APPEAL NO. 991721

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 July 7, 1999. She determined that the respondent/cross-appellant's (claimant) compensable injury of _____, extended to his right shoulder; that appellant/cross-respondent (carrier) waived the right to dispute the compensability of the claimed right shoulder injury by not disputing it within 60 days of written notice of the claimed injury; and that the claimant had disability only from February 11, 1998, to July 20, 1998. The carrier appeals the findings of a compensable right shoulder injury and waiver of its right to dispute, contending that these determinations are not supported by sufficient evidence. The claimant replies that these determinations are correct, supported by sufficient evidence, and should be affirmed. The claimant appeals the determination that disability did not extend through the date of the CCH, contending that this determination is against the great weight of the evidence. The appeals file contains no response to the cross-appeal.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant injured himself while lifting steel plates. The parties agreed that the compensable injury included the neck and low back. The claimant contends he also injured his right shoulder in this lifting incident. He had the burden of proving that his injury extended to the right shoulder. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Normally, because of the nature of the claimed injury, it could be proved by claimant's testimony alone if found credible by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In this case, the claimant testified very briefly and mentioned in his testimony only that he felt a snap in his neck and felt pain in his shoulders. He conceded that he initially complained to doctors only about back and neck pain, but his testimony was very vague about a right shoulder injury. The hearing officer commented that the claimant was a poor historian, so she gave "more weight" to the medical evidence. That evidence consisted of numerous visits to Dr. H, D.C., which regularly reflected complaints of right shoulder pain beginning on March 31, 1998, and a right shoulder MRI in December 1998, which was reported as showing, in addition to bursitis, a partial tear of the supraspinatus tendon. Dr. H considered this to be caused by the lifting incident and, according to Dr. H, sought a referral to a specialist, but this was denied. Dr. G examined the claimant at the request of the carrier and noted complaints of right shoulder "trouble." In Dr. G's opinion, the MRI "showed a little separation of the posterior labrum but [claimant] has no symptoms referrable to this."

The hearing officer commented that she found the MRI report and opinion of Dr. H more credible in establishing a right shoulder injury than Dr. G's comments. In its appeal, the carrier focuses on the hearing officer's comments that the claimant was a poor historian

and that, for this reason, she placed greater weight on the medical records and suggests that this was an "improper" burden shifting, not between the parties, but between different elements of the claimant's evidence. The carrier suggests that the claimant should have been required to affirmatively assert a shoulder injury. While we can agree from our review of the record that the claimant was a poor historian, there, nonetheless, was other medical evidence supporting the claimed shoulder injury. The claimant obviously did not deny a shoulder injury in his testimony. The hearing officer as fact finder was the sole judge of the weight and credibility of the evidence. Section 410.165(a). Her reliance on the medical records to shore up the claimant's testimony was, in our opinion, no more than a weighing of the evidence. The carrier also points to the lack of an early reference to a right shoulder injury until recorded by Dr. H in March 1998 and argues that any pain in the shoulder was referred from the neck. These, too, were matters for the hearing officer to consider in weighing the evidence and assigning it credibility. 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 find the evidence of Dr. H and the MRI report sufficient to support the finding of a right shoulder injury and decline to reverse that determination.

Section 409.021(c) generally requires that a carrier dispute the compensability of an injury by the 60th day after receiving written notice of the injury. Texas Workers' Compensation Commission Appeal No. 952232, decided February 8, 1996. Failure to do so in the absence of newly discovered evidence (not asserted in this case) results in a waiver of the right to contest compensability, and the injury becomes "compensable as a matter of law." Texas Workers' Compensation Commission Appeal No. 990724, decided May 24, 1999. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1 (Rule 124.1) further provides that an employer's first report of injury (TWCC-1) triggers the 60-day dispute provision of Section 409.021. Ms. O, the employer's risk manager, testified that she prepared a TWCC-1 and signed it on February 13, 1998. In block 19 of the form, which is titled "Part of Body Injured or Exposed," she wrote "Rt. Shoulder/neck." Ms. O testified that she never spoke with the claimant, but filled out this form based on another internal report of the employer. She said that the reference to the right shoulder was "probably picked up from" this other report. Ms. OW, the adjuster for the carrier, testified that she received the TWCC-1 on February 19, 1998, and that a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) was filed on October 6, 1998, well beyond the 60-day time limit for contesting a claim. The hearing officer found from this evidence that the carrier did not timely contest the claimed right shoulder injury and thereby waived the right to do so.

In its appeal, the carrier argues that despite the overwhelming clarity of the TWCC-1 description of the injured body part, the hearing officer should have looked at the TWCC-1 in context. It then attempted to weave a context of other medical reports tending to defeat, or at least obfuscate, the assertion of a right shoulder injury. The Appeals Panel has commented in the past that certain documents may not be enough to trigger either the 60-

day period to contest or to generate a requirement for the carrier to go on a "treasure hunt" through the documents to find any possible claims of new injuries. Texas Workers' Compensation Commission Appeal No. 980177, decided March 13, 1998. That is hardly the case here. The information about a claimed right shoulder injury was conveyed on a TWCC-1. Upon receipt, the carrier was obligated to investigate and pay or dispute within the statutory limits and not become a "passive repository" for the information. The questions asked of Ms. O on the witness stand, which went to the compensability of the claimed right shoulder injury, could have and should have been asked within 60 days of February 19, 1998. Whatever investigation was done, the results were not timely incorporated in a TWCC-21. The evidence is more than sufficient to support the finding of carrier waiver.[1]

Dr. H released the claimant to return to light duty on July 20, 1998. According to Ms. O, a position was created for the claimant, which Dr. H personally approved in a visit to the employer's facility. The position involved operating a push button machine. The claimant was apparently given a second warning about job performance on October 8, 1998. According to Ms. O, there was a conflict with the supervisor, but no physical problem with the work. In any case, the claimant did not work after October 8, 1998. Dr. H apparently continued the claimant in a light-duty status until December 11, 1998, when he placed him in an "unfit for work" status which continued thereafter. The hearing officer, in Finding of Fact No. 15, to support her conclusion of no disability after July 20, 1998, found as follows:

> A report from [Dr. H] dated October 8, 1998 showed Claimant being taken back off work without explanation. A comparison of the July 29, 1998 report and the October 8, 1998 report showed that Claimant had more complaints when he was released to modified duty than he had on October 8, 1998 when he was taken back off work.

A review of Dr. H's October 8, 1998, report reflects that on this date he continued the claimant in a modified-duty status and did not place him off work. We are aware of no July 29, 1998, report, but a report of a May 29, 1998, visit declares the claimant unfit for work. The claimant on appeal contends that the hearing officer "misread" the medical evidence in ignoring the December 12, 1998, excuse from work. The claimant in his testimony shed no light on the issue of disability.

In his appeal, the claimant relies essentially on the proposition that the claimant, with a light-duty release, had no obligation to look for work and, in effect, established disability as a matter of law. *See* Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The facts of this case, however, show that the claimant was actually working in a light-duty position, approved by Dr. H, and that he stopped working on

[1] Carrier's other assertion that failure to timely contest cannot create an injury when none otherwise exists also fails in light of the evidence establishing an injury. *See* Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.); Texas Workers' Compensation Commission Appeal No. 990223, decided March 22, 1999; Texas Workers' Compensation Commission Appeal No. 990135, decided March 10, 1999.

October 8, 1998. The hearing officer made no findings as to why he stopped working, nor does she address the effect of later work excuses from Dr. H. Disability need not necessarily be a continuing status, but periods of disability may recur after periods of nondisability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. Because the hearing officer's finding of when disability terminated appears to be based on an erroneous reading of the medical evidence; does not address why the claimant stopped working on October 8, 1998; and seems to ignore the later duty excuses of Dr. H, we are unable to determine how she arrived at the ending date of disability. For these reasons, we reverse the finding that disability ended on July 20, 1998, and remand this issue for further specific findings of fact which address these matters and a conclusion of law on whether disability continued after July 20, 1998. The finding of disability from February 11, 1998, to July 20, 1998, has not been appealed and should remain undisturbed. At issue on remand is only the date of termination of disability. While no further evidence should be taken, it was unfortunate that the claimant contributed nothing about disability in his testimony. *See* Texas Workers' Compensation Commission Appeal No. 990621, decided May 28, 1999. The finding that the compensable injury included the right shoulder and that the carrier failed to timely contest compensability of the right shoulder injury are affirmed.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

DISSENTING OPINION:

I respectfully dissent with respect to the majority's decision to remand the disability issue. Although the hearing officer's rationale for ending disability on July 20, 1998, could have been more clearly stated, I believe that a full reading of her decision reveals that she determined that the claimant did not have disability after July 20th, because he voluntarily left the light-duty position he was given by his employer on October 8, 1998, and would

have continued to make his preinjury wage but for that resignation. In addition, I believe that she decided not to credit Dr. H subsequent off-duty slip because her review of Dr. H's records demonstrated that the claimant's complaints were more pronounced at the time he was released to light duty in July 1998, than they were at the time Dr. H again took the claimant off work. The hearing officer was acting within her province as the sole judge of the weight and credibility of the evidence under Section 410.165(a) in so interpreting Dr. H's records. In my opinion, the evidence in the record sufficiently supports a July 20th ending date of disability and the hearing officer's determination in that regard is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, I would have affirmed the disability determination. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

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Elaine M. Chaney
Appeals Judge