APPEAL NO. 010050

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 December 6, 2000. The sole issue on appeal was disability, and the hearing officer found that the respondent (claimant) had disability for the period from August 25, 1999, through September 7, 2000.

The appellant (carrier) has appealed, arguing both that the claimant was able to obtain and retain employment for her shoulder injury for the time periods in issue, and, further, that a previous CCH is res judicata on the period between August 25, 1999, and March 28, 2000. There is no response from the claimant.

DECISION

We affirm the hearing officer's decision.

The claimant sustained an undisputed compensable injury to her right shoulder on _____. She worked as a truck driver, and was able to work for a period of time before she was taken off work for a time period that was not disputed (early September through November 4, 1998). The claimant said that she went back to work with restrictions on November 4, 1998, but that her shoulder continued to bother her. She went to Dr. H on August 20, 1999, to seek further treatment for her shoulder, and was referred to Dr. M, who formed the opinion that the claimant's problem was bilateral carpal tunnel syndrome (CTS). The claimant said that although Dr. M told her there was a relationship between her shoulder injury and this condition, she was advised to file a separate claim for CTS and did so.

The compensability of the CTS, and related disability and other issues, was adjudicated on March 28, 2000. The hearing officer held that the claimant had not proven that her CTS was compensable. He found that the claimant had not lost time from work "as a result of a compensable injury." The Appeals Panel upheld this decision; the only portion of the Appeals Panel decision that comments on disability is a brief statement that without a finding of compensable injury, there can be no disability.

The claimant said that although she had two CTS release surgeries after August 25, 1999, and had indeed testified that her CTS was the primary reason she missed work, she also stated that her shoulder never ceased to be a factor or cause pain and an inability to raise her right arm beyond a certain point. Portions of the transcript from the earlier CCH, which are in evidence, are consistent with the claimant's testimony at the CCH that she went to Dr. H because of her shoulder, and that it continued to bother her, notwithstanding treatment for the CTS.

An MRI of the right shoulder on September 13, 1999, showed that the claimant had bicipital tenosynovitis and a degenerative change of the acromioclavicular joint but no

rotator cuff tear. Dr. M referred to this MRI in his subsequent medical reports as indicative of impingement. Dr. M documented that the claimant continued to have shoulder pain but opined that attention to her CTS would diminish this pain. On February 15, 2000, Dr. M wrote that the claimant continued to have significant right shoulder pain and now desired to have it fixed, and that this was apparently approved by the carrier. The claimant had surgery for her right shoulder on March 31, 2000 (right after the previous CCH). As of August 1, 2000, Dr. M opined that the claimant was not ready to return to work at that time because of shoulder pain and weakness. On October 31, 2000, Dr. M stated that the claimant had been unable to work since September 1999 due to both the CTS and shoulder. The claimant said that she had been unable to work since August 25, 1999. It was agreed that she reached statutory maximum medical improvement on September 7, 2000.

The carrier's argument that the previous decision is res judicata for the period from August 25, 1999, through March 28, 2000, is twofold: it argues that disability was actually litigated with regard to both upper extremities, and found against the claimant; or that it should and could have been raised at that point and therefore the doctrine of res judicata covers disability in general even if the shoulder was not expressly raised. We reject both arguments.

The same hearing officer held both CCHs and has pointed out that the issue of disability related to the shoulder was not before him in the prior CCH. The evidence was not, as the carrier asserts, "identical" in both hearings and the thrust of the disability issue in the previous CCH was plainly as related to the asserted CTS injury (as were related issues having to do with the date of injury, notice to the employer, and timely dispute of compensability by the carrier). However logical it might seem for various issues to be tried as a "unit," the 1989 Act specifically limits the issues before the hearing officer to those raised at the benefit review conference unless the parties agree to add the issue. Section 410.151. There was no showing that the parties agreed to try to the general issue of disability with respect to both the CTS and the shoulder in the prior CCH.

The hearing officer did not err in finding that the claimant had disability due in part to her shoulder. It was the burden of the carrier to demonstrate that a condition other than the shoulder injury was the "sole cause" of the inability of the claimant to work for the period of time also affected by the CTS. After March 31, 2000, the medical evidence demonstrated that the primary reason the claimant missed work was due to her shoulder surgery and recovery period thereafter. The medical evidence supports that the shoulder continued to be a factor in the inability to work. A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ).

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). 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.).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Although different inferences could be drawn for part of the time period under review, we do not agree that this was the case here and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge