APPEAL NO. 001883

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 July 27, 2000. The issues at the CCH were whether the respondent (claimant) sustained a compensable injury on _____, and whether he had disability from that injury and, if so, for what periods.

The hearing officer found that the claimant had a right shoulder injury on the date in question, and had disability beginning on December 10, 1999, and continuing to the date of the CCH.

The appellant (carrier) has appealed, pointing out the many other illnesses that caused the claimant to be hospitalized and out of work for a period of time. The carrier argues that there is no evidence that the claimant was taken off work due to his right shoulder. The carrier points out the lack of any mention in the medical records about a shoulder injury until January 2000 and argues that there was no compensable injury so there is no disability. The claimant responds that the failure of the claimant to report his injury earlier, or of the doctors to document such injury, may be explained by the need to treat the claimant's serious conditions first.

DECISION

Affirmed on the occurrence of an injury, reversed and rendered for the period of disability.

The claimant had worked since 1970 for (employer). He worked in the cutting area, which entailed bundling up materials that were used to make trousers after they came from the cutting machine. The claimant worked the late night shift on the date in question, and said that around 1:45 a.m., one-half hour before his shift ended, he lifted one bundle, and he felt a pulling sensation in his right shoulder. This was not reported to his supervisor, who was in another location at that time. His brother, who worked alongside him, testified as to being told of the incident.

The claimant testified that the next day, he did not work and went to his doctor for an illness that turned out to be pneumonia. He was treated unsuccessfully with inhalers for a few days. The claimant was hospitalized for emergency treatment of his pneumonia on December 14. Although the claimant's brother testified that the claimant began missing work in part due to his shoulder, the claimant's testimony was that he missed work due to the pneumonia, and went to the hospital for that reason, although he also stated that he hoped the doctors would be able to take care of his shoulder while he was in the hospital.

The claimant said he was discharged on December 17, 1999. As it happened, this was the day that the employer began a holiday recess when no one but administrative staff worked at the employer's location. This recess continued until the first Monday after New

Year's Day in January 2000 (according to Mr. M, the plant safety manager). Whether this leave was on a paid or unpaid status for the employees was not developed.

There was considerable testimony, although there was no timely reporting issue, as to when the claimant first reported his injury to the employer. The record indicates that the report of a shoulder injury on the job was first made on January 6, 2000.

The claimant was also under treatment by a cardiologist, Dr. T. The claimant said that he had a check-up on April 24, 2000, and had not yet been released to work by his cardiologist. He said that Dr. T "cleared" him of his pneumonia effective February 24, 2000. The claimant said he had received "sick leave payments" from the employer until around April 24, 2000. He was not currently receiving any payments at the time of the CCH.

The claimant had an MRI of his shoulder on January 10, 2000, which showed a rotator cuff tear. The claimant was treated by Dr. A for his shoulder. He said that Dr. A wanted to perform surgery.

A report from Dr. AB, with respect to the claimant's hospital admission, indicated a possible problem with dust at the workplace but otherwise made no notation of a shoulder injury sustained at work. The diagnoses recorded in this report were chronic obstructive pulmonary disease, polycythemia, pulmonary hypertension, and chest pain (rule out myocardial infarction). The discharge report likewise contains no mention of shoulder pain. A report of December 15, 1999, from Dr. T specifically noted that claimant had no weakness or numbness of his upper or lower extremities. He found that claimant had some irregular heart rhythm on an electrocardiogram and chest pain and discomfort. The claimant again complained of working in a closed-in area around dust. On this same day, Dr. S, a consulting physician, noted that the claimant had mild achiness over his mid-back area. Dr. S denied any other complaints. None of the 12 listed conditions included any shoulder conditions.

On January 6, 2000, Dr. AB noted that he was going to send the claimant for a shoulder MRI because he could not abduct his arm. When a rotator cuff tear was revealed, the claimant began treating with Dr. A on January 25, 2000, and surgery was recommended. On this date, Dr. A completed a “To Whom It May Concern" checklist form indicating that he had seen the claimant that day and treated him again for a rotator cuff tear for which arthroscopic surgery was recommended. However, Dr. A did not check the portion of this form which stated that the claimant was presently unable to work.

Dr. AB wrote on March 29, 2000, that his office had not treated the claimant's work-related injury. He said that the claimant had two distinct problems, only one of which (the shoulder) was work-related. Dr. AB's June 1, 2000, letter attempts to explain why the claimant might not have earlier reported a shoulder injury due to the severity of his other conditions.

A note of Dr. AB dated January 10, 2000, released the claimant to limited duty effective January 18. His note states "[the] patient comes in today to get his attending physician statement of employment. He wants to go back to work on 01/18/00. He was cleared to do so on limited duty. We are waiting for his MRI that he had of his shoulders." This is the only medical record that appears to comment on whether the claimant had an ability to work.

The hearing officer is the sole judge of the relevance, 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). 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). As we review the record, the hearing officer's decision regarding whether the claimant sustained a compensable injury is sufficiently supported. Although different inferences could be drawn as to the occurrence of the shoulder injury on _____, the decision is not against the great weight and preponderance of the evidence. We accordingly affirm the hearing officer's decision and order insofar as it finds that the claimant sustained a shoulder injury on _____.

Of greater concern is the finding of the hearing officer that disability from the shoulder injury began on _____. Temporary income benefits are due when an injured worker has not reached maximum medical improvement and has disability. Section 408.101(a). Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." An injury need not be the sole cause of disability. Texas Workers' Compensation Commission Appeal No. 93767, decided October 8, 1993; Texas Workers' Compensation Commission Appeal No. 93697, decided September 23, 1993; Texas Workers' Compensation Commission Appeal No. 92242, decided July 24, 1992. However, the compensable injury should, when compared to other conditions, be a "producing cause" of subsequent inability to obtain and retain employment equivalent to the preinjury average weekly wage. Texas Workers' Compensation Commission Appeal No. 960239, decided May 6, 1996. We have repeatedly observed, following long-established precedent from Texas appellate courts, that there may be more than one producing cause of disability and that to establish that a noncompensable intervening injury or condition ends disability, the carrier has the burden to prove that the intervening injury or condition is the sole cause of the claimant's disability. A claimant's testimony alone, if believed, may establish disability. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989).

What is striking in this case is the lack of evidence, even in testimony, that the claimant was unable to work due to his right shoulder injury. There are no medical records which state this; in fact, Dr. A's January 25, 2000, checklist refrains from stating that the claimant is unable to work. Perhaps due somewhat to the fact that most of the testimony was directed at the occurrence of the injury, the claimant was not asked about his own assessment of his ability to work. Rather, when he stated that he was not able to work, he attributed that to his pneumonia. It is, however, the claimant's burden to establish disability. It is not enough to prove only that an injury occurred. While the hearing officer is the finder of fact, there must be facts in the record to establish disability.

The determination that the claimant had disability beginning on December 10, 1999, is so against the great weight and preponderance of the evidence, as to be clearly wrong or unjust and we reverse and render a decision that the claimant failed to prove that he had an inability to obtain and retain employment equivalent to his preinjury average weekly wage due to his compensable injury.

Susan M. Kelley
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Tommy W. Lueders
Appeals Judge