

APPEAL NO. 991774

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 20, 1999. He (hearing officer) determined that the appellant's (claimant) compensable injury of _____, did not extend to the right shoulder and that the respondent (carrier) timely disputed a right shoulder injury. The claimant appeals only the determination that the compensable injury did not include a right shoulder injury, expressing his disagreement with that determination. The carrier replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The finding that the carrier timely disputed a right shoulder injury has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The claimant worked as a truck driver delivering bulk cement. He testified that on _____, while attempting to hook up a hose he carried on his right shoulder, he slipped and fell backwards. He said he landed on his low back "more to the right." The carrier does not dispute that the claimant sustained a compensable low back injury as a result of this fall, but disputes that he also injured his right shoulder in the fall.

The claimant first saw Dr. B on the date of the injury. His diagnoses were lumbar and sacral strain. No mention is made of right shoulder pain. The claimant said that he initially felt only low back pain and not until October did he start to experience problems with his right shoulder, which became painful in November 1998. On October 20, 1998, the claimant completed an Employee's Request to Change Treating Doctors (TWCC-53) from Dr. B to Dr. V, wherein he described an injury to the lower back only. Dr. V first saw the claimant on October 29, 1998. Dr. V's report of this visit contains no mention of right shoulder complaints. The first time "some degree of pain" in the right shoulder is mentioned by Dr. V is a visit of January 8, 1999. On January 26, 1999, the claimant first received right shoulder treatment in the form of an injection. In an undated "To Whom It May Concern" letter, Dr. V wrote that the claimant "fell backwards and a little to the right." He also said that the claimant did not mention a shoulder injury at his first visit because the shoulder "was only aching slightly." Since then the pain increased.

The claimant had the burden of proving that his compensable injury of _____, included his right shoulder. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he injured his right shoulder at that time and in that way was a question of fact which could be proved by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The claimant's position was that he was initially concerned with a low back problem; that his low back pain essentially masked his shoulder pain until sometime in November; that this is why the initial medical records do not reflect complaints of shoulder pain; and that he did report shoulder pain to Dr. V in November

1998, but this report was not recorded by Dr. V. The hearing officer, as fact finder, was the sole judge of the weight and credibility of the evidence. Section 410.165(a). He found the claimant's evidence insufficient to meet his burden of proof particularly because of the absence of early reports of shoulder pain. 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 claimant's credibility for that of the hearing officer. Rather, we find his determination that the compensable injury did not extend to the right shoulder sufficiently supported by the evidence.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge