "the shop" about hurting "your left arm," to which claimant replied, "I told him I was having problems with my arm and I wasn't sure at that time what the problem was other than I told him that I had popped--I had felt something pop when I was pulling on that tank down there." The hearing officer then asked if claimant had mentioned the phrase, "I felt something pop when I was pulling on that tank down there," to which claimant replied, "yes sir, I did." While a sound argument could be made that claimant's testimony was inconsistent as to what he said he told Mr. Mc at different times while testifying, the statement of counsel quoted above does nothing to promote carrier's appeal when it makes an assertion not supported by the evidence.

In addition to the claimant's history of injury being reported in medical records, employer's own Employer's First Report of Injury or Illness (TWCC-1), dated December 1, 1998, shows that the alleged cause of injury was "pulling on 36[-inch]" pipewrench"; there was no objection to admission of that document. As stated, the hearing officer is the sole judge of the weight and credibility of the evidence. There was no issue of timely notice. A finding of fact that claimant was a credible witness may not have been made by another fact finder, but that is no basis for reversal. There is evidence that claimant was credible in points that related to the question of injury, such as providing a history to medical personnel that his CTS was from a prior injury. A finding of fact that claimant was pulling on a pipewrench which gave way causing injury to his arm, shoulder and neck is sufficiently supported by the evidence from claimant and his medical records, which did not just show an MRI but also a restricted range of motion. A finding of fact that claimant had disability from December 10, 1998, through January 7, 1999, is sufficiently supported by the medical records. Other findings of fact appealed, such as what claimant told Mr. Mc or that dealt with phone messages, reporting to work, and lack of referral to a company doctor, are also sufficiently supported by evidence of record.

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:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge