

APPEAL NO. 950284

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 on January 27, 1995, in (city), Texas, with (hearing officer) presiding as hearing officer. Addressing the sole issue that was appealed, the hearing officer determined that the respondent's (claimant herein) compensable injury of (date of injury), extended to her neck, chest, ribs, right breast, hands, arms, and included thoracic outlet syndrome (TOS) and carpal tunnel syndrome (CTS). The appellant (carrier herein) requests review of this determination arguing that the claimant's compensable injury included the right shoulder only and that the claimant failed to establish that her injuries resulted in TOS or CTS. The claimant replies that the carrier's appeal was untimely and the decision and order of the hearing officer are supported by sufficient evidence and should be affirmed.

DECISION

We affirm.

The decision and order of the hearing officer was distributed to the parties on February 8, 1995, with a cover letter dated February 7, 1995. The deemed date of receipt was five days later on February 13, 1993. See Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)). The carrier was required to submit its appeal within 15 days of this date, which is no later than February 28, 1995. The carrier's appeal was mailed on February 24, 1995, and received on February 28, 1995. It was therefore timely.

The claimant worked as a "greeter" and security person at the employer's retail store. On (date of injury), she observed a juvenile shoplifting and chased him out of the store. When she finally caught up with him she fell or was thrown to the ground striking the curb landing on her right shoulder and the upper part of her body. She contends that the injuries she sustained in this confrontation included her neck, chest, a fractured rib, her right breast, her right shoulder, her hands and arms (which together include the CTS) and the TOS. The carrier concedes a compensable right shoulder injury and specifically argues on appeal that the claimant failed to prove the CTS and TOS were work related.

The earliest medical records in evidence date to a March 8, 1982, evaluation of the claimant by (Dr. B) for possible TOS. The claimant was at the time complaining of "some vague aching in both shoulders. . . ." His impression was the claimant "may have a mild TOS problem, but probably all of her symptoms are posture. related." She continued seeing Dr. B on a more or less regular basis into 1987 with her neck and shoulder pain coming and going depending on her activities and exercise. She did not see Dr. B again until a June 2, 1994, visit which is discussed in more detail below.

The claimant testified that she had not been on medication for any physical problems for the seven years prior to the claimed injury of (date of injury). She said that about nine months prior to this injury, she fell at work while carrying stock and landed on her right arm,

but insisted that she never got any workers' compensation benefits nor did she miss work as a result of this incident. She first sought care for her (date of injury), injury the next day from (Dr. G). He reported her complaints as neck and right shoulder pain, soreness of the right knee and ecchymotic discoloration of the right breast. His impression was probable strain and contusion of the right shoulder and a superficial abrasion of the right knee. In a follow-on visit of (date), the claimant was complaining of severe pain in her right chest. He then suspected a rib fracture. In a visit of January 25, 1994, the claimant expressed concern about "compressed nerves" in the shoulder and wanted further testing. Dr. G doubted more testing would be "efficacious" in light of her "relatively negative PE" and declined to authorize them. On January 28, 1994, Dr. G discussed with claimant "the cause of these recurrent severe subjective pains" in the shoulder and upper arm. He could find no objective pathology to account for this "pain syndrome."

The claimant next changed treating doctors to (Dr. S) who, on March 2, 1994, diagnosed right shoulder rotator cuff impingement with pain extending into the neck and down the arm. Follow-up visits with Dr. S through May 9, 1994, refer only to neck and shoulder pain. An MRI of the right shoulder on April 21, 1994, showed no evidence of rotator cuff tear or significant impingement. In a visit of April 25, 1994, the claimant still complained of severe shoulder and arm pain which Dr. S attributed to bursitis and impingement. A nerve conduction study of the upper right extremity on April 27, 1994, was abnormal and consistent with CTS, but an EMG of the upper right extremity on the same date was normal.

Emergency room (ER) visits by the claimant on February 25 and April 26, 1994, refer only to upper back, neck and right shoulder and arm pain.

(Dr. R) became the claimant's next treating doctor and in an initial examination of May 17, 1994, reported the claimant complaining of "chronic right arm, shoulder and neck pain. . . ." He diagnosed possible reflex sympathetic dystrophy of the right arm and possible rotator cuff tendinitis. He did not think she had "significant symptomatic" CTS, but thought depression was playing a large role in her predicament.

The claimant was next examined by (Dr. W) on May 18, 1994, for complaints of headaches, right shoulder and arm pain. He diagnosed chronic shoulder pain, probably myofascial pain, and secondary anxiety disorder. He recommended entry into a chronic pain program.

An MRI of the cervical spine on May 23, 1994, reflected a mild annular bulge at C4-5 and C6-7. In a history form completed on June 3, 1994, for examination by (Dr. BL), the claimant complained of hand and wrist pain and muscle spasms and knots in the neck, back and right shoulder. An impairment evaluation was done on June 3, 1994, by (Dr. O) at the carrier's request. He described her present complaints as upper back, right shoulder and hand and wrist pain, "hands go to sleep at night, and muscle spasms at the base of the head and in the right shoulder." His testing for CTS was negative.

On June 2, 1994, the claimant returned to Dr. B for treatment. Her reported complaints involved the shoulder and neck and the right arm and to some extent the left arm. In what is only the second mention of TOS since his diagnosis of 1982, Dr. B states "I believe there is a possibility of recurrence of the [TOS] and/or [CTS]. A complete upper extremity EMG conduction study on June 9, 1994, showed "minor problems." On June 28, 1994, he recommended physical therapy. In a letter of November 10, 1994, Dr. B stated that TOS was "picked up" in this EMG.

On October 17, 1994, (Dr. WB), an agreed upon designated doctor, examined the claimant and found no objective evidence of injury to the right knee, chest, arms, hands, and wrists. He felt she had a cervical strain and impingement syndrome of the right shoulder. He withheld an opinion on TOS until a examination on December 5, 1994, in which he found probable TOS, but made no comment about CTS.

It is well established that the claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Injury may be proven by the testimony of the claimant alone and objective medical evidence is not required to establish that particular conduct resulted in the claimed injury, except in those cases where the subject is so technical in nature that a fact finder lacks the ability from common knowledge to find a causal basis. See Texas Workers' Compensation Commission Appeal No. 92083, decided on April 16, 1992. Whether an injury occurred as claimed is a question of fact for the hearing officer, who is the sole judge of the relevance and materiality of the evidence and of its weight and credibility, to decide. Section 410.165(a). We have also held that the extent of an injury is a question of fact. See Texas Workers' Compensation Commission Appeal No. 94105, decided March 7, 1994. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). We are satisfied that the testimony of the claimant, which in this case was supported by some medical evidence of the nature of the injuries, constituted sufficient evidence to support the determination of the hearing officer that she suffered compensable injuries to her ribs (fracture), neck (strain) and right breast (bruises and ecchymosis).

More problematic is whether the claimant sustained further specific injuries in the nature of TOS in her right shoulder, neck and chest, and CTS in her arms, wrists and hands. The carrier concedes in its appeal that the claimant sustained a compensable right shoulder injury, and we are left to assume by this it means only some type of impingement syndrome, not TOS. The question is further complicated by a diagnosis of TOS more than ten years before the date of the claimed injury in this case. Dr. B suggested the possibility that the claimant as a result of her fall on (date of injury), suffered a recurrence of TOS. Dr. WB found TOS probable. Other doctors failed to diagnose TOS. The aggravation of an existing injury can be a new compensable injury in and of itself. Texas Workers' Compensation Commission Appeal No. 93416, decided July 8, 1993. Whether the symptoms of TOS presented by the claimant represent a continuation of the old injury or a new injury was a question of fact for the hearing officer to decide. The hearing officer, as the trier of fact, can make reasonable inferences from the evidence presented and a reviewing body must affirm his determination if there is evidence of probative value to support that decision. Texas Workers' Compensation Commission Appeal No. 941374, decided November 23, 1994, a case also involving TOS and CTS. We are satisfied that the testimony of the claimant about how the injury occurred together with the reports of Dr. B and Dr. WB provide some probative evidence in support of the hearing officer's conclusion that the claimant's TOS was compensable and for that reason we affirm this part of his decision and order. We note that although an appellate level body might arrive at inferences different from those deemed most reasonable by the fact finder, such is not a sufficient basis for reversal. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

We also find probative evidence to support the determination of the hearing officer that the claimant had compensable CTS. The carrier makes much of Dr. R's findings that he believed the claimant did not have "significant" CTS and erroneously seems to equate this with a finding of no CTS. The hearing officer could credit the claimant's testimony about how she fell, which was not disputed, and Dr. R's conclusion that there was evidence of CTS and conclude that the claimant had a compensable CTS injury. In doing so, he was not compelled to accept the opinion of other doctors who failed to diagnose CTS.

Finding the evidence sufficient to support the decision and order of the hearing officer, we affirm.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge