

APPEAL NO. 022519
FILED NOVEMBER 18, 2002

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 August 27, 2002. The hearing officer determined that the appellant's (claimant) _____, compensable injury does not include an injury to the right shoulder; that the employer did not tender a bona fide offer of employment (BFOE) to the claimant; and that the claimant had disability from March 18 through April 24, 2002. The claimant appealed the extent-of-injury and disability determinations. The respondent (carrier) responded, urging affirmance. The determination that there was no BFOE tendered is unappealed and has become final. Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury in the form of a fractured humerus of the right arm on _____. At issue in this case was whether the compensable injury included an injury to the claimant's right shoulder and what the period of disability was. The hearing officer determined that the compensable injury does not include an injury to the right shoulder and that the claimant had disability beginning on March 18 and ending on April 24, 2002, the date the cast for the broken humerus was removed. The hearing officer stated the rationale for his determination in the Statement of the Evidence and Discussion portion of his decision. He wrote the following:

On the more fundamental issues of the extent of the compensable injury, and the amount of disability caused by the injury, the claimant's position is less compelling. The claimant himself was an evasive and ultimately unpersuasive witness; likewise, the medical evidence submitted on his behalf, primarily from his current treating doctor, [Dr. G], appeared at best overstated, and was also not persuasive. Certainly, the claimant was disabled by the fractured humerus that was accepted by the carrier. However, as of April 24, 2002 that fracture was healed; beyond that date, the evidence does not credibly establish that the claimant was unable to perform his pre-injury duties as a result of the compensable injury, nor does it credibly establish a shoulder injury caused by the original compensable incident. This is especially so in light of the fact that the medical evidence here is essentially based on the claimant's own statements to his doctor.

Our review of the record in this case reveals that the hearing officer's injury and disability determinations are against the great weight and preponderance of the evidence and must therefore be reversed.

We note that the claimant in this case is Spanish speaking and required an interpreter at the hearing. It is undisputed that the claimant sustained a compensable mid-shaft fracture of his right humerus when the earth moving equipment he was driving rolled over and trapped his right arm. He presented at the emergency room that same day, was placed in a hanging arm cast, and permitted to return to light duty on February 27, 2002. The claimant followed up with the emergency room physician on March 4 and March 14, 2002. Based on the records presented, the area of concern and testing was the right humerus. The March 14, 2002, record indicates that the claimant was complaining of discomfort in the cast.

On March 28, 2002, the claimant was seen by Dr. R on consultation from Dr. G. Dr. R's report noted that the claimant was complaining of right arm and right elbow pain. Dr. R further indicated that the right shoulder could not be tested due to the humeral fracture. In his report dated April 24, 2002, Dr. R noted that the claimant's cast was removed. Dr. R recommended a course of physical therapy focused on the right elbow and shoulder to restore full range of motion (ROM) and he took the claimant off work. On June 4, 2002, Dr. R ordered a right shoulder MRI.

On April 25, 2002, Dr. G noted that the claimant was complaining of a "mild to moderately severe ache about the right shoulder accompanied by an intermittent sharp and stabbing pain." He also noted that the claimant was experiencing "great difficulty and increased pain with movements of this area." Dr. G further noted "[s]ignificant spasm in the right bicep with atrophy noted in the right bicep, tricep, deltoid and supraspinatus." Physical examination revealed decreased ROM in the right shoulder. Dr. G recommended physical therapy for four weeks and diagnosed internal derangement of the right shoulder. On May 24, 2002, Dr. G noted that the claimant was having ongoing problems with his right shoulder, but that the physical therapy has definitely improved his condition.

On June 27, 2002, Dr. G described a history of the claimant's treatment. He noted that an MRI of the right shoulder had been requested but denied twice by the carrier. He further noted that from the outset, physical examination of the claimant's right shoulder indicated that there was internal derangement (weakness, high pain levels, muscle spasms, and positive signs of internal derangement). Dr. G noted that the claimant should be maintained on off-work status.

On June 25, 2002, the claimant was evaluated by Dr. H. In his report, Dr. H states the following:

I believe that this patient has a possible rotator cuff tear of the right shoulder. I believe that he needs an MRI of the shoulder. I believe that in reasonable medical probability it was injured in the accident on _____ . Even though the shoulder was not his initial major complaint, he says it hurt then. The fracture would be expected to be more painful than a soft tissue injury and this pain could have easily

masked the pain of the rotator cuff. The fracture area is a mere few inches away from the shoulder. The same type of injury could have easily caused both problems. The patient speaks only Spanish and may not have been able to communicate his problems with his caregivers.

The carrier presented no medical evidence to contradict the claimant's position regarding extent of injury and disability in this case. In the instant case, we find the hearing officer's decision to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. While we agree that the claimant has the burden of proof to establish the extent of his injury and the period of his disability, and that the finder of fact is the sole judge of the weight and credibility to be given to the evidence presented, we do not agree that the claimant's medical evidence was "overstated" or based solely on the claimant's "own statements to his doctor."

Whether or not translated testimony at a CCH could be considered evasive is not the determination on which the evidence in this case turns. The great weight of medical evidence, from several doctors, shows consistent and ongoing complaints of shoulder pain in the casted extremity, persisting after the cast was removed. Based upon the mechanism of the injury, the objective findings on physical examination, the fact that the right shoulder could not be tested earlier while the right arm was casted, and the fact that the claimant immediately complained of right shoulder problems upon the removal of the cast but further objective tests have been denied, we reverse, and render the decision that the claimant's _____, compensable injury does include his right shoulder.

We likewise find the hearing officer's determination that the claimant's disability ended on April 24, 2002, to be against the great weight and preponderance of the evidence. First of all, such conclusion is based in part on the determination that the right shoulder was not part of the compensable injury, which we have reversed. The medical records clearly show that the claimant had continuing spasms, atrophy, restricted ROM, and that physical therapy was required. Thus, even without considering the shoulder, it seems unreasonable to end disability the day the cast comes off an injured extremity, when it was clear that further strengthening and therapy was needed to restore the previously immobilized limb for full use. Dr. G's last report maintains the claimant on off-work status until the right shoulder injury can be adequately addressed and treated. Therefore, we reverse and render the decision that the claimant has had disability resulting from his compensable injury from March 18, 2002, and continuing through the date of the hearing.

The hearing officer's decision and order is reversed and a new decision is rendered that the claimant's compensable injury of _____, does include an injury to the right shoulder and the claimant had resulting disability from March 18, 2002, and continuing through the date of the hearing.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.**

Susan M. Kelley
Appeals Judge

CONCUR:

Veronica Lopez
Appeals Judge

Robert W. Potts
Appeals Judge