APPEAL NO. 931049

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). A contested case hearing (CCH) was opened on September 14, 1993, in (city), Texas, with the record closing on October 4, 1993. (hearing officer) presided as hearing officer. In issue at the CCH were: 1. the extent of the respondent's (claimant herein) injury; 2. the correct date of maximum medical improvement (MMI); 3. the correct impairment rating; and, 4. whether or not the claimant suffered disability from (date of injury), continuing to May 11, 1992, or beyond. The hearing officer determined the claimant suffered an injury to his back and hip, that the issues of MMI and impairment rating are not ripe because a designated doctor has not yet been appointed and that the claimant had disability due to his injury from (date of injury), and ending November 6, 1991, and again beginning November 6, 1991, and continuing to the date of the CCH. The appellant (self-insured), a self-insured political subdivision, appeals arguing: 1. the hearing officer was without jurisdiction in that the claims and issues in this CCH had been previously heard before another hearing officer whose findings were appealed to the Appeals Panel and affirmed; 2. the claimant is collaterally estopped from reasserting claims previously determined; 3. the findings of the hearing officer are not supported by substantial evidence; and, 4. the actions of the hearing officer were arbitrary and capricious. The claimant replies that the decision of the hearing officer was correct and should be affirmed.

DECISION

Finding that the hearing officer was barred from finding disability during a period for which another hearing officer had found no disability and finding that the accrual of benefits begins on the eighth day after disability commences we reform the decision of the hearing officer as to date of the commencement of disability. We also disregard as surplusage the hearing officer's findings as to accrual of temporary income benefits (TIBS) and the ending date of MMI. As reformed we affirm his decision as being supported by sufficient evidence in the record.

The claimant has alleged two injuries. He claimed that he was injured on (date of injury), and on (date of injury), suffered a reinjury to the same spot in his lower back and hip as he injured on (date of injury). On December 19, 1991, the self-insured and the claimant entered into an agreement at a Benefit Review Conference (BRC) in which the self-insured agreed to pay two percent impairment for the claimant's (date of injury), injury. After another BRC on October 8, 1992, a CCH was held on December 1, 1992, with (hearing officer) presiding. The issues at the CCH were whether the claimant had suffered an injury in the course and scope of his employment on (date of injury), and, if so, whether the injury of (date of injury), caused the claimant disability.

At this December 1, 1992, CCH the self-insured took the position that the claimant had not suffered an injury on (date of injury), but that his problems were a continuation of his (date of injury), injury for which the issue of disability had been settled by the December

19, 1991, BRC agreement. The claimant took the position that he had suffered a second injury on (date of injury), for which he had suffered disability which was not controlled by the BRC agreement of December 19, 1991, since the agreement only resolved the disability issue concerning his (date of injury), injury. The hearing officer ruled that the claimant had suffered an aggravation of his (date of injury), injury on (date of injury), and under the 1989 Act this aggravation constituted a compensable injury. The hearing officer also found that as a result of his (date of injury), injury the claimant did not suffer disability after October 17, 1991. The self-insured appealed the decision of the hearing officer to the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 93103, decided March 22, 1993, requesting that we reverse the decision of the hearing officer that the claimant had suffered a compensable injury on (date of injury). The claimant also filed a request for review of the hearing officer's determination that he did not have disability after October 17, 1991. In Appeal No. 93103 we affirmed the decision of the hearing officer holding that there was sufficient evidence to support the finding of the hearing officer that the claimant suffered a compensable injury on (date of injury), and that the decision of the hearing officer in regard to disability had become final because the claimant's request for review was filed untimely.

The claimant in the present CCH presents medical evidence to show that he suffered disability after October 17, 1991, due to his (month year) injury and based on this evidence the hearing officer as stated *supra* has found that as a result of the (date of injury), injury that the claimant had disability from (date of injury), until November 6, 1991, and from November 14, 1991, continuing to the date of the CCH.

The self-insured alleges that the hearing officer erred by allowing the claimant to relitigate the issue of disability which was originally decided at the CCH of December 1, 1992. The self-insured invokes both the doctrines of *res judicata* and collateral estoppel in urging its point. In Texas Workers' Compensation Commission Appeal No. 93663, decided September 15, 1993, we discussed the doctrines of *res judicata* and collateral estoppel, particularly as they relate to issues of disability under the 1989 Act. In Appeal No. 93663, *supra*, we stated that *res judicata* is where a final judgment upon a matter is conclusive of the rights of the parties in all other actions on the issues adjudicated in the first suit and collateral estoppel is where relitigation is barred in a subsequent action upon a different cause of action based on fact issues actually litigated and essential to a prior judgment.

In regard to *res judicata* and disability we stated in Appeal No. 93663 as follows:

> We would be the first to agree that *res judicata* would not permit the claimant to reopen the issue of the period of disability that was considered in the first decision. That hearing officer had to decide the issues before her based upon the evidence presented, which apparently lacked sufficient information for her to be able to differentiate between claimant's injuries from the two incidents, one compensable and one not compensable. But the Appeals Panel has consistently pointed out that disability can recur. (citations omitted). Unlike other issues relating to compensability, the existence of

> "disability" is not fixed but depends upon many factors which can change over the continuum of an injured employee's recovery, such as return to work or change in physical condition. A claimant must be paid [TIBS] on a weekly basis; the parties cannot reduce a recovery for such benefits to a lump sum. Section 408.081(b); Section 408.005(a). The Commission may order lump sum payment of [TIBS] in a lump sum only if they accrued, but not paid. Section 408.064. Both parties are thus free, under the 1989 Act, to re-examine the existence of disability at any time up to the point where the injured employee reaches maximum medical improvement. The hearing officer in this case did not carry his findings into the earlier time period already litigated, but addressed his analysis solely to a time period following the closing of the prior record.

Applying the holdings of the majority in Appeal No. 93663 to the present case, we find that the hearing officer here is bound by the prior determination of the first hearing officer that the claimant did not have disability after October 17, 1991. We hold that such finding only covered the period until the record of the prior CCH closed on December 1, 1992. In other words, the hearing officer in the present case does have jurisdiction to determine whether the claimant has disability but only after December 1, 1992. In the present case the hearing officer did find disability after December 1, 1992, and to the degree that his decision finds disability after December 1, 1992, such finding is not barred by the doctrine of *res judicata* or collateral estoppel. Thus, unless otherwise invalid (which will be discussed *infra*), the hearing officer's finding of disability for periods after December 1, 1992, is sustainable.

The self-insured's argument that MMI was determined at the CCH of December 1, 1992, is without merit. The issue of MMI was not a listed issue at that CCH. A careful reading of the hearing officer's decision reveals that the agreement as to MMI and impairment related to the injury of (date of injury), not the injury of (date of injury) (according to his "Statement of Evidence," this was the testimony of *self-insured's* handling adjuster at that CCH). Thus the hearing officer in the CCH presently under appeal had jurisdiction to determine that MMI had not been reached in regard to the (date of injury), injury.

The self-insured argues that there is not substantial evidence to support the findings of the hearing officer as to disability and MMI. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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.); Aetna Insurance Co. v. English, 204

S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not generally 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard we find sufficient evidence in the record to support the finding of the hearing officer as to disability. The claimant testified that he was unable to obtain and retain employment due to his injury. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. Further, while the medical evidence was contradictory, there was medical evidence to support the claimant's contentions as to disability. The hearing officer could have chosen to believe this medical evidence, rather than the contradictory medical evidence.

As to MMI, as explained *supra*, the hearing officer was not barred from determining this matter since the issue of MMI regarding the (date of injury), injury had not been previously determined. Further, applying the proper appellate standard, there was sufficient evidence to support the hearing officer's finding that the claimant had not yet attained MMI. In regard to the hearing officer's finding that the claimant will reach MMI on October 17, 1993, the self-insured argues that there is no basis in the record to support this finding.

Section 401.011(30) states as follows:

"Maximum medical improvement" means the earlier of:

(a)the earliest date after which, based on reasonable medical probability, further material recovery from or lasting

improvement to an injury can no longer reasonably be anticipated; or

(B)the expiration of 104 weeks from the date on which income benefits begin to accrue.

In the present case, the hearing officer's finding that MMI would be reached on October 17, 1993, was based on his finding that the claimant's entitlement to TIBS began to accrue on (date of injury). This finding is not sustainable because the statute states that income benefits do not accrue until the eighth day after the beginning of disability. Texas

Workers' Compensation Commission Appeal No. 93678, decided September 15, 1993. Also it is not correct unless the finding of the hearing officer that the claimant's disability commenced on (date of injury), is correct and the hearing officer was barred from finding disability until December 1, 1992. In any case it was not necessary for the hearing officer to determine a prospective ending date for MMI. In this regard his findings as to the date the claimant's income accrued and the ending date of MMI are unnecessary surplus, and should be disregarded. *See* Texas Workers' Compensation Commission Appeal No. 92692, decided February 12, 1993; Texas Workers' Compensation Commission Appeal No. 93647, decided September 13, 1993.

Finally the self-insured asserts that the hearing