

## APPEAL NO. 991800

On July 21, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether respondent (claimant) sustained a compensable injury on injury 2; (2) whether the compensable injury extends to and includes an injury to claimant's left shoulder, neck, back, and right hip; and (3) whether claimant has had disability. Appellant (carrier) requests that the hearing officer's decision that: (1) claimant sustained a compensable injury on injury 2; (2) the compensable injury extends to and includes claimant's left shoulder and neck; and (3) claimant had disability from the injury 2, compensable injury, from January 6, 1999, to June 8, 1999, be reversed and that a decision be rendered in its favor. No response was received from claimant. There is no appeal of the hearing officer's decision that the compensable injury of injury 2, does not include claimant's back or right hip.

### DECISION

Affirmed.

Section 401.011(26) defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease." Section 401.011(10) defines a "compensable injury" as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage."

Claimant testified that he fractured his left wrist in a work-related accident in Injury 1; that he had several surgeries for that injury; that he was in a cast for several months, which caused elbow pain; that he missed time from work because of his wrist injury; and that he had had some complaints of back and neck pain prior to injury 2, but that pain was different than the back and neck pain he had after injury 2. Dr. S, who treated claimant for his wrist injury, wrote in September 1998 that claimant should have an extensor origin release, apparently for symptoms of reflex sympathetic dystrophy (RSD); that claimant complained of thoracic and shoulder pain, as well as tenderness over the lateral epicondyle; and that claimant would be off work until his surgery. Dr. Z saw claimant in October 1998 for his wrist injury of injury 1 and Dr. Z noted complaints of pain in the left elbow, shoulder, upper back, and right hand. Dr. J reported in November 1998 that claimant reached maximum medical improvement (MMI) on November 11, 1998, with a zero percent impairment rating (IR) for his injury of Injury 1.

Claimant testified that on injury 2, employer instructed him to deliver tables to a client and that he fell out of the back of the truck when his back gave out while he was lifting one of those tables. He said that he felt right hip pain at the time of the accident and

that the next morning he felt pain in his neck, left shoulder, and back. Claimant said that there were no witnesses to the accident.

In a note dated January 6, 1999, Dr. G, D.C., mentions left arm and wrist pain. Dr. B reported on January 14, 1999, that he is a designated doctor and that claimant reached MMI on November 11, 1998, with a four percent IR for his injury of Injury 1. According to a report of Dr. E, D.C., claimant saw Dr. E on January 14, 1999, and Dr. E noted that on injury 2, claimant fell when moving the table out of the truck on January 5th and he diagnosed claimant as having cervical radiculitis, left shoulder internal derangement, and right hip internal derangement.

Dr. E referred claimant to Dr. N, who wrote that claimant had been carrying an object on the left side of his neck on injury 2. Claimant said he did not tell Dr. N that the injury occurred that way. Dr. N also noted that claimant had neck pain radiating into his shoulders and that claimant had been treated in the past for a cervical condition. Dr. N diagnosed a lumbar sprain and an exacerbation of cervical and shoulder pain. On January 20, 1999, the Texas Workers' Compensation Commission approved claimant's request to change treating doctors for his injury 1 injury from Dr. S to Dr. E. In a letter dated February 5, 1999, Dr. E wrote that claimant had positive orthopedic tests in his left shoulder, right hip, lumbar area, and cervical area and related claimant's injuries to a work-related injury that occurred when claimant was carrying a table out of the back of a truck in January 1999.

Dr. S wrote in March 1999 that he had recently seen claimant, that claimant's left elbow discomfort had resolved, that claimant had apparently sustained a new injury to his left shoulder, and that the new injury should be classified and evaluated as a new problem rather than being related to his lateral epicondylitis. Dr. H, who also treated claimant for his injury 1 wrist injury, saw claimant in March 1999 and Dr. H noted that he had previously seen claimant for RSD; that claimant informed him of the accident that occurred on injury 2, when he was moving the table out of the truck; that his physical examination of claimant indicated that claimant was injured in a work-related incident on injury 2; that that has nothing to do with the prior RSD claimant had been treated for and that had resolved; that claimant has a cervical syndrome type problem, an internal derangement of the left shoulder, and lumbar syndrome; and that "this is a separate injury."

Claimant said that he resigned from employer on January 12, 1999. Dr. V, D.C., who is associated with Dr. E, and Dr. E issued a series of work status reports beginning on January 14, 1999, and continuing to June 8, 1999, which state that, due to the extent of claimant's injuries or his response to treatment, it is necessary for claimant to be excused from work. Claimant said that he was unable to work from January 6, 1999, to June 8, 1999, and that, due to financial problems, he asked to be released to return to work. On June 8, 1999, Dr. V released claimant to regular duty.

Claimant had the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ.

App.-Texarkana, 1961, no writ). Claimant also had the burden to prove that he sustained disability as defined by the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. There is no appeal of the hearing officer's finding that claimant did not injure his back or right hip on injury 2. Carrier appeals the hearing officer's findings that claimant injured his left shoulder and neck taking a table off a truck on injury 2, and that because of the compensable injury of injury 2, claimant has been unable to obtain and retain employment at wages equivalent to his preinjury wage from January 6, 1999, to June 8, 1999. Carrier also appeals the hearing officer's conclusions that claimant sustained a compensable injury of injury 2; that the compensable injury of injury 2, extends to and includes claimant's left shoulder and neck; and that claimant had disability from the compensable injury of injury 2, from January 6, 1999, to June 8, 1999.

The issues of compensable injury, extent of injury, and disability presented factual questions for the hearing officer to determine from the evidence presented. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the appealed findings, conclusions, and decision are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Susan M. Kelley  
Appeals Judge