APPEAL NO. 991099

On April 27, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether appellant/cross-respondent (claimant) sustained a compensable injury to his left shoulder on _____; (2) whether claimant gave timely notice of injury to the employer; and (3) disability. The hearing officer decided that claimant did not sustain a compensable injury to his left shoulder on _____; that claimant gave timely notice of injury to the employer; and that, because claimant did not sustain a compensable injury, he did not have disability. Claimant requests that the hearing officer's decision that he did not sustain a compensable injury on _____, and that he has not had disability be reversed and that a decision be rendered in his favor or that the case be remanded to the hearing officer. Respondent/cross-appellant (carrier) requests reversal of a finding of fact on the disability issue, even though the hearing officer determined that claimant did not have disability because he did not sustain a compensable injury, and requests affirmance of the hearing officer's decision on the issues of compensable injury and disability. There is no appeal of the hearing officer's decision that claimant gave timely notice of injury to the employer.

DECISION

Affirmed.

When claimant began working for the employer in June 1990, he operated a weed eater and later drove a riding lawnmower for 40 hours a week. Claimant said that he turned the steering wheel of the lawnmower with his left arm. Dr. C is claimant's family doctor. According to Dr. C's notes of June 9, 1997, he saw claimant that day for complaints of left shoulder pain and claimant told him that his pain had been present since the weekend when he lifted a lot of heavy furniture helping his brother move from a house. Dr. C gave an assessment of left shoulder deltoid bursitis and gave claimant an injection for shoulder pain. Claimant said that was probably the first time he had seen Dr. C for complaints of left shoulder pain. Claimant said that he continued to drive the lawnmower through the months of January and February 1998. Dr. C noted that when he saw claimant for complaints of left shoulder pain on January 27, 1998, claimant told him that his pain began three weeks ago and that he has to do a lot of twisting and turning actions with his left arm when driving the lawnmower. Dr. C diagnosed claimant as having left acromioclavicular (AC) joint bursitis and tendinitis of the left rotator cuff and recommended that claimant undertake physical therapy, apply ice to his left shoulder after work, and rest his left shoulder as much as possible. On February 5, 1998, Dr. C noted that he gave claimant a cortisone shot in his left shoulder and, later that month, recommended an MRI and referred claimant to Dr. B, an orthopedic surgeon.

Dr. B wrote on February 19, 1998, that he saw claimant that day, that claimant presented with a several-year gradual insidious onset of left shoulder pain, that claimant told him that turning the steering wheel of the lawnmower at work exacerbates his pain, that

he had had a cortisone injection of the shoulder one year ago which gave him temporary relief, that three weeks prior to the visit of February 19th claimant had a recurrence of pain and a popping sensation and then had a cortisone injection which did not relieve his pain, that the MRI showed rotator cuff tendinitis, that review of x-rays showed a large cyst and a large spur in the subacromial arch of the left shoulder, and that there was rotator cuff tenderness on examination as well as popping and grinding with abduction. Dr. B diagnosed claimant as having chronic rotator cuff tendinitis and a large spur with evidence of chronic tendinitis with an absorptive cyst at the rotator cuff insertion. Dr. B gave claimant a cortisone injection and wrote that he showed claimant some ergonomic changes with regard to turning the lawnmower steering wheel with his right arm. Dr. B also wrote that, if claimant continued to have symptoms, then he may benefit from a subacromial decompression and an arthroscopic procedure but that he would first see how claimant responded to conservative measures.

Claimant said that on _____, he was at work mowing a field when he felt excruciating pain in his left shoulder as he was turning the steering wheel of the lawnmower and that he stopped working and reported to his supervisor that his shoulder went out on him. Claimant said that his shoulder was feeling all right prior to the time he felt the pain when turning the steering wheel. Claimant said that his left shoulder had not gone out on him like that before and that he had not previously injured his left shoulder, although he had some discomfort in his left shoulder prior to the incident of March 31st. Claimant's supervisor completed an incident report on _____, noting that claimant told him that when he turned the steering wheel of the lawnmower he felt pain in his left shoulder and that claimant's regular doctor had previously referred him to a specialist for his left shoulder problem.

Claimant said he had a previously scheduled appointment with Dr. B on April 6, 1998, and was unable to move that appointment up. Claimant said he did not go back to work because his shoulder hurt and he felt that he could not use it to do anything at work. Dr. B wrote that he saw claimant on April 6, 1998, for a follow-up evaluation of his shoulder; that he appeared to have reinjured his shoulder at work while steering and felt a pop the week before; that examination revealed that claimant continues to have a very highly positive impingement sign and tenderness over his rotator cuff; that the predominance of his symptoms appear to be rotator cuff tendinitis with a large spur noted on his acromion; and that surgery would be indicated if he does not improve with physical therapy. Claimant said Dr. B took him off work. Claimant underwent physical therapy to his left shoulder in April 1998 and the therapist wrote that claimant is right-handed, that Dr. B referred him for an impingement of the left shoulder secondary to a bone spur, that claimant reported that the onset of his injury occurred while he was at work, that he was not working while undergoing therapy, and that his shoulder pain seemed to be aggravated by his work.

