

APPEAL NO. 991246

A contested case hearing was originally held on January 11, 1999, under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), with (hearing officer) presiding as hearing officer. In Texas Workers' Compensation Commission Appeal No. 990271, decided March 29, 1999, the Appeals Panel noted that some findings of fact were not appealed and had become final under the provisions of Section 410.169 and stated that the evidence was sufficient to support other findings of fact and affirmed them. The Appeals Panel reversed findings of fact that infer that the appellant's (claimant) compensable injury included injury to his cervical spine and findings of fact that the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage from July 23, 1998, through the date of the hearing as a result of the compensable injury and a conclusion of law that the claimant had disability for that period because the parties did not litigate questions answered by four findings of fact and remanded for the parties to be afforded the opportunity to litigate those issues and for the hearing officer to make findings of fact and conclusions of law to determine whether the claimant sustained a compensable injury to his neck on \_\_\_\_\_, and whether he had disability as the result of an injury to his neck sustained on that day. The hearing officer held another hearing on May 26, 1999, and rendered another decision the next day in which he again made some of the same findings of fact that had become final and also found that the claimant had sustained a prior cervical injury and had undergone a cervical fusion for that injury prior to October 1995; that after the claimant's referral to Dr. T in 1998, Dr. T discovered several bulging discs in the claimant's spine and opined that the bulging discs are the result of the incident of \_\_\_\_\_; that Dr. T's opinion that the bulging cervical discs are the result of the \_\_\_\_\_, injury is predicated upon the absence of disc bulges in an MRI taken in October 1995 and the subsequent findings of disc bulges in an MRI taken on December 15, 1998; Dr. T's opinion that the claimant's cervical disc bulges are the result of the \_\_\_\_\_, injury is not supported by the other evidence in this matter and is not credible; that the claimant did not sustain an injury to his cervical spine on \_\_\_\_\_, resulting in four bulging discs; and that the claimant's inability to obtain and retain employment at wages equivalent to his preinjury wage after returning to work on September 1, 1997, is not the result of his compensable injury of \_\_\_\_\_, and concluded that the claimant did not sustain a compensable neck injury on \_\_\_\_\_, and did not have disability resulting from the bulging cervical discs. The claimant appealed, stated that he disagreed with those findings of fact and conclusions of law, pointed out evidence that he thinks shows that those findings and conclusions are wrong, stated that the respondent (carrier) did not dispute his cervical injury within 60 days, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor. The carrier replied, urged that the appealed determinations of the hearing officer are supported by sufficient evidence, and requested that the decision of the hearing officer be affirmed.

DECISION

We affirm.

The claimant sustained a compensable injury lifting a welding machine on \_\_\_\_\_. He testified that he felt pain in his right shoulder and neck; that he was seen at a clinic used by the employer; that he told the doctor about his shoulder and neck; that he was told that he had a strain and was to return to work; that he did not get better; that he went to his own doctor; and that his doctor took him off work. He said that he returned to work, that he worked for about 10 months with pain, that he was taken off work, that the doctor told him that he could not treat his arm and neck at the same time and that the arm would be treated first, that he had surgery on his shoulder, that he asked if he could work light duty, and that the doctor told him that he should wait until he was "fixed." The claimant stated that he had a cervical injury in 1989, that he had a fusion performed by Dr. T, that he had surgery on his shoulder before the \_\_\_\_\_ injury, and that he was able to work as a welder after both of those surgeries. He maintained that he complained of neck pain the day of the \_\_\_\_\_ injury and continued to complain of neck pain.

In a clinic note of a visit on July 17, 1997, Dr. B recorded that the claimant said that he hurt his right shoulder lifting a welding machine on \_\_\_\_\_, and that now the claimant complained of pain in the right upper posterior shoulder and into the upper back and neck region; that the neck had full range of motion; that there was full range of motion of the upper and lower extremities; that the claimant has had surgery for a T & A, knee surgery, back surgery, and shoulder surgery; that the diagnosis was right shoulder strain; that no medication other than Advil or Tylenol were prescribed; and that the claimant was released to regular duty. In a report dated July 23, 1997, Dr. F stated that it appeared that the claimant had muscle strains of the right shoulder and was provided Soma for muscle spasm. Dr. F continued to treat the claimant's shoulder and on August 10, 1998, reported that he was going to have to perform a repeat decompression of the claimant's shoulder to remove regrowth of bone spurs. In a report to the carrier dated September 17, 1998, Dr. K opined that the surgery performed by Dr. F to remove the bone spurs should not be considered causally related to the \_\_\_\_\_, injury but due to problems related to the prior shoulder surgery. In a letter dated September 29, 1998, Dr. F stated that in his professional opinion the 1997 injury directly resulted in the recurrence of rotator cuff tendinitis that was subsequently treated operatively. In a letter to the claimant dated April 23, 1999, Dr. T wrote:

I have gone back through several records dating back as far as 1995, and I have found an old MRI scan of your neck to compare with a more recent one that was done on December 15, 1998. The MRI scan of your neck done December 15, 1998, at (Hospital), clearly shows small central disc bulges at C5-6, C6-7, and C1-2. You have a very small central bulge at C3-4 and, of course, the solid anterior cervical fusion at C4-5. Prior to that study, we have an MRI scan of your neck from October 1995, which showed a well healed anterior cervical fusion at C4-5 and no bulging discs. No bulge at C3-4, C5-6, or T1-2 discs are seen on the MRI scan of your neck done in October 1995. Based on the fact that these discs were completely normal and are now bulging and, also, based on the fact that you did have a work related

injury on \_\_\_\_\_. It is my opinion that the work related injury is what led to the bulging of your cervical disc. I realize that the only other MRI scan you had for comparison was done several years prior to your work injury in 1997, but we had no reason to repeat that scan before the work injury in July of 1997. So, again, it remains my opinion that the bulging discs in your neck that we see now are directly related to your work injury of \_\_\_\_\_.

We first address the claimant's statement that the carrier did not dispute his cervical injury within 60 days. We remanded:

for the parties to be afforded the opportunity to present evidence on and make argument related to whether the claimant sustained a compensable injury to his neck on \_\_\_\_\_, and whether he had disability as the result of an injury to his neck sustained on that day.

Compensable injury means "an injury that arises out of and in the course and scope of employment for which compensation is payable." Section 401.011(10). The definition of course and scope of employment in Section 401.011(12) includes:

an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer.

Section 409.021 provides time limits for a carrier to contest compensability of a claimed injury. If a claimant does not have an injury, the failure of a carrier timely to contest compensability of the claimed injury does not result in a compensable injury. Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.). However, if the claimant does have an injury or condition, the failure of the carrier to contest compensability as required by Section 409.021 results in the carrier waiving the right to contest compensability and the injury or condition becoming compensable. Texas Workers' Compensation Commission Appeal No. 981847, decided September 25, 1998. In the case before us, the remand included compensability, not just injury in course and scope of employment. However, in closing argument, the ombudsman assisting the claimant said that there was no issue on the 60-day question, but that if there was, the claimant's position would be that the carrier did not contest compensability of the cervical injury within 60 days of receiving written notification of that injury. The hearing officer did not make a factual determination concerning timely contest of compensability by the carrier. In Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991, the Appeals Panel stated that the record of the hearing indicated that the issue of whether the carrier failed to contest compensability within 60 days was never brought before the hearing officer, there was not resolution of that issue by the hearing officer for it to review, and that the claimant had waived the right to have that issue resolved. In the case before us, there

is nothing for us to review concerning a question of whether the carrier timely contested the compensability of the claimed cervical injury.

We now address the factual determinations made by the hearing officer. The burden is on the claimant to prove by a preponderance of the evidence the extent of an injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. 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). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the 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). A medical expert's deductions from facts are not binding on the fact finder even when not contradicted by an opposing expert. Texas Workers' Compensation Commission Appeal No. 961610, decided September 30, 1996. That different factual determinations could have been made based upon the same evidence is not a sufficient basis to overturn factual determinations of a hearing officer. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 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 judgment for that of the trier of fact even if the evidence would 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). The appealed determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and are affirmed. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders  
Appeals Judge

CONCUR:

Joe Sebesta  
Appeals Judge

Philip F. O'Neill  
Appeals Judge