APPEAL NO. 000077

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 December 20, 1999. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, to his right shoulder; that a prior right shoulder injury was the sole cause of the current shoulder condition; that the respondent (carrier) did not waive the right to contest the compensability of the claimed right shoulder injury; and that the claimant does not have disability. The claimant appeals these determinations, contending that they are against the great weight and preponderance of the evidence. The carrier replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as a millwright. He testified that on _____, he pulled on a metal plate and felt pain in his arm and shoulder. Though in a recorded statement he told an adjuster that he had no prior right shoulder problems, he admitted in his testimony at the CCH that this was incorrect and that he had a prior right shoulder injury in 1996 for which he sought medical treatment, which included a series of injections, the last one being in late 1997. His last visit for this prior injury with Dr. B was in March 1998. The claimant said that, as of this visit, he was without shoulder pain and had total range of motion. He also passed a physical examination prior to his employment and considered his prior shoulder problem resolved. He contended at the CCH that he sustained either a new injury or a compensable aggravation of the prior condition on _____.

The focus of the hearing was on the medical evidence. The evidence largely relied on by the claimant was a right shoulder MRI on August 15, 1997, which noted an abnormal appearance of the anterior and superior labrum, superior labral degeneration, and possible SLAP lesion, and the report of a right shoulder arthroscopy on September 27, 1999. The report noted "significant fraying and tearing of the superior labrum consistent with a degenerative type I SLAP lesion."

Dr. P, apparently a former treating doctor, wrote on March 24, 1999, before the surgery, that from a review of the claimant's medical records, "it appears that he has been under treatment for his right shoulder pain since 1996 and that his current complaints are a continuation of his prior injury and its symptomatology." On April 1, 1999, Dr. B wrote that the "problem for which I evaluated [claimant] on 7-7-98 was a continuation of the same problem for which he had been treated by [Dr. Pa] dating back to September 1996." Later in the same letter, Dr. B wrote that he was "unable to tell whether his re-presentation in my office on July 7, 1999 is due to a continuation of the old problem or whether he had an exacerbation secondary to another incident of which I am not aware of." On August 9,

1999, Dr. B wrote that there "is no question in that [claimant] had some significant pre-existing pathology in his right shoulder pre-dating the injury of _____. However, he states that he was doing quite well and working at heavy labor prior to that incident. There is no denying that this injury contributed to an aggravation of his symptomatology. As such, I feel that this should be a compensable injury and all treatment resulting from this injury." Dr. Po, D.C., the claimant's current treating doctor, testified that he believed that the claimant's current right shoulder condition was a direct result of the _____, incident. He based this conclusion on a review of the 1997 MRI, which identifies an anterior labral tear, and the 1999 operative report of Dr. B, which revealed a superior labral tear. In his opinion, these are two different tears which reflect two separate injuries. He also admitted that he based this conclusion, in part, on the history of full recovery given him by the claimant and had no way of knowing when the change in the reports occurred. He also acknowledged that it was not unusual to find different things during an operation than are revealed in an MRI.

The claimant had the burden of proving he sustained a compensable right shoulder injury as claimed on _____. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The aggravation of a prior condition can be a new injury provided the claimant establishes a reasonably identifiable cause. The mere recurrence or remanifestation of symptoms of the prior condition does not equate to an aggravation injury. Rather, there must be evidence of "some enhancement, acceleration or worsening of the underlying condition." Texas Workers' Compensation Commission Appeal No. 93866, decided November 8, 1993. In the case we now consider, the claimant pointed to a specific event that he believed caused a new shoulder injury and relied essentially on the distinction between an anterior and superior labral tear to establish a new injury or at least an aggravation of a preexisting condition. The hearing officer considered this evidence and concluded that the claimant did not meet his burden of proving a compensable injury under either theory. In his appeal, the claimant asserts that the hearing officer erred "by ignoring the exhibits" and in substituting her opinion for the medical opinions contained in the evidence. We believe it is important to point out that the hearing officer, as fact finder, was charged with the responsibility of weighing the evidence and determining what facts had been established. Section 410.165(a). By declining to find the claimant's evidence persuasive, she was not impermissibly inserting herself into the medical process, but discharging her responsibility as hearing officer. As such, she could accept or reject all, part, or none of the evidence (Texas Workers' Compensation Commission Appeal No. 93819, decided October 28, 1993), including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We do not believe that evidence compelled a conclusion one way or the other. The hearing officer was not persuaded that the simple distinction between an anterior and superior labral tear was enough to establish a new injury. On this question, Dr. P admitted that surgery can disclose additional diagnoses not seen in an MRI and the MRI in this case noted an abnormal anterior and superior labrum. 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). While another hearing officer may have found otherwise, we conclude from our review of the record in this case that there was sufficient evidence to support the determination of the hearing officer that the claimant's evidence was insufficient to establish a compensable injury on _____, and under our standard of review, we affirm that determination.

A second reported issue was whether the prior shoulder injury was the sole cause of the current shoulder condition. The hearing officer found that it was. It is unclear to us why a separate sole cause issue was added to the first issue in this case. *See* Texas Workers' Compensation Commission Appeal No. 950800, decided June 30, 1995, where we noted that the failure of a carrier to prove sole cause is immaterial where the threshold issue of producing cause has not been proven by the claimant. Given the finding that the claimant failed to meet this threshold burden, the finding on sole cause can be considered surplusage. In any event, for the same reasons we found the evidence sufficient to support the determination that the claimant failed to meet his threshold burden of proving the cause of his current shoulder condition, we also find the evidence sufficient and affirm the sole cause finding of the hearing officer.

Section 409.021(c) provides that if a carrier "does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability." Under these circumstances, the claimed injury becomes compensable as a matter of law. Texas Workers' Compensation Commission Appeal No. 94326, decided May 2, 1994. We have held that the 60-day time period for contesting compensability begins on the date the carrier receives written notice of the claimed injury. Texas Workers' Compensation Commission Appeal No. 952232, decided February 8, 1996. In an unappealed finding, the hearing officer determined that the carrier filed a dispute of compensability on September 2, 1998. Because she further found that the date of receipt of written notice was July 6, 1998, she found this dispute timely. In his appeal, the claimant argues that oral and written notice of the injury was received on June 29, 1998, when a pharmacy called for approval of medications. Introduced into evidence was a pharmacy billing record dated June 29, 1998. The record contains no indication of when, if at all, it was received by the carrier. From this evidence, the hearing officer concluded that the pharmacy did receive approval for the prescriptions and the carrier paid them, but "there was no evidence that Carrier had written notice at the time the call was made asking for prescriptions." We agree that no such evidence of written notice on or about this date was introduced. Because the duty to dispute is only triggered by written notice, we find the evidence sufficient and affirm the determination that the carrier did not waive its right to contest the compensability of the claimed shoulder injury.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

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

Philip F. O'Neill
Appeals Judge