APPEAL NO. 000546

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 February 8, 2000. The issues at the CCH were whether the compensable injury of April 11, 1995, extends to the respondent=s (claimant) left shoulder and whether the claimant is entitled to supplemental income benefits (SIBs) for the first and second quarters. The hearing officer determined that the claimant=s compensable _____, injury extends to her left shoulder and that the claimant is entitled to SIBs for the first and second quarters. The appellant (carrier) appeals the hearing officer=s findings that the claimant=s compensable injury extends to her left shoulder, that the claimant had no ability to work, and that the claimant was unable to work as a direct result of her impairment. The appeals file contains no response from the claimant.

DECISION

Affirmed in part, reversed and remanded in part.

The parties stipulated that on _____, the claimant sustained a compensable cervical and lumbar spine injury while in the course and scope of her employment; that the claimant has a 39% impairment rating (IR) per the designated doctor=s report; that the claimant did not commute any portion of her impairment income benefits (IIBs); that the first quarter ran from July 10, 1999, through October 9, 1999; and that the second quarter ran from October 10, 1999, through January 7, 2000. Given the dates of the quarters, the qualifying period for the first quarter was from March 26, 1999, through June 24, 1999, and the qualifying period for the second quarter was from June 25, 1999, through September 24, 1999. On _____, the claimant sustained a compensable injury when she was bending down to reach an item from a drawer and a heating gun fell and hit her on the left side of her head, causing her to fall. The claimant testified that several days later she developed severe neck and back pain. The claimant sought medical treatment with several doctors and said that she complained of shoulder pain and problems with dropping things. The claimant was eventually referred to Dr. S, who performed an anterior cervical diskectomy and fusion at C5-7 on June 24, 1996. The claimant testified that after the surgery her condition got worse and she continued having left arm pain and weakness.

The medical records prior to the cervical surgery indicate that the claimant had complaints of left arm and shoulder pain with some weakness. Following the cervical surgery, Dr. R states on September 9, 1996, that the claimant had residual neck pain and suprascapular pain with some fatigue and weakness of the arms. In March 1997, the claimant began treating with Dr. H. Although Dr. H=s report dated March 20, 1997, does not indicate that the claimant specifically complained of shoulder pain, it states Arule out shoulder pathology.@ Dr. H=s medical records indicate that the claimant had complaints of numbness and tingling in her fingers and pain radiating into her shoulders. The medical records of Dr. C

on August 18, 1997, state that the claimant had pain in her shoulder, upper back, and neck area.

In September 1998, the claimant sought treatment with Dr. S for her left shoulder pain. Dr. S diagnosed impingement and anterior instability and treated the claimant with injections. On May 24, 1999, Dr. S performed a left shoulder arthroscopy which revealed impingement of the left shoulder, anterior instability, and degenerative joint disease of the acromioclavicular joint. Dr. S states:

> Based on medical probability, I believe that the complaints for which [the claimant] presented to me on her initial evaluation were compatible with the injury she sustained on _____. I have frequently seen many patients who were initially treated for cervical spine injuries with even going so far as having anterior cervical fusion for what was originally a shoulder injury. Shoulder injuries frequently have pain not only in the shoulder, but in the muscles that attach to the shoulder, including the neck, shoulder and arm. They can also have numbness and tingling in the forearm and fingers.
>
> It is my medical opinion that the symptoms [the claimant] presented to me, for which she ultimately underwent shoulder surgery, were directly related to the accident of _____.

The claimant had the burden to prove the extent of her compensable injury. The 1989 Act defines Ainjury,@ in pertinent part, as Adamage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm.@ Section 401.011(26). It has been held that the immediate effects of an injury are not solely determinative of the nature and extent of that injury and that the Afull consequences of the original injury . . . upon the general health and body of the workman are to be considered.@ Texas Employers' Insurance Association v. Thorn, 611 S.W.2d 140 (Tex. Civ. App.-Waco 1980, no writ), quoted in Texas Workers' Compensation Commission Appeal No. 94232, decided April 11, 1994. The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, 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.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

The carrier argues that the claimant did not complain of left shoulder pain until over three years after the date of injury and that there is no explanation as to what is the claimant=s left shoulder condition. The hearing officer found that the condition of the claimant=s left shoulder was caused by, and/or naturally resulted from, her _____, injury. In so determining, the hearing officer states that the claimant and her doctors initially thought that her

shoulder problems were due to her neck condition, but that when the shoulder problems persisted after the neck surgery, an independent cause was suspected. The medical records support a diagnosed left shoulder injury and Dr. S causally relates the claimant=s shoulder problems to the injury sustained on _____.

When reviewing a hearing officer's decision, we will reverse such decision only if it is so contrary to the overwhelming weight 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). We find there was sufficient evidence to support the hearing officer's determination that the claimant=s compensable _____, injury extends to her left shoulder.

It is undisputed that the claimant made no attempt to seek employment during the qualifying periods. The claimant testified that during the qualifying periods she was not released to return to work by Dr. S or Dr. H. Although the claimant had left shoulder surgery on May 24, 1999, the medical records of Dr. S do not address the claimant=s ability to work, other than to state on June 4, 1999, Ano lifting/pushing/pulling.@ The only medical documentation addressing the claimant=s ability to work, other than a record dated two years prior to the second qualifying period, is a report dated August 10, 1999, which states:

> [The claimant] has been under my care for her work related injuries. She was in my office today for follow up consultation and treatment. As I have mentioned in my previous reports, [the claimant] remains instructed by me to be completely off work due to her ongoing physical and psychological problems. Any attempt by [the claimant] to return to any level of work will likely aggravate her injuries.

The carrier presented the report of Dr. P dated October 28, 1999, to support its position that the claimant had an ability to work during the qualifying periods. Dr. P states:

> This patient surely may work. The nature of the work that she was accomplishing at the time of her injury was relatively sedentary. The nature of the accident seems not likely to reproduce itself once again. There is no physical reason that the patient could not return to the same type occupational endeavor that she was accomplishing at the time of onset of her symptoms. Her protestations of the subjective complaints of pain seem incapacitating. Objectively, the patient lacks anatomic changes of marked consequence. Despite her protestations as regards her inability to move her cervical spine, the available joints to do so are quite readily available. Surely this patient could work in a sedentary setting, which would provide some relative protection for her cervical spine if indeed that were needed, which it may not be.

Pursuant to Section 408.142, an employee is entitled to SIBs if, on the expiration of the IIBs period, the employee: has an IR of 15% or more; has not returned to work or has returned

to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment; has not elected to commute a portion of the IIBs; and has attempted in good faith to obtain employment commensurate with the employee's ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d)(3) (Rule 130.102(d)(3)), in effect at the relevant time, provides that an injured employee has made the required good faith effort to obtain employment commensurate with the ability to work if the employee:

> has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

In Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999, we stated that each of the three parts of this rule should be considered by the hearing officer, with an explanation of how these factors relate to a finding on the question of no ability to work.

The hearing officer made a finding that between March 26, 1999, and September 24, 1999, the claimant acted in good faith in not seeking to obtain employment since she was unable to work and had not been released to return to work by her treating doctors. In so determining, the hearing officer states that the medical records of Drs. S and H, in their totality, establish the claimant=s inability to perform any work due to her condition and her medications. No further findings or discussion on the specific elements of Rule 130.102(d)(3) were made. For this reason, we reverse the determination that the claimant had no ability to work during the qualifying period and that she was entitled to the first and second quarters SIBs and remand for further specific findings of fact on each element of Rule 130.102(d)(3) required to establish an inability Ato perform any type of work in any capacity.@ On remand, the hearing officer should consider whether the narratives relied on by the claimant specifically explain how the injury causes the total inability to work. *See* Texas Workers' Compensation Commission Appeal No. 991616, decided September 15, 1999. The hearing officer should also address the credibility of Dr. P's opinion and expressly find whether or not there is a record showing the claimant is able to return to work. *See* Texas Workers' Compensation Commission Appeal No. 992554, decided December 22, 1999 (Unpublished). We affirm the direct result finding.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers= Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Elaine M. Chaney
Appeals Judge