On April 24, 1998, Dr. B gave a preoperative and postoperative diagnosis of recurrent impingement of the left shoulder and Type III large subacromial spur, and performed surgery on claimant's left shoulder consisting of an arthroscopy, subacromial decompression of the spur, and excision of the inferior surface of the AC joint. On May 7,

1998, Dr. B wrote that claimant stated that his account may be transferred to workers' compensation and that that appeared to agree with claimant's original onset of injury which appeared to have been work-related. Claimant underwent physical therapy for his left shoulder in May and June 1998. On July 29, 1998, Dr. B released claimant for full duty with permanent restrictions of no heavy overhead lifting or heavy lifting with his shoulder over 20 pounds. Dr. B also noted that claimant was unable to do his "current job" and requested that claimant be retrained. Dr. B wrote in January 1999 that claimant appears to have a workers' compensation injury.

Claimant said that the employer told him that there was no job for him to be retrained for and terminated him from employment. Claimant said that he looked for work that does not require heavy lifting; that in February 1999 he obtained a full-time job with another employer at approximately the same hourly wage as his preinjury job; that his new job duties include cleaning windows, watering plants, and sweeping floors; and that he thinks that he could have done his new job when Dr. B released him to work in July if it had been offered to him at that time.

The first issue at the CCH was whether claimant sustained a compensable injury to his left shoulder on _____. Claimant's position was that, while he probably sustained an occupational disease to his left shoulder from years of turning the steering wheel of the lawnmower and probably had good cause if he was late in reporting an occupational disease to the employer, he was not claiming an occupational disease but instead was claiming a specific aggravation injury to his left shoulder from the specific event of turning the steering wheel of the lawnmower on _____, and feeling the excruciating pain, after which he was taken off work and had surgery. Carrier's position was that claimant had not sustained a compensable aggravation of his preexisting shoulder condition on _____. The hearing officer found that claimant "did not sustain a compensable injury as a result of the _____ pain to the left shoulder while in the course and scope of his employment on _____" and concluded that claimant did not sustain a compensable injury to his left shoulder on _____.

Claimant had the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). In Texas Employers Indemnity Company v. Etie, 754 S.W.2d 806 (Tex. App.-Houston [1st Dist.] 1988, no writ), the court stated that an injury that aggravates a preexisting condition is compensable, provided that an accident arising out of employment contributed to the incapacity. In Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, the Appeals Panel stated that an aggravation of a preexisting condition is an injury in its own right, citing INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ), and that a carrier that wishes to assert that a preexisting condition is the sole cause of an incapacity has the burden of proving that, citing Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977).

In Appeal No. 94428, the Appeals Panel stated that merely asserting aggravation

does not carry the burden that the proponent has to prove that an injury occurred. The Appeals Panel stated that what must be proven is not a mere recurrence of symptoms inherent in the etiology of the preexisting condition that has not completely resolved, but that there has been some enhancement, acceleration, or worsening of the underlying condition from an injury. Appeal No. 94428 noted that whether there has been an aggravation is generally a question for the trier of fact to determine. Section 401.011(26) defines injury as damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm and the term includes an occupational disease. In Martinez v. Travelers Insurance Company, 543 S.W.2d 911 (Tex. Civ. App.-Waco 1976, no writ), the court stated that, in a workers' compensation case, as in any other case, the plaintiff has the burden of proving elements of his asserted claim by a preponderance of the evidence.

The hearing officer found that before and after the claimed injury of _____, claimant had a diagnosis of left rotator cuff tendinitis with a large spur. When Dr. B saw claimant on April 6, 1998, which was the first visit to Dr. B after the claimed injury of March 31st, Dr. B wrote that claimant appeared to have reinjured himself at work but noted that claimant continued to have a very highly positive impingement sign, which indicates that the impingement sign was not new. The hearing officer was evidently not persuaded that claimant had proven that the pain he experienced while turning the steering wheel of the lawnmower at work on _____, amounted to a new injury to his left shoulder or that claimant had shown that he sustained a new injury to his left shoulder on that date by way of an aggravation of a preexisting condition or injury.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Claimant asserts in his appeal, as he did at the CCH, that carrier had to show that the sole cause of claimant's left shoulder condition and disability was a preexisting injury and that carrier did not produce evidence to support a sole cause argument. Claimant brought up a contention about sole cause at the benefit review conference and the CCH, maintaining that, since he was alleging an injury by aggravation of a preexisting condition or injury, carrier had the burden to prove that the sole cause of his left shoulder condition was a preexisting condition or injury. Carrier contended that claimant would not be able to

prove that he aggravated his preexisting left shoulder injury or condition at work on _____. The hearing officer made no finding on whether a preexisting condition or injury was the sole cause of claimant's left shoulder condition or disability, but did find that claimant did not sustain a compensable injury on _____, which indicates that she was not persuaded that claimant had met his burden to prove that he sustained a compensable aggravation of his preexisting left shoulder condition on _____. Under the particular circumstances of this case, we find no basis to remand the case to the hearing officer to consider claimant's sole cause argument as is requested by claimant.

The hearing officer found that, due to the claimed injury, claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage through February 1, 1999. Carrier contends that that finding is against the great weight and preponderance of the evidence because Dr. B released claimant to full-duty work and claimant said that he probably could have performed the duties of the job he obtained in February 1999 when Dr. B released him to work in July 1998. Dr. B's release contains restrictions on lifting and states that claimant should be retrained because he cannot perform his current job, which was the lawn mowing job, and there is no evidence that the job claimant began in February 1999 was offered to him before that time. We conclude that the appealed finding is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. However, the hearing officer concluded that, because claimant did not sustain a compensable injury, he did not have disability. Without a compensable injury, claimant could not have disability as defined by Section 401.011(16). Thus, the hearing officer did not err in determining that claimant has not had disability.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge