APPEAL NO. 991447

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 22, 1999, a contested case hearing was held. With respect to the issues before him, the hearing officer determined that the compensable injury of the respondent (claimant) is a producing cause of her proximal humerus fracture. Appellant (carrier) appeals on sufficiency grounds. Claimant responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Carrier contends that the hearing officer erred in determining that claimant's compensable right arm injury is a producing cause of her proximal humerus fracture. Carrier asserts that medical evidence from (Dr. S) shows that claimant's _____, injury was a "new" injury and was unrelated to the (prior date of injury), compensable right arm injury. Carrier also states that claimant said the December 1998 fall was "very minor" and that she did not hit her injured right arm, which, carrier asserts, shows that the December 1998 fall was "unrelated to the compensable injury."

Claimant had the burden to prove by a preponderance of the evidence that the proximal humerus fracture was caused by her compensable injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). This question of the cause of the proximal humerus fracture had to be proved by expert evidence to a reasonable medical probability. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 941583, decided January 9, 1995. Claimant was not required to prove that the (prior date of injury), compensable injury was the sole cause of the proximal humerus fracture, but only that it was a producing cause of the proximal humerus fracture. *See* Texas Workers' Compensation Commission Appeal No. 962391, decided January 8, 1997. The use of "magic words" by an expert does not in itself establish causation, but that the substance of the expert evidence, including the reasons given for the opinions expressed, must be considered in resolving the issue of causation. *See* Texas Workers' Compensation Commission Appeal No. 950455, decided May 9, 1995; Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. A subsequent injury, whether an aggravation of the original injury or a new and distinct injury, may be compensable if it is the direct and natural result of a compensable primary injury. *See* Texas Workers' Compensation Commission Appeal No. 960746, decided May 30, 1996. Where a carrier asserts that the sole cause of the claimant's current condition and disability is not a prior compensable injury, but an intervening injury or event, the

carrier has the burden of proving sole cause. Texas Workers' Compensation Commission Appeal No. 952061, decided January 23, 1996. Whether the primary compensable injury caused or resulted in the later injury is a fact question for the hearing officer. Appeal No. 960746.

Carrier accepted liability in this case for claimant's initial right arm injury of (prior date of injury). Claimant testified that she saw (Dr. L) and (Dr. S) and that she was told she had a fracture at the top of her right arm near the shoulder with a piece of bone sticking out. Claimant said she was told to keep her arm in a sling and that the doctors would perform surgery only if there was a "nonunion." Claimant said she fell again on _____, while away from work. She said she fell on her left side and that she did not hit her injured right arm. Claimant testified that she felt her injured right arm "give way." She went to the hospital where she was told that she had "an extension" of the spiral fracture in the same area.

In a _____, medical note, Dr. S stated that claimant had fallen again, that she went to the ER, and that she "was found to have a closed neurovascularly intact new spiral fracture of the proximal 1/3 of her humerus." In a January 15, 1999, medical note, Dr. L stated that claimant had not healed from her October 1998 fracture, that "this type fracture is easy to reinjure," and that there is "no question whatsoever" that the second fracture is related to the first. Dr. L said, "the second fall and injury is the consequence of having the initial fracture of the humerus." In a March 29, 1999, letter, Dr. S stated:

> [Claimant's] injury of (prior date of injury), is the primary cause of her current problems to her right arm. In that injury, she sustained a comminuted proximal humerus fracture with non-displaced extension of the fracture down the proximal one-third of the shaft of the humerus. This non-displaced fracture became relevant when she fell on _____. It is at this point that this fracture fragment displaced and has yet to heal, while the more proximal portion of this fracture has healed without event.

Dr. S then opined that the _____, incident was not the sole cause of claimant's right arm problems.

The hearing officer determined that: (1) on (prior date of injury), claimant fell and sustained a hairline fracture of her upper right arm, her proximal humerus; (2) on _____, claimant fell and exacerbated the hairline fracture so that the hairline fracture became a spiral fracture of her upper right arm; and (3) a preponderance of the evidence indicates that claimant's fracture of her right proximal humerus was caused in part by claimant's (prior date of injury), injury.

The hearing officer considered the evidence and concluded that claimant's proximal humerus fracture was related to the compensable injury. We will not reverse his

determinations unless they are so against the great weight and preponderance of the evidence as to be clearly erroneous and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Section 410.165(a) provides that the hearing officer, as fact finder, is the sole judge of the weight and credibility to be given the evidence. In the discharge of this responsibility, the hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer could judge the credibility of the medical evidence and conclude that claimant met her burden of proof regarding causation in this case. *See* Texas Workers' Compensation Commission Appeal No. 94103, decided March 7, 1994.

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge