APPEAL NO. 000724

On February 17, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq*. (1989 Act). The hearing officer resolved the disputed issues by deciding that respondent (claimant) sustained a compensable injury on _____; that claimant timely notified employer of her injury and appellant (carrier) is not relieved of liability; that claimant had disability from January 16, 1996, to February 7, 1996, and from December 26, 1997, through the date of the CCH; and that claimant is not barred from pursuing Texas workers= compensation benefits under an election of remedies. Carrier requests that the hearing officer=s decision on all issues be reversed and that a decision on all issues be rendered in its favor. Claimant requests that the hearing officer=s decision be affirmed.

DECISION

Affirmed.

Claimant began working for employer in April 1994. Her job was to test bottles in a burst testing machine. The door of the burst machine slides open and closed and it has a handle on it. Claimant said that it was hard to open and close the door of the burst machine and to pull the handle. She said that the night of _____, she had been opening and closing the door of the burst machine to test bottles and her arm was getting sore and that when she pulled on the handle with her left hand the handle jammed and something popped in the back of her left shoulder. Claimant said that she reported to the night supervisor on _____, that she hurt her shoulder while operating the burst machine. She was not certain of the supervisor=s name but thought it may have been JM. She said that she thought she may be having a heart attack and she said she also reported that to the supervisor. Claimant went to Dr. T on January 16, 1996, and Dr. T diagnosed myositis and prescribed physical therapy for claimant=s left neck muscles and trapezius region. Dr. T reported that x-rays of claimant=s left shoulder, cervical spine, and chest were negative. A physical therapy report of January 18, 1996, states a history of problems with arms and neck that started six months ago but also notes Ano prior@ and Ano prior therapy.@ Claimant said that she did not tell the physical therapist that her accident happened six months ago. Another physical therapy report of January 18, 1996, notes Aold injury@ but claimant said that she did not write that on the report and that she did not tell the therapist that it was an old injury. Claimant said that Dr. T took her off work on January 16, 1996. Dr. T noted on another report that claimant did not think that she could return to work on February 3, 1996, due to neck pain and that she wanted to try to return to work on February 7, 1996. Dr. T noted that claimant could return to work on February 7, 1996, which apparently was when claimant did return to work. Dr. T wrote on February 1, 1996, that claimant should be evaluated by a cardiologist to rule out a cardiac etiology for her symptoms. Claimant said that she has not gone to a cardiologist.

Claimant began seeing Dr. N in November 1997 and Dr. N issued a work-absence excuse. Dr. N noted on one work-absence excuse that claimant could return to work on January 5, 1998, but then he issued several more work-absence excuses after that. In November 1998, Dr. N noted lifting restrictions due to arthritis and in January 1999 he noted that claimant was off work due to arthritis of her neck and shoulder and that claimant should not work until seen by an orthopedic specialist. Dr. N noted on another work-absence excuse that claimant could return to work on January 5, 1999, but noted on other work-absence excuses that claimant was released only for light-duty work. Dr. N=s March and April 1999 reports note that claimant is under his care for her left shoulder and that she is limited to light-duty work. Dr. N also noted various work restrictions in June 1999 and noted that it was unknown how long the restrictions would continue.

Dr. E examined claimant in March 1999 for her left shoulder problems which he indicated started at work while pulling a handle in 1996 and he made an assessment of degenerative joint disease of the acromioclavicular (AC) joint, impingement, and possible rotator cuff tear. Claimant had an MRI of her left shoulder done on March 4, 1999, which did not show a tear but did show degeneration. Dr. E wrote that the MRI of the left shoulder showed degenerative changes of the AC joint and that claimant probably does have some impingement. Dr. P wrote in May 1999 that EMG and nerve conduction studies were negative and that he thought that claimant may have a cervical radicular syndrome. Dr. E wrote in May 1999 that claimant=s cervical MRI done that month was negative for anything other than some mild straightening of the spine.

Claimant applied for disability benefits from employer in December 1998 and noted on the disability form that her accident occurred on February 4, 1994. Claimant said that she was on medication when she completed that form and that the February 4, 1994, date was a mistake. The accident is described on the form as pulling the handle on the burst machine and opening and closing the door. Claimant testified that she did not make an informed choice between using her health insurance, which she apparently did use, and using workers= compensation insurance.

YP, claimant=s coworker, testified that the burst machine door was hard to open and close and that the handle of the machine would stick. YP said that she does not recall the date of claimant=s injury, but that on the night claimant told her she had hurt her shoulder, all they were doing were burst tests using the burst machine. YP also indicated that a person claimant had identified as a supervisor had told her, possibly in 1996, that claimant had hurt her shoulder using the burst machine. EN, claimant=s coworker, testified that employees were always complaining about the burst machine and that on some date she could not recall claimant had told her that she had been hurt using that machine. DW, who was a lead person for employer, testified that over time the door of the burst machine became hard to open and close and that several employees, including claimant, complained about that. DW said that about a year ago claimant told her that she had hurt her shoulder opening the door of the burst

machine. There was testimony that claimant would open the door of the burst machine 50 to 70 times in a shift.

The hearing officer found that claimant injured her left shoulder while operating a sticking door numerous times while performing her job on _____; that claimant reported the injury to her employer on _____; that because of the compensable injury of _____, claimant was unable to obtain and retain employment at wages equivalent to her preinjury wage from January 16, 1996, to February 7, 1996, and from December 26, 1997, through the date of the CCH on February 17, 2000; and that claimant did not make an informed choice between workers= compensation insurance and her group health benefits. The hearing officer concluded that claimant sustained a compensable injury on _____; that carrier is not relieved of liability because claimant timely notified her employer under Section 409.001; that because of the compensable injury of _____, claimant had disability from January 16, 1996, to February 7, 1996, and from December 26, 1997, through the date of the CCH on February 17, 2000; and that claimant is not barred from pursuing Texas workers= compensation benefits.

The evidence is certainly conflicting on the disputed issues. However, the 1989 Act makes the hearing officer the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers= Compensation Commission Appeal No. 950084, decided February 28, 1995. As an appeals tribunal, the Appeal Panel 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. Appeal No. 950084. When reviewing a hearing officer=s decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer=s decision on all appealed issues is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer=s decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Tommy W. Lueders

Appeals Judge

Elaine M. Chaney
Appeals Judge