APPEAL NO. 000735

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 March 14, 2000. With respect to the issues before him, the hearing officer determined that the respondent/cross-appellant (claimant) did not sustain a compensable injury to his cervical spine in addition to his left shoulder and left upper extremity on _____; that the appellant/cross-respondent (carrier) did not waive its right to contest compensability of the claimed injury to the cervical spine; and that the claimant had disability from May 6, 1998, through February 14, 1999. In its appeal, the carrier argues that the hearing officer's disability determination is against the great weight of the evidence. In a document that purports to be an appeal and a response to the carrier's appeal, the claimant asserts error in the hearing officer's determinations that his compensable injury does not include his cervical spine and that the carrier did not waive its right to contest compensability of the alleged cervical injury. That document does not specifically address the hearing officer's disability determination. Although the claimant's combined appeal and response was timely filed as a response, it was not timely filed as an appeal. Records of the Texas Workers' Compensation Commission reflect that the hearing officer's decision and order was distributed to the parties on March 23, 2000, under a cover letter of the same date. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 102.5 (Rule 102.5), the claimant is deemed to have received the hearing officer's decision five days after it was mailed, or on Tuesday, March 28, 2000. Pursuant to Section 410.202 and Rule 143.3, a claimant's appeal is timely if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, or in this instance by Wednesday, April 12, 2000. The claimant's appeal was mailed on Monday, April 17, 2000, and is therefore, untimely. Accordingly, the hearing officer's extent-of-injury and carrier waiver determinations have become final pursuant to Section 410.169.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury to his left shoulder and left arm on _____, in the course and scope of his employment with Wal-Mart (employer). The claimant testified that on that date, he lifted a pallet from the floor to stack it on some other pallets, when he felt a "pop" in his left shoulder. The claimant has undergone two shoulder surgeries as a result of his compensable injury in August 1997 and August 1998, respectively. On July 7, 1999, the parties executed a Benefit Dispute Agreement (TWCC-24) agreeing that the compensable injury extended to carpal tunnel syndrome and cubital tunnel syndrome in the left upper extremity. In November 1999, the claimant had surgery for those conditions. The claimant stated that he returned to work after his injury and that he was assigned to work in a supervisory position, such that he was not having to lift the pallets or operate a forklift as he had been required to do prior to his injury. He continued to work in a supervisory position with the

employer until late 1996 or early 1997, when he was required to return to the job he was doing at the time of his injury. The claimant stated that he had difficulty performing his job duties because of his compensable injury and that he had to stop working on February 14, 1997, because he was no longer able to perform his duties. The claimant stated that he has not worked since February 1997 because of his compensable injury.

The disability period at issue in this case is the period from May 6, 1998, to February 14, 1999, the agreed date of statutory maximum medical improvement (MMI). The claimant did not pursue a claim for disability after the statutory MMI date. In addition to his testimony that he was not able to work in that period, the claimant introduced evidence from Dr. B, his treating doctor, stating that he was not able to work for all of 1998 because of his compensable injury. In an October 13, 1999, To Whom it May Concern letter, Dr. B stated that the claimant "has been recovering from surgery and was unable to work from January until June of 1999." In that letter, Dr. B also opined that "we anticipate, within reasonable medical probability, that he will be able to return to some sort of useful employment in the next 12 months." The carrier offered a letter dated January 13, 1999, from Dr. M dismissing the claimant from a physical therapy/work hardening program on January 13, 1999, following his completion of that program. Dr. M stated that as of that date, the claimant was released to work with a 40-pound lifting restriction.

The carrier contends that the hearing officer's determination that he had disability from May 6, 1998, to February 14, 1999, is against the great weight of the evidence. The claimant has the burden to prove by a preponderance of the evidence that he had disability. That question presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass=n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. Disability can be based on the testimony of the claimant alone if it is believed by the hearing officer; however, the testimony of the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the 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 (Tex. App.-El Paso 1991, writ denied).

In arguing that the claimant had not sustained his burden of proving that he had disability for the period found by the hearing officer, the carrier contends that the bulk of the claimant's complaints and treatment were for the cervical condition which is not part of the compensable injury. The claimant's medical records reflect that he had ongoing problems with his left upper extremity, namely his shoulder and the left carpal and cubital tunnel syndrome, as well as, cervical complaints. Indeed, Dr. B performed shoulder surgery in August 1998. Thus,

we find no merit in the assertion that the claimant's left upper extremity injury was not a cause of his disability in this case. Admittedly, Dr. M released the claimant to work in January 1999, but Dr. B, the treating doctor, opined that the claimant could not work in all of 1998 and from January to June of 1999. The hearing officer was acting within his province as the fact finder in deciding to credit the claimant=s testimony and the evidence from Dr. B over the contrary opinion from Dr. M. Our review of the record does not reveal that the hearing officer=s determination that the claimant had disability from May 6, 1998, to February 14, 1999, is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, 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 hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge