

## APPEAL NO. 000378

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 January 25, 2000. The issue at the CCH was whether the appellant's (claimant) cervical and right shoulder injury was related to or caused by the compensable injury. The hearing officer determined that the claimant's cervical and shoulder injury was neither related to nor caused by the compensable injury.

The claimant appeals, requesting that we reverse the hearing officer's decision and render a decision in his favor. He argues that the hearing officer misunderstood the theory of his claim for injury. He recites the substance of telephone conversations that were not part of the evidence at the CCH. There is no response from the respondent (carrier).

### DECISION

We affirm.

The claimant worked as a truck driver for (employer) on \_\_\_\_\_, the date of the claimed injury, and said he had 16 years of experience with the same task. Basically, his truck delivered items by picking them up with a hydraulic lift, and it was sometimes necessary for him to adjust the item on the forklift. He said that raising and lowering the lift caused the truck to bounce and jar. Claimant also maintained that he had, for some indefinite period of time, a broken driver's seat. It was claimant's theory of injury that doing his job over a period of years caused injury to his shoulder and cervical area, as well as the lower back. The carrier had accepted compensability of the claimed low back injury. At the time of the events under review, the claimant was 49 to 50 years old.

While the claimant contended that he had complained from the very first day of injury to his neck and shoulder, the evidence includes an \_\_\_\_\_, report of injury that he filed with the employer that reports right hip and leg pain only, and contends that this occurred from having to press heavily on the accelerator and from riding on rough roads. That day, the claimant was sent to a clinic by the employer, and examined by a Dr. W, who also recorded pain in these same areas and put claimant back to work with restrictions. He treated claimant again on June 2, 1998, and at that time gave claimant a pain injection. Neither report mentions neck or shoulder pain.

The claimant said he changed doctors to Dr. H, who treated only backs. Dr. H's records indicate that he is an orthopedic surgeon. Dr. H first saw claimant on June 12, 1998, and noted, in addition to the low back, that claimant had complaints of neck and right shoulder pain "starting within the past week." Dr. H stated that the cervical and shoulder problems were not related to the work-related injury. Dr. H's records that were admitted into evidence continue to note pain but do not state that it is work related. Dr. H noted that an MRI of the cervical area showed a large herniation at C4-5 and C6-7. The claimant told Dr. H (according to these notes) that he did not desire a referral for this. There are no objective medical records of a specified injury (as opposed to pain) to the right shoulder. A

December 16, 1999, letter from Dr. H was not admitted into evidence for the failure of the carrier to timely exchange it.

The claimant said that he did not want a referral because he could not afford it. However, he also testified that his neck had been covered under his regular health insurance. The carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on June 22, 1998, which disputed the relationship of the neck and shoulder problems to the compensable injury. Although the claimant contended he had been stating he would fight the carrier every step of the way, the Dispute Resolution Information System notes for the local field office show that claimant did not request a benefit review conference on the scope of his injury until May 3, 1999.

The claimant was examined by a carrier doctor on August 27, 1998, and found not to have reached maximum medical improvement (MMI). Claimant was examined again on October 27 1999, and was found to have reached MMI on that date, with a 13% impairment rating for his lumbar spine. He did not rate the cervical area because of the ongoing dispute.

It appears to us from the record that the hearing officer has not misunderstood claimant's argument; he has found both that the injuries claimed did not occur on the job or did not stem from the lumbar injury, which he is required to find in order to conform to the definition of injury set forth in Section 401.011(26). The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this was the case here, and affirm the decision and order.

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Philip F. O'Neill  
Appeals Judge