

APPEAL NO. 991678

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 14, 1999, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer determined that respondent (claimant) sustained a compensable left shoulder and cervical injury on _____ (all dates are 1998 unless otherwise noted), and that claimant had disability beginning October 23rd and continuing through the date of the CCH.

Appellant (carrier) appeals, noting discrepancies between claimant's testimony and claimant's initial statement regarding the date of injury, the delayed (but still timely) reporting of the injury and the history recited in the medical reports. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds to carrier's points and urges affirmance.

DECISION

Affirmed.

Claimant was employed as a laborer by (employer) and was assigned to a company that was cleaning up after the severe floods in Central Texas October 17th and 18th. Claimant testified that on _____ he reported for work and was taken to a location where he spent the day pulling up mud and water soaked wall-to-wall carpeting and moving furniture, including a very heavy pool table. There is a dispute regarding the date of injury in that claimant originally reported that he was injured on Wednesday, (Subsequent injury), and elsewhere said that he was hurt on a Tuesday because he had taken Monday off to clean his own apartment, which had also flooded. Documentation later established that claimant had worked on October 16th and did not work again until Thursday, _____. The dispute as to dates and what claimant said to whom was fully presented to the hearing officer.

Claimant testified that he began to notice pain in his shoulder and neck on the drive back on the day of injury, but that claimant thought it was just normal fatigue after a hard day's work. Claimant testified that the pain grew progressively worse that evening and over the ensuing next few days. Claimant first sought medical care at a hospital emergency room (ER) on October 29th. In evidence is a form ER report suggesting that claimant has bursitis, that claimant "[r]est and protect the area in order to feel better" and see his regular doctor. A note by the ER doctor indicates a referral to an "orthopedist" if claimant is "not better 11/2/98." Claimant was subsequently seen by Dr. C on November 9th. Dr. C recites a history of an "insidious onset of left shoulder pain around the 29th of October. There was not an injury associated with it." Dr. C described the pain and recited the ER visit but makes no mention of a work-related injury. Dr. C had an impression of "[i]mpingement syndrome left shoulder, possible cervical radiculopathy." A November 19th note contains claimant's continued left arm complaints and orders an MRI. The MRI performed on November 24th shows a "small left posterolateral broad based disc protrusion" that

minimally indents the thecal sac. Dr. C, in a note dated November 30th, indicates the MRI "reflects [claimant] to have a left sided C5/6 disc" and refers claimant to a specialist, Dr. V. In another note, dated December 2nd, Dr. C remarks:

This is to certify that [claimant] is under my care for left cervical radiculitis. However, his off work status will not be determined until he is evaluated by [Dr. V]. He is scheduled to see [Dr. V] on 12-14-98 @ 9:00. He has been under my care from 11-09-98 [to] 11-30-98 and has not been able to work since. Please refer to [Dr. V] for a final work status determination.

Dr. V, in an off-work slip, took claimant off work on December 14th. Claimant testified that Dr. V has refused treatment because carrier has denied liability.

The hearing officer, in his Statement of the Evidence, commented:

The Carrier in closing argument noted this was a case of credibility as to whether Claimant sustained the claimed injury. There were inconsistencies as to the date of injury and delayed reporting of the injury. However, the Claimant's testimony was credible. He sustained a compensable injury on _____ removing carpet, furniture, and a pool table from flood damaged residences.

Carrier, in its appeal, again points out the discrepancies that claimant initially claimed an Subsequent injury injury on his Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) (which was later amended) and quoted from a transcribed recorded statement where claimant said he was pretty sure he got hurt on a Tuesday. Carrier points out that claimant did not seek medical care for a week after his alleged injury, that Dr. C's November 9th note said "no injury" and that claimant had signed a daily pay form which said he had not been injured at work that day. All of this information was presented to, and considered by, the hearing officer.

We have many times noted that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). In this case, the hearing officer considered the conflicts and inconsistencies in the evidence and resolved them in claimant's favor. We will reverse a factual determination of a hearing officer 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.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge