

## APPEAL NO. 991315

On May 28, 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 issue at the CCH was whether appellant's (claimant) compensable injury of \_\_\_\_\_, extends to claimant's right shoulder. Claimant requests that the hearing officer's decision that his compensable injury of \_\_\_\_\_, does not extend to his right shoulder be reversed and that a decision be rendered in his favor. No response was received from carrier.

### DECISION

Affirmed.

Claimant, who is 67 years of age, worked as a truck driver for employer. The parties stipulated that claimant sustained a compensable injury on \_\_\_\_\_. The issue at the CCH was whether the compensable injury of \_\_\_\_\_, extends to claimant's right shoulder. Claimant said that he had no problems with his right shoulder prior to his injury of \_\_\_\_\_, and that his right shoulder problems started with that injury. On the day of the injury, the trailer of the 18 wheeler claimant was driving was struck by a train and the cab of the 18 wheeler was dragged along until the trailer connection snapped. Claimant said that the entire right side of his body, including his right shoulder, was thrown against the inside of the cab. He said that immediately after the accident the entire right side of his body, including his right shoulder, was stiff and sore. Claimant was taken to a hospital on the day of the accident. The hospital report records that claimant was wearing his seatbelt at the time of the accident; that after the accident he got out of the truck and walked and did not have any immediate problems; that claimant walked into the emergency room (ER) complaining of stiffness and discomfort to his neck, lower back, and right leg; that he was otherwise asymptomatic; and that x-rays of the cervical and lumbar spine revealed degenerative joint disease. The ER doctor diagnosed claimant as having acute cervical, lumbar, and right ankle strains and discharged him to home after several hours with pain medication and instructions to follow up with his doctor.

Claimant said that from the time of the accident his head, neck, right arm, right elbow, and right shoulder, and entire right side all the way down were stiff, sore, and painful and that, within a week of the accident, his right shoulder began tightening up and continued to tighten up and that he was unable to use his right arm much.

Claimant started treating with Dr. Z on September 18, 1997, and in his initial report of September 19, 1997, Dr. Z wrote that claimant was seen on September 18th for complaints of pain in his head, cervical spine, thoracic spine, lumbar spine, right leg, right elbow, right hip, and for anxiety and stress. Dr. Z noted that claimant used a pain grid drawing to indicate symptoms in his lumbosacral spine, right leg, and right elbow. On physical examination, Dr. Z noted, among other things, that claimant had trigger points in the trapezius muscles bilaterally and in the right rhomboid muscle and that pain radiated

into the right shoulder. Dr. Z also noted that claimant complained, among other things, of generalized discomfort of the right upper extremity and that weakness of the right upper extremity was present. Dr. Z wrote that claimant's symptoms were more prominent in the low back than in the neck and upper back and, in general, more prominent on the right side than on the left side. Dr. Z had lumbar x-rays done. Dr. Z diagnosed claimant as having acute traumatic cervicothoracic sprain and lumbosacral sprain secondary to a sudden impact motor vehicle accident, acute cervicothoracic lumbosacral myofibrositis, status post head contusion with post traumatic cephalgia, status post contusion injury of the right elbow with a sprain, mixed cephalgia syndrome, right lower extremity paresthesias, and status post contusion injury of the right hip. Dr. Z noted that claimant would undergo therapy for his cervicothoracic and lumbosacral regions, that claimant was to avoid engaging in any type of activity that could aggravate his condition further, and that claimant would be in an off-work status until further notice. Claimant said that he has been off work from his job with employer.

A videotape taken of claimant in September and October 1997 was excluded from evidence for failure to timely exchange it with claimant. However, the investigative report that describes what is in the videotape was admitted into evidence without objection. That report reflects that the videotape taken on September 27, 1997, shows claimant working on a lawnmower with both hands (claimant is right handed); driving a pickup truck to various locations; using his right hand to lift up one side of a lawnmower, and with another man lifting the other side of the lawnmower, carrying the lawnmower and setting it down on the tailgate/bed of a pickup truck; and lifting with both hands/arms a five-gallon plastic bucket, that appeared to be heavy, into the bed of the pickup truck. The investigative report reflects that the videotape taken on September 28, 1997, shows claimant driving the pickup truck to various locations; lifting a lawnmower by himself out of the bed of the pickup truck and placing it on the ground; pulling an eight-foot aluminum extension ladder out of the truck and carrying it; climbing the ladder and working on an outdoor light fixture with both hands; using hand tools to work on the light fixture; and carrying the ladder back to the truck. Claimant said that he owns rent houses but has personally done only minor work on them, that he hires people to do the major work, and that he did not change a light fixture and does not work on lawnmowers.

Dr. Z noted in October 1997 that claimant was undergoing therapy; that he had complaints of pain in his cervicothoracic and lumbosacral regions, with pain radiating into his right hip and leg; that he had discomfort in his right elbow; that he had trigger points in his trapezius muscles bilaterally and pain in his mid scapular region; and that claimant was to remain off work. Dr. Z wrote in November 1997 that claimant continued to have pain in his neck, upper back, and lower back; that an MRI study of the cervical spine showed disc bulges and spondylosis; that an MRI study of the lumbar spine showed a disc herniation at L2-3, bulges at different levels, and severe spondylosis; and that an EMG of the lower extremities showed bilateral radiculopathy. Dr. Z wrote in January 1998 that claimant continued to have pain in his lower back and stiffness in his neck, upper back, and lower back with pain radiating into his legs, and that he had diffuse pain extending across the upper back into the shoulders. Dr. Z recommended a work conditioning program.

Dr. Z wrote on June 1, 1998, that claimant was complaining of some stiffness and soreness of the right shoulder and recommended that claimant advance to a work hardening program. Dr. Z testified at the CCH. He said he was not sure when the work hardening program started but believes it was at the beginning of June 1998. Claimant said that prior to work hardening his right shoulder was bothering him, that he had to lift big weights at work hardening, that his right shoulder became a lot worse after he started working hardening, and that he could not handle the work hardening program. Claimant also testified that when he got out of work hardening he could not lift his right arm above shoulder level, but also testified that it was sometime in 1997, after his accident, that he realized he could not lift his right arm above shoulder level.

Dr. Z wrote on June 15, 1998, that claimant complained about increasing right shoulder pain and decreased mobility of the right shoulder. Dr. Z noted that claimant had pain and weakness of the right shoulder and that it appeared that claimant was developing some fibrous adhesive capsulitis of the right shoulder. Dr. Z recommended that claimant continue in work hardening with emphasis on range of motion stretching of the right shoulder. Dr. Z noted on June 22, 1998, that claimant felt that his right shoulder condition was worse and that he would be unable to continue work hardening because of that discomfort. Dr. Z noted that claimant had a positive right shoulder impingement sign, took the claimant out of work hardening because of his right shoulder, and recommended a right shoulder MRI and a consult with another doctor about the right shoulder problem.

Dr. F reported that an MRI of claimant's right shoulder done on July 13, 1998, showed severe post-traumatic fibrotic changes within the rotator cuff tendons with subacromial granulation tissue and capsular granulation tissue compatible with post-traumatic adhesive capsulitis; that there is evidence of disruption of the mid to lateral rotator cuff tendons and of severe impingement of the musculotendinous junction of the supraspinatus tendon due to proliferative changes about the AC joint; sclerotic degenerative changes about the glenohumeral joint; and post-traumatic blunting of the anterior and posterior glenoid labrum with a possible posterior glenoid fracture. Dr. F stated that "the findings would be compatible with an impingement severity grading of 3B (tendinobursitis with complete tear)."

On August 6, 1998, Dr. Z wrote that claimant told him that when he was injured, he had injured the entire right side of his body, including his right shoulder; and that when he was initially seen by Dr. Z he had right shoulder pain, but it was not as severe as other areas; and that it was in the exercise program, with increased activity, that he began to experience significant discomfort of the right shoulder. Dr. Z wrote that "[i]n reviewing the MRI study, the most logical reason is that injury did occur in the original accident; the injury, however, was subacute and not as severe as injuries to other areas. It was the active exercising with the use of weight training that resulted in these symptoms becoming more apparent." On August 13, 1998, Dr. Z wrote that "[i]t is felt that the patient did suffer an insult in the accident which was extended and made more apparent and acute via the work hardening program. As such it is my opinion that his shoulder condition is causally related to his injury of \_\_\_\_\_." Dr. Z's progress notes reflect that claimant has continued to

complain of pain in his neck, upper back, lower back, and right shoulder. Dr. Z wrote on January 5, 1999, that when he initially saw claimant he had multiple areas of pain, including some discomfort of the right shoulder and that:

The MRI study to the right shoulder dated July 13, 1998, clearly demonstrates internal derangement of the shoulder area. In all likelihood, the patient did suffer injuries to the right shoulder in this accident, but the injuries were subacute in comparison to his more acute pain to the neck, upper back and low back regions, as well as to the right elbow and right hip. The work hardening activities simply brought out the symptoms, which were detected on MRI study.

Dr. Z testified at the CCH that claimant did have pain radiating into his right shoulder when he first saw claimant on September 18, 1997. Dr. Z testified that in his medical opinion, the rotator cuff tear of the right shoulder was not present when he initially examined claimant on September 18, 1997, but that claimant did sustain a right shoulder injury in the accident of \_\_\_\_\_, which caused inflammation and scar tissue formation which weakened the shoulder tendons, and that the increased stress placed on the shoulder at work hardening resulted in the rotator cuff tear. Dr. Z testified that he had claimant in an off-work status with the intent that claimant not work and that he was unaware of what claimant was doing outside of work hardening. Dr. Z also testified that it was possible claimant may have had a minor, partial tear of the rotator cuff in September 1997 and that that could have graduated to a complete tear in work hardening. Dr. Z further testified that claimant would not have been able to drive an 18 wheeler if the pathology shown on the July 1998 MRI was present before the accident of \_\_\_\_\_.

A notation in the benefit review conference report states that Dr. D was an "agreed on RME physician." In a report dated March 24, 1999, Dr. D wrote that he had conducted a medical record review, but had not examined claimant. He noted that he had reviewed, in their entirety, all records provided to him. Dr. D set forth the history of the accident with the train and claimant's treatment with Dr. Z, specifically pointing out that Dr. Z had noted in his initial report that claimant had pain radiating into his right shoulder. Dr. D stated that the MRI of the right shoulder done in July 1998 showed degenerative changes with evidence of an impingement syndrome. Dr. D wrote that it would be unlikely for a physician to miss on examinations an impingement and rotator cuff injury and that it would be impossible for a physical therapist in an active physical therapy program not to note problems performing physical activities because of an impingement syndrome of claimant's magnitude. Dr. D wrote that it was his medical opinion that:

there is no indication of a causal relationship between the shoulder internal derangement, which includes tendinobursitis and complete cuff tear and his accident of \_\_\_\_\_. I base my opinion on the fact that numerous physician examinations have been performed as well as regular physical therapy treatments with physical therapist examinations, and no mention had been made of such a problem. Therefore, it would be beyond the scope of

reasonable medical probability that this particular problem is a direct result of the accident on \_\_\_\_\_.

The imaging study suggests a chronic and longstanding degenerative process which is a disease of life process, and the fact that the complaints of difficulty occurred when they did would support that; this was the natural progression of a preexisting arthritic condition.

Claimant had the burden to prove the extent of his compensable injury. Texas Workers' Compensation Commission Appeal No. 960733, decided May 24, 1996. If claimant injured his right shoulder in the work-related accident of \_\_\_\_\_, or in the physical therapy or work hardening programs that were prescribed by Dr. Z as a result of his work-related injury, then claimant's right shoulder injury would be compensable. Texas Workers' Compensation Commission Appeal No. 92538, decided November 25, 1992; Texas Workers' Compensation Commission Appeal No. 93861, decided November 15, 1993. The hearing officer states in her decision that claimant failed to prove that he sustained an injury to his right shoulder during the accident of \_\_\_\_\_, or during any physical therapy or work hardening program. The hearing officer found that the \_\_\_\_\_, injury claimant sustained while working for the employer does not extend to his right shoulder and she concluded that claimant's compensable injury of \_\_\_\_\_, does not extend to the claimant's right shoulder.

There is conflicting evidence with regard to the disputed issue. 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. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. 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. Appeal No. 950084. 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).

The hearing officer's decision and order are affirmed.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Judy L. Stephens  
Appeals Judge