

## APPEAL NO. 991552

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 22, 1999. He determined that the respondent (claimant) injured his shoulder in the course and scope of his employment on Injury 2, and that he had disability beginning on October 22, 1998, and continuing through the date of the hearing. The appellant (carrier) appealed, urged that the determinations of the hearing officer are against the great weight and preponderance of the evidence, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant was not injured in the course and scope of employment and did not have disability. The claimant responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

### DECISION

We affirm.

The claimant testified that on Injury 1, he slipped and fell at work, bruising his right arm; that he received conservative treatment from Dr. H, an orthopedic surgeon; that he was off work until November 17, 1997, because of that injury; that he received a two percent impairment rating for loss of range of motion of the right shoulder for that injury; that when he returned to work, his right arm was not as strong as it had been; that he could perform his job and participate in recreational activities without difficulty; that he injured his neck in an automobile accident on January 17, 1998; that he did not injure his shoulder in the automobile accident; that he was released to return to work on April 6, 1998; that the employer told him he had a job; but that he did not return to work until July 8, 1998, because of delays by the employer; and that he did not have problems with his right shoulder from April 6 to July 8, 1998. The claimant said that on Injury 2, he reached over some boxes in the freezer to lift a box of sausage that weighed about 35 pounds; that the box was frozen to the floor; that he shook the box from side to side to get it unstuck; that the box came loose; that his right arm popped; that he felt tingling, irritation, and numbness in his right shoulder; that he moved his shoulder around, did not feel a lot of pain, but his shoulder felt strange; that he took a pain reliever, used his right arm as little as possible, and completed his shift; and that he told his mother he had hurt his arm at work. He stated that when he returned to work after the first injury at work, the then-general manager of the restaurant made him sign a statement agreeing that if there was any further injury he would be terminated, that he had been released by his doctor, and the employer would no longer be liable for his 1997 right shoulder injury. That testimony is consistent with a document dated November 17, 1997, signed by that general manager and the claimant. The claimant said that he did not tell his supervisor about the Injury 2, injury because he was afraid that he would lose his job; that he called the local office of the Texas Workers' Compensation Commission (Commission) and told a person about the agreement and the injury; that the Commission employee told him to report the injury within 30 days; that he called Dr. D the next day and got an appointment; that he was not scheduled to work the next two days;

that he returned to work; that his shoulder bothered him; that he told the night manager that he did not feel well; that he worked the next three days; that his father went into the hospital on August 19, 1998; that he called in and said that he could not work because his father was in the hospital; that he saw Dr. D on August 20, 1998, and was taken off work for the next day; that he spoke with Ms. C, the current general manager, and advised her that he would return to work the next Wednesday; that she was upset and told him he could be terminated; that he called Ms. C again on August 23, 1998, and that he understood she had terminated him. The claimant testified that Dr. D was transferring his practice to another city; that Dr. D referred him to Dr. H; that he saw Dr. H on October 22, 1998; that he had worked for another employer four hours a day for about three weeks before he saw Dr. H; that he needed a job and worked in pain; and that Dr. H took him off work on October 22, 1998. The claimant stated that his 1997 injury was a bruise on his right arm; that it healed with treatment, rest, and time; that the pain from the Injury 2, injury was different and was in a different location near the shoulder blade; that another employee pushed his right shoulder on about August 15, 1998; and that his shoulder was not injured when the employee pushed him.

Ms. C testified that she became the general manager on July 12, 1998; that the claimant and another employee were reprimanded for an incident that occurred in August 1998; that the incident was probably after Injury 2; that she first learned the claimant was injured when he brought a doctor's statement saying he could return to work; that the claimant missed a lot of work because of his father's illness; that the claimant did not communicate well with her; and that she terminated him. She stated that some employees told her the claimant said that before he left he was going to get hurt and that those employees made statements.

In a note dated August 20, 1998, Dr. D stated that his impression was right shoulder sprain/strain, exacerbation of preexisting right shoulder pain. On January 14, 1999, Dr. D wrote that his records showed he treated the claimant for a right shoulder injury sustained on Injury 1; that the claimant was in a motor vehicle accident on January 17, 1998; that he injured his neck and not his shoulder in the motor vehicle accident; that the claimant recovered over the next two or three months; that he was doing well until he re-injured his right shoulder in August 1998; and that the claimant had a new injury to his right shoulder in August 1998. A report from Dr. H dated October 22, 1998, states that the claimant was unable to work indefinitely; a note from him dated April 20, 1999, states that the claimant is not to perform strenuous or repetitive activities involving the right shoulder; and a note from Dr. H dated April 27, 1999, states that the claimant is to be off work if required to do strenuous or repetitive activities involving the right shoulder or upper or mid back.

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). 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 hearing officer's determinations that the claimant sustained a compensable injury on Injury 2, and had disability beginning on October 22, 1998, and continuing through the date of the hearing are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge