

APPEAL NO. 991955

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 August 17, 1999. The issues reported from the benefit review conference (BRC) and agreed to by the parties at the beginning of the CCH, with no motion to add issues, were:

1. Did the Carrier [respondent] waive the right to contest the compensability of the claimed cervical, thoracic, lumbar injury, and psychological problems by not contesting compensability within sixty (60) days of being notified of the claimed injury; and
2. Does the Claimant's [appellant] compensable injury extend to and include the Claimant's shoulders, cervical (neck), thoracic (mid-back), lumbar (low back) spine, and psychological condition (post traumatic stress disorder and depression)?

The hearing officer determined these issues, but she added "shoulders" to the second issue. She then held that the claimant's injury extended to his neck, back, and psychological conditions, but not to his shoulders. She further held that the carrier waived the right to dispute all body parts except the shoulders because it had no obligation to dispute the shoulders as there was no injury experienced by the claimant in his shoulders when he fell on the job on _____. (We would note that the conclusion of law concerning the extent of the injuries states both that the claimant did injure his shoulders and that he did not injure his shoulders.)

The carrier has not appealed, but the claimant has appealed the sole issue of the findings relating to the claimant's shoulder injuries, pointing out that these were not part of the disputed issues and were, in fact, accepted by the carrier until final argument. The claimant points out the considerable evidence in favor of injury. The carrier responds briefly that the factual determinations made by the hearing officer are supported. It does not respond directly to the assertion that there was no proper issue before the hearing officer concerning the compensability of the claimant's shoulder injuries.

DECISION

Reversed and rendered that the issue of the compensability of the claimant's shoulder injuries was not properly before the hearing officer as a disputed issue. The unappealed portions of the decision have become final.

The claimant was climbing a ladder to install a ceiling fan when he fell six feet as the ladder holding him tipped. He caught himself by landing on his hands, with his arms extended. He fractured his right elbow. The medical records indicate various complaints, and growing psychological and emotional distress. The parties stipulated that the carrier "initially" accepted compensability of the right arm and elbow.

To summarize the evidence regarding the shoulders, the medical evidence records from the very first that the claimant complained of shoulder pain and, in fact, objective testing was pursued to rule out a right rotator cuff tear. The claimant also completed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated December 2, 1997, on which he listed all parts of the body that he stated had been injured, including his left and right shoulders. The designated doctor, Dr. O, assigned part of his impairment rating for shoulder range of motion deficits. However, an MRI was negative for rotator cuff tear.

At the beginning of the CCH, the parties agreed to the issues as stated in the BRC. No motion was made by the carrier to add "shoulders" to the list of disputed regions in either issue. Nor did the parties agree to add this region. Brief testimony and evidence mentioning the claimant's shoulders was brought out in the evidence, much as the undisputed elbow injury was. However, no dispute was raised about the connection of (or even the existence of) the claimant's shoulder injuries during the course of the CCH.

At the very end of the CCH, in final argument, the claimant's attorney began making her argument and made reference to the claimant's shoulders. She was interrupted in her argument by the hearing officer, who questioned why she had been told at the outset of the CCH that the claimant had injured his arm and elbow, and she asked if there was an intent to dispute compensability of the shoulders as well. The claimant's attorney, clearly puzzled, stated that she understood that the carrier has been covering the shoulders and it was not at issue. The carrier's adjuster was questioned whether he agreed the shoulders were part of the injury. He reviewed the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) filed by the carrier, which did not dispute the shoulders, and stated it was the only one filed by the carrier. Nevertheless, he stated that he could not agree that the shoulders were part of the injury. The carrier's representative also argued that the claimant should have raised an issue regarding the shoulders at the BRC. The hearing officer announced (and did not seek agreement) that she would add the shoulders because "I think we've litigated it." The hearing officer also announced that she looked through the claims file and did not find stamped copies of either the TWCC-21 or the TWCC-41 and was going to consider that neither had been filed. (Again, neither party asserted that the other party had not properly filed the document in question.)

We agree that the *sua sponte* addition of an issue by the hearing officer about the extent of the claimant's injuries to his shoulders during the final argument stage was error, and reverse her decision to the extent that it found that the claimant's compensable injury did not extend to his shoulders and the carrier did not have a duty to dispute such injury. Without citing it directly, the hearing officer appears to rely on the case of Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.- Tyler 1998, no writ) as the basis for holding that the carrier was under no obligation to dispute injuries to the shoulders. Given that injury to the claimant's shoulders is documented throughout the medical records, whether or not there was a rotator cuff tear, we cannot agree that the Williamson case would necessarily apply under the facts of this case to absolve the carrier of the duty to react to the numerous notices it received of shoulder injuries, where the question is the connection of an injury to a work-related incident. See Texas Workers'

Compensation Commission Appeal No. 991506, decided August 23, 1999.

We need not discuss this further, however, because an issue of the relationship of shoulder injuries to the compensable injury was clearly not before the hearing officer as set forth in Section 410.151(b). We cannot agree that the mere mention of the claimant's shoulders in the course of developing evidence on the stated issues and disputed conditions constitutes "actual litigation" over the compensability of his shoulders. Essential to litigation of a controversy by consent is a meeting of the minds of the parties that there is a controversy. This was plainly not the case during the CCH, and not even during final argument, when the claimant's attorney expressed the belief that the carrier had not disputed the shoulders (as borne out by the absence of this injury on the TWCC-21).

For the reasons stated above, we reverse and render a decision that strikes all reference to the compensability of the claimant's shoulders and otherwise the unappealed findings and conclusions of the hearing officer as to the claimant's neck, back, and psychological injuries have become final as decided.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge