

## APPEAL NO. 001943

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in [City], Texas, on July 19, 2000. The issues were does the compensable injury sustained on \_\_\_\_\_, extend to and include the left elbow, left shoulder, cervical area, and thoracic outlet syndrome and whether the respondent (claimant) had disability. The hearing officer determined that the claimant's compensable injury includes injuries to those areas and that he had disability beginning on November 3, 1999, and continuing through the date of the hearing. The appellant (carrier) appealed; contended that the hearing officer did not accurately summarize the report of Dr. D concerning tardy ulnar palsy; urged that the determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly unjust; stated that even if the claimant's compensable injury does extend to include his left shoulder, cervical area, and thoracic area, disability ended on March 22, 2000, when he had surgery for the left tardy ulnar palsy; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor. A response from the claimant has not been received.

### DECISION

We affirm in part and reverse and remand in part.

Briefly, the claimant testified that he pulled a rope to start the engine on a "tamper" used to tamp ground; that because the rope did not have a handle, he wrapped the rope around his left hand; that his left arm was severely jerked in the process of starting the "tamper"; that he continued working, but doing only light-duty work, for two days; that he first complained of pain in his wrist and hand; that he was taken to a company doctor; that he later complained of pain in his hand, up his arm, and into his neck and mid-back; that he was not happy with the treatment of the company doctor; that he went to another doctor; that he was taken off work; that he was referred to several doctors; that he had surgery on his elbow; that he has not been released to return to work; and that he could not return to work. The carrier does not dispute that the claimant has the conditions that are the subject of the appeal. It contends that they are not part of the compensable injury. Each party presented medical records, contending that the medical evidence supported their respective positions.

Because of the carrier's specific appeal concerning the hearing officer's summary of the report of Dr. D, we first address the appeal as it relates to the determination that the claimant's compensable injury includes the left shoulder, the cervical area, and thoracic outlet syndrome. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal

No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it 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). Only were we to conclude, which we do not in this case, that the hearing officer's determinations that the claimant's compensable injury includes the left shoulder, the cervical area, and thoracic outlet syndrome are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support those determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994. We affirm those determinations.

We next address the carrier's contention that the hearing officer did not accurately summarize the report of Dr. D concerning tardy ulnar palsy. The statement of the evidence in the Decision and Order of the hearing officer contains:

[Dr. D] states Claimant sustained injury as a result of the jerking event to his left arm. [Dr. D] states Claimant's injuries include probable cervical injury, left shoulder sprain, rotator cuff tendinitis, left wrist sprain and a tardy ulnar palsy that may or may not be related to the injury.

Dr. D examined the claimant at the request of the carrier. He filed a Report of Medical Evaluation (TWCC-69) dated May 19, 2000, in which he certified that the claimant had not reached maximum medical improvement (MMI) and estimated that he would reach MMI in six to eight weeks. He attached a seven-page, single spaced report to the TWCC-69. The report contains:

He recently underwent a left ulnar nerve transposition surgery approximately one month ago by a [Dr. C] in [City]. I do not have any medical records detailing that particular surgery but according to [claimant] he had this performed one month ago following diagnosis of a ulnar nerve compression at the elbow. He is currently undergoing treatment by [(Dr. DB)], a neurologist in [City].

\* \* \* \*

He obviously has pain over the left ulnar nerve transposition scar site from his surgery one month ago.

\* \* \* \*

He initially saw [Dr. DB] on 12/15/99 with complaints of left posterior neck, left lateral shoulder and left hand pain with associated numbness in the left thumb, index and middle fingers.

\* \* \* \*

An EMG/nerve conduction study was completed on 1/13/00 and interpreted as showing a tardy ulnar palsy at the left elbow along with a left C6 radiculopathy. . . . Of note is that the nerve conduction at the left wrist included ulnar and median latencies which were completely normal showing no sign of left carpal tunnel syndrome [CTS].

\* \* \* \*

The provocative testing was interpreted as showing a number of findings with final assessment by [Dr. CB] being left [CTS], entrapment of the left ulnar nerve at the elbow and left thoracic outlet syndrome primarily to the left lower cord of the brachial plexus.

\* \* \* \*

IMPRESSION/RECOMMENDATIONS:

\* \* \* \*

4. Diagnosis of left tardy ulnar palsy of questionable relation to the work injury; the patient is status post left ulnar transposition one month ago.

\* \* \* \*

His hand was wrapped around the cord of the tamp machine and the violent recoil could certainly have caused a jerking motion that could have caused injury to the wrist, shoulder and cervical spine. However, I find it very hard to believe that there could be a tardy ulnar palsy form [sic] from this type injury. Tardy ulnar palsy is a repetitive type traumatic injury that usually occurs over time. I am not denying that this was present as noted on the EMG/nerve conduction study but I simply don't think that this could be directly related to a single incident such as the jerking motion. It appears that [claimant] sustained a musculoskeletal injury to the left wrist, left shoulder and left posterior cervical spine due to a violent twisting motion.

\* \* \* \*

Apparently the tardy ulnar palsy was present on the EMG and he has undergone surgery for that diagnosis but I don't think that this is related to the work injury of \_\_\_\_\_. This may have pre-existed the work injury.

\* \* \* \*

I would recommend that he be referred for a comprehensive outpatient physical therapy program concentrating on the left cervical spine, left shoulder and left wrist. These would be the compensable injuries dated \_\_\_\_\_.

\* \* \* \*

I cannot predict what outcome he will have with his ulnar nerve neuropathy but I would not expect him to have any complications from this particular surgery; however, he needs to undergo aggressive therapy to the left elbow for range of motion, strengthening and desensitization techniques in order to regain maximum function. This of course would not be covered under the current work injury.

The report of Dr. D does contain "of questionable relationship to the work injury" and "I find it very hard to believe that there could be tardy palsy form [sic] from this type of injury" that are subject to different interpretations, but it does not appear that the tardy ulnar palsy may be related to the injury is a reasonable one. It also contains statements that he simply does not think that the tardy ulnar palsy could be directly related to a single jerking motion, that he does not think that the tardy ulnar palsy is related to the work injury, and that therapy for the elbow surgery would not be covered under the current work injury. These statements are certainly stronger than the tardy ulnar palsy may not be related to the injury. The hearing officer's summary of Dr. D's report as it relates to the nexus between the work injury and the tardy ulnar palsy is not accurate. The claimant did not contend that he sustained an injury to the left elbow other than to the ulnar nerve. The carrier relied heavily on the report of Dr. D. The hearing officer's inaccurately summarizing that report may have resulted in the hearing officer not properly considering the report of Dr. D and may have resulted in an improper determination that the compensable injury extends to the claimant's left elbow. We reverse the finding of fact and the conclusion of law the claimant's compensable injury extends to his left elbow and remand for the hearing officer to reconsider the evidence in the record and render findings of fact and a conclusion of law on the question of whether the claimant's compensable injury extends to his left elbow. Since the condition of the claimant's left elbow, especially after surgery, impacts on his ability to obtain and retain employment at wages equivalent to the preinjury wage, we also reverse the finding of fact and conclusion of law concerning disability and remand for the hearing officer to reconsider the evidence in the record and render a finding or finding of

fact and a conclusion of law to resolve the disputed issue of whether the claimant had disability, and if so, for what period.

We affirm the determinations that the claimant's compensable injury includes the left shoulder, the cervical area, and thoracic outlet syndrome. We reverse the determinations that the claimant's compensable injury includes the left elbow and that he had disability beginning \_\_\_\_\_, and continuing through the date of the hearing. We remand for the hearing officer to make findings of fact and conclusions of law to resolve those issues.

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.

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Tommy W. Lueders  
Appeals Judge

CONCUR:

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Robert E. Lang  
Appeals Panel  
Manager/Judge

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Philip F. O'Neill  
Appeals Judge