

## APPEAL NO. 991500

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 16 and 18, 1999. She (hearing officer) determined that the respondent's (claimant) compensable injury of Injury 3, extended to a left shoulder injury.<sup>1</sup> The appellant (carrier) appeals this determination, contending it was against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

### DECISION

Affirmed.

The claimant has a history of bilateral shoulder injuries, including a right shoulder injury which resulted in a shoulder reconstruction in injury 1, a left shoulder dislocation injury in injury 2 which resulted in reconstructive surgery, and another right shoulder injury on Injury 3, which resulted in a total right shoulder replacement on June 23, 1998, and which is the underlying injury for purposes of these proceedings. Dr. M, the claimant's surgeon and treating doctor, prescribed physical therapy (PT) for this latest right shoulder injury. It was not disputed that the therapy included bilateral biceps curls. The claimant testified that as she began this exercise on (alleged date of injury), she did not realize that the exercise equipment carried a 50-pound resistance, instead of the prescribed weight, which she said was 10 pounds.<sup>2</sup> She said she immediately felt severe right shoulder pain and became "hysterical" at the pain and thought that she had ruined the hardware placed in her right shoulder. She was taken to an emergency room (ER). The record of this visit reflects only treatment of the right shoulder and makes no mention of the left shoulder. She said the next day she woke up with extreme left shoulder pain and believed that the incident at PT the day before had caused a subluxation of the left shoulder. When she experienced the right shoulder pain, she said, she cupped the right elbow in her left hand and effectively immobilized the left shoulder. She denied that she experienced any other incident between (alleged date of injury), and January 6, 1999, which could have caused acute left shoulder trauma.

The claimant said that she called Dr. M's office on December 24, 1998, complaining of bilateral shoulder pain. A letter of April 7, 1999, from an office administrator confirms that this call was made. Because she was unable to see Dr. M due to the holidays, the claimant saw Dr. A, in her words, to assure that she did not have a dislocation of the left shoulder. In a report of this visit, Dr. A found no left shoulder dislocation and diagnosed neuropraxia of the left upper extremity. On December 30, 1998, she saw Dr. B, who diagnosed a left shoulder strain.

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<sup>1</sup>A disability issue was withdrawn by the parties.

<sup>2</sup>There was other evidence that the prescribed exercise weight was 20 or 30 pounds.

The claimant first saw Dr. M after the (alleged date of injury), incident on January 6, 1999. In the history portion of his report of this visit, he noted incorrectly that the left shoulder was reduced at the ER. His examination showed left shoulder subluxation and commented that this occurred during the incident at PT on (alleged date of injury). In his testimony at the CCH and in later reports, Dr. M stated that the left shoulder revealed "multi-directional instability," which he considered common in an acute injury, and that her shoulder had either subluxed or dislocated. He also believed that the pain would have been immediate upon subluxation. In a letter of March 4, 1999, he again attributed the left shoulder condition to the incident at PT and observed that over the last 10 years, "she has had no problems with the left shoulder until the incident in [PT] where her shoulder was dislocated." In his testimony, he admitted that the claimant did have a left shoulder operation in 1995.

Dr. P, an orthopedic surgeon, reviewed the claimant's records and testified at the CCH at the request of the carrier. In his opinion, the claimant did not sustain a left shoulder injury as a result of the incident at PT on (alleged date of injury), for essentially these reasons: (1) there is no record of an immediate complaint of left shoulder pain, which should have been noticed right away; (2) multi-dimensional instability as found by Dr. M is, in Dr. P's opinion, not common in cases of shoulder trauma; (3) the claimant's left shoulder condition was "long-standing"; and (4) biceps curls do not usually cause injury to the shoulder because the arm is not extended in this exercise and the shoulder is stabilized by muscles.

The hearing officer considered this evidence and made the following finding of fact and conclusion of law, which have been appealed by the carrier:

#### **FINDING OF FACT**

5. The Claimant attempted to do the weighted chest curl exercise on (alleged date of injury), but the incorrect weight was loaded and the heavier weight caused the Claimant to injure her left shoulder.

#### **CONCLUSION OF LAW**

3. The compensable injury sustained by the Claimant on or about Injury 3, extends to and includes the left shoulder.

The carrier, both at the CCH and on appeal, observes that the resolution of this dispute centers on the credibility of the claimant, of Dr. M, and of Dr. P. Its position was that the claimant's left shoulder subluxed sometime after (alleged date of injury), but before the visit on January 6, 1999, with Dr. M. It challenges the correctness of the claimant's assertion that references in the record to lifting a 20-pound backpack and playing with a pet involve incidents that did not happen until mid-January. It also argues that Dr. M was not provided an accurate history by the claimant and, therefore, his opinion of causation is not credible. It further emphasizes the lack of reference to the left shoulder in the early medical reports

and submits that the claimant lacked credibility in her assertion that her right shoulder pain and "hysteria" masked left shoulder pain. Its position is that the claimant's left shoulder condition is a continuation of her prior problems and reflects ongoing degenerative changes. Dr. P, in his testimony, acknowledged his respect for the abilities of Dr. M and commented that their disagreement in this case was just a difference of professional opinions.

The circumstances of the incident at PT on (alleged date of injury), and the ultimate question of whether the incident caused a left shoulder injury were questions of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). In her role as fact finder, she could accept or reject in whole or in part any of the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). A factual determination of a hearing officer is subject to reversal on appeal only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer. Rather, we find the testimony of the claimant and the opinion of Dr. M, deemed credible and persuasive by the hearing officer, sufficient to support her finding that the claimant's compensable injury included the left shoulder.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge