

APPEAL NO. 992055

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 27, 1999. With respect to the issues before him, the hearing officer determined that the appellant's (claimant) compensable injury does not extend to neck and right shoulder injuries; that the respondent (carrier) did not waive its right to contest compensability of the alleged neck and right shoulder injuries; and that the claimant is not entitled to supplemental income benefits (SIBS) for the third quarter. In his appeal, the claimant challenges each of those determinations as being against the great weight of the evidence. In its response, the carrier urges affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that the claimant sustained a compensable injury to his left knee on \_\_\_\_\_, when he was knocked from a ladder, while he was cutting down steel duct work, and thrown against a column. The claimant contends that in addition to his left knee, he also injured his neck and right shoulder. He stated that the carrier has paid for treatment to his neck and left shoulder, specifically steroid injections in both areas. In addition, he testified that Dr. S, his treating doctor, has told him that he needs to have neck and shoulder surgery. A right shoulder MRI of May 11, 1998, revealed "degenerative arthrosis of the AC joint." A cervical MRI of the same date demonstrated "chronic degenerative disc disease with posterior marginal osteophytes causing moderate compromise of the spinal canal and neural foramina bilaterally" at C5-6 and C6-7.

On September 8, 1997, a prior hearing was held in this case. The hearing officer's decision and order from that hearing was admitted in evidence at this hearing. At that hearing, the hearing officer determined that claimant sustained a compensable injury on \_\_\_\_\_; that the carrier "waived the right to contest compensability based on existence of injury" but did not waive its right to contest compensability based on timely reporting; that the claimant timely reported his injury; and that the claimant did not have disability. In his discussion, the hearing officer noted that the "Claimant asserts he was knocked from the ladder and was jolted several times against the falling duct work injuring his left side, left knee, neck, right shoulder, and right arm and about his body generally." (Emphasis added.) The hearing officer further noted that the "full extent of Claimant's injury cannot be determined until his condition is fully evaluated and differentiated between pre-existing problems and causal connection with the duct/ladder incident." Records of the Texas Workers' Compensation Commission (Commission) indicate that the hearing officer's decision from that hearing was distributed to the parties on October 8, 1997. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), the claimant and the carrier are deemed to have received it on Monday, October 13, 1997.

The parties stipulated that the claimant had at least a 15% impairment rating and that he did not commute his impairment income benefits. The third quarter of SIBS was identified as the period of January 13 to April 13, 1999, with a corresponding filing period of October 14, 1998, to January 12, 1999. The hearing officer determined that the claimant's unemployment in the filing period was a direct result of his impairment and the carrier did not appeal that determination. On May 20, 1997, Dr. G examined the claimant at the request of the carrier. In a report dated June 16, 1997, Dr. G opined that the claimant "may return to work without restrictions, working eight hour shifts." In a report of January 26, 1999, Dr. M opined that the claimant "is at a minimum capable of returning to light active work lifting up to 35 pounds occasionally and 20 pounds or less on a regular basis." On April 12, 1999, Dr. B performed a functional capacity evaluation (FCE) on the claimant. Dr. B stated that "as determined by the physical examination and the [FCE], it was determined that this examinee was capable of doing Sedentary work only." In a report of October 12, 1998, Dr. S, the claimant's treating doctor, stated:

I feel that this patient should not return to any type of work until he can clarify the entire situation, because if he tries to return to work he may aggravate the above condition and this will cause a much more complex and complicated situation.

The claimant testified that he was unable to work in the filing period and acknowledged that he made no effort to look for work in that period.

Initially, we will consider the hearing officer's determination that the claimant is not entitled to SIBS for the third quarter. In Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, the Appeals Panel stated that if a claimant established that he or she had no ability to work at all during the filing period in question, then seeking employment in good faith commensurate with this inability to work would be not to seek work at all. In Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, we emphasized that the burden of establishing no ability to work is firmly on the claimant. Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994, states that an assertion of inability to work must be judged against employment generally, not just the job where the injury occurred. In addition, we have noted that an assertion of no ability to work must be supported by medical evidence. Texas Workers' Compensation Commission Appeal No. 950654, decided June 12, 1995. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact decides the weight to assign to the evidence before him and resolves conflicts and inconsistencies in the testimony and evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. An appeals level body is not a fact finder, and it 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. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

The hearing officer determined that the claimant did not sustain his burden of proving that he had no ability to work during the filing period for the third quarter. There was conflicting evidence on the question of the claimant's ability to work in that period. Dr. S opined that the claimant was unable to work, while Drs. B and M opined that the claimant could work in a sedentary or light job, respectively, and Dr. G opined that the claimant could return to work without restrictions. It was the hearing officer's responsibility to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. He did so by finding that the claimant had not established that he had no ability to work in the relevant filing period. The hearing officer simply was not persuaded that the evidence presented by the claimant was sufficient to prove that he was totally unable to work. He was acting within his province as the sole judge of the weight and credibility of the evidence in so finding. Our review of the record does not demonstrate that the hearing officer's determination that the claimant had some ability to work in the filing period for the third quarter is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The claimant acknowledged that he did not engage in a job search in the filing period; accordingly, the hearing officer properly determined that he did not satisfy the good faith requirement and that he is not entitled to SIBS for the third quarter.

Next, we will consider the hearing officer's determination that the claimant's compensable injury did not extend to his right shoulder and neck. In his decision the hearing officer noted that the injury history in the claimant's early medical reports did not reflect complaints of neck and right shoulder pain and that the "[p]rimary treatment has always been to his left knee." In addition, the hearing officer stated that the claimant was "not persuasive that any neck and right shoulder problems resulted from the compensable injury." The hearing officer properly considered those factors in making his extent-of-injury determination. Our review of the record does not reveal that the hearing officer's determination that the claimant did not prove the causal connection between his neck and right shoulder injuries and the compensable injury is so contrary to the great weight and preponderance of the evidence as to compel its reversal on appeal. Pool; Cain.

Finally, we consider the hearing officer's determination that the carrier did not waive its right to contest compensability of the alleged neck and right shoulder injuries. The hearing officer made Finding of Fact No. 3 in support of his conclusion that the carrier did not waive its right to contest compensability of the neck and right shoulder. Finding of Fact No. 3 states:

Carrier did not receive written notice of claimed injuries to Claimant's neck and right shoulder. Because Carrier was not obligated to contest compensability of the neck and right shoulder without written notice, Carrier's [Payment of Compensation or Notice of Refused/Disputed Claim] TWCC-21 of October 1, 1998 was filed timely.

The determination that the carrier never received written notice of the claimed injuries to the neck and right shoulder is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. As noted above, in his decision from a prior hearing in this case, the hearing officer stated that the claimant specifically alleged at that time that he injured his neck and right shoulder in the \_\_\_\_\_, on-the-job injury. The hearing officer further stated that the "full extent of Claimant's injury cannot be determined . . . ." Under Section 409.021(c) a carrier waives its right to contest compensability of a claimed injury if it does not contest within 60 days of the date it receives written notice of the claimed injury. Rule 124.1(a)(3) provides that written notice can come from any document "regardless of source, which fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability." We have consistently stated that it is the assertion of the facts showing compensability which triggers the duty to dispute and not the proof thereof. Texas Workers' Compensation Commission Appeal No. 980822, decided June 3, 1998; Texas Workers' Compensation Commission Appeal No. 962403, decided January 9, 1997; and Texas Workers' Compensation Commission Appeal No. 961618, decided October 3, 1996. The hearing officer's decision from the first hearing clearly demonstrates that the claimant was alleging that he had injured his neck and right shoulder in the \_\_\_\_\_, work-related injury. The hearing officer acknowledged the assertion and stated that he could not determine the "full extent" of the claimant's injury at that time. There is no question that the hearing officer's decision identified the employee, the employer, the date of injury and the allegation of the facts showing compensability. In fact, it is difficult to envision what document would serve to give more complete written notice that the claimant was asserting that his compensable injury extended to additional body parts than that decision. As noted above, Commission records reveal that the decision from the September 8, 1997, hearing was distributed to the carrier on October 8, 1997, and it is deemed to have received the decision on October 13, 1997. The carrier's receipt of the decision triggered its obligation to contest compensability of the claimed neck and right shoulder injuries, within 60 days of October 13, 1997. The carrier's TWCC-21 in this instance is not date-stamped as having been received by the Commission until October 5, 1998, nearly a year after it received written notice that the claimant was asserting that his compensable injury extended to his neck and right shoulder. As such, we reverse the hearing officer's determination that the carrier timely contested compensability of the neck and right shoulder injuries and render a new decision that the carrier waived its right to contest the compensability of those injuries by failing to do so within 60 days of October 13, 1997. The neck and right shoulder injuries have become compensable as a matter of law under Section 409.021(c).

The hearing officer's determinations that the claimant is not entitled to SIBS for the third quarter and that the claimant did not establish the causal connection between his compensable injury and his neck and right shoulder injuries are affirmed. However, his determination that the carrier timely contested compensability of the neck and right shoulder injuries is reversed and a new decision is rendered that the carrier waived its right to contest compensability of those injuries and that the neck and right shoulder injuries have become compensable as a matter of law.

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Judy L. Stephens  
Appeals Judge

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Dorian E. Ramirez  
Appeals Judge