

APPEAL NO. 991079

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 April 15, 1999. She (hearing officer) determined that on \_\_\_\_\_, the respondent (claimant) injured his left shoulder, neck, back, and head in the course and scope of his employment and that he had disability from that compensable injury from February 1, 1999, through March 31, 1999. The appellant (carrier) requested review, contended that the hearing officer improperly construed sworn statements in the record, urged that the determinations of the hearing officer are 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 the decision of the hearing officer and render a decision that the claimant did not sustain a compensable injury on \_\_\_\_\_, and that he did not have disability. A response from the claimant has not been received.

DECISION

We reverse and remand.

The claimant testified that on \_\_\_\_\_, he was working on a fiberglass module; that another fiberglass module was being moved on a forklift operated by Mr. C; that Mr. A was working about three feet from where he was working; that the modules weigh about 1,500 or 2,000 pounds; that the module being moved hit his left shoulder, back, neck, and head; that it was like a little jar when he got hit; that he was pushed forward, but did not fall to the floor; that he had a bruise on his upper shoulder; that he could not see the bruise, but that the company doctor told him he had a bruise; that he did not have a cut; and that the statement of Mr. A that the module did not come within 10 inches of him is not truthful. The claimant said that he reported what happened to the employer's safety person; that he went to Dr. S, the company doctor; that he was examined and x-rays were taken; that medication and physical therapy (PT) were prescribed; that he received PT that day; and that the next day he returned to work at light duty. He said that he went to the company doctor twice; that he obtained permission to see Dr. D and saw him on November 30, 1998; that Dr. D examined him and said that he had "a lumbar strain, in my shoulder and my neck"; and returned him to work at light duty. The claimant stated that he returned to work at regular duty on January 4, 1999; that he tried to work for two weeks, but was unable to do so; that he went back to Dr. D on January 29, 1999, and was placed back on light duty; and that he took the light-duty slip to the employer and was told that it no longer had light-duty work for him.

An adjuster questioned Mr. A and Mr. C. The carrier introduced transcripts of the questions and answers that were sworn to by Mr. A and Mr. C. Mr. A was asked if the module hit the claimant and he responded "[n]o, no, no, it didn't hit him" and that it was about 10 inches away from the claimant. Mr. A also said that the claimant did not make any movement like the module hit him; that the claimant said that it hit him, but that he did not rub himself; and that it came oh so close to the claimant, but he did not think it hit the

claimant. Mr. C said that he was moving a module on a forklift; that the module was about five and one-half feet off the ground; that he stopped and honked to make sure everyone was out of the way; that he traveled forward about two or three feet and then backed up; that he delivered the module and went to the restroom; that he was then told that he had hit the claimant and said that he had not hit anybody; that the module hangs about 10 to 12 feet on each side of the forklift; that if there is any little hit on either side of the module, you are going to feel the module move; that you feel it if you just scrape something; that he did not feel any movement or hear any complaint; and that Mr. A said that he was right there and that I, Mr. C, did not hit the claimant.

In an Initial Medical Report (TWCC-61) dated \_\_\_\_\_, Dr. S reported that the claimant said that he was hit by a piece of fiberglass and had pain in his shoulder and upper back; that there was tenderness in the scapula area with rotation; that x-rays were taken; that his diagnosis was shoulder contusion; that medication and PT were prescribed; and that the claimant was placed on light duty. A PT report dated that same day states that the diagnosis was left shoulder contusion and that there was tenderness of the muscle without ecchymosis. Ecchymosis is defined as a small hemorrhagic spot, larger than a petechia, in the skin or mucous membrane forming a nonelevated, rounded or irregular, blue or purplish patch. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 28th Edition, 1994.

In the statement of the evidence in the Decision and Order, the hearing officer wrote:

The issue of credibility played a major role in sorting the facts of this case. In this regard, the Claimant's testimony was credible, and it and other evidence showed that he was compensably injured while working for [employer] on \_\_\_\_\_ when a forklift carrying a heavy module collided with him. Other statements in evidence, particularly when read in view of the totality of the evidence, actually support the Claimant's testimony—or at least, do not negate it—that he was actually hit by the forklift/module.

In its appeal, the carrier contends that both Mr. A and Mr. C, in their statements, deny that the incident occurred and that the hearing officer's comment about those statements is not accurate. The hearing officer stated that the claimant's testimony was credible, but her comment that the other statements in evidence actually support the claimant's testimony or at least do not negate it indicate that she did not consider the statements to be in conflict with the testimony of the claimant. The claimant testified that the statement of Mr. A that the module did not hit the claimant is not truthful. Because of the carrier's specific appeal concerning the hearing officer's comment on the evidence, we reverse Findings of Fact Nos. 2 and 3, Conclusions of Law Nos. 4 and 5, the decision, and the order of the hearing officer and remand for the hearing officer to consider the conflicting evidence, to make findings of fact and conclusions of law, and to render a decision and an order not inconsistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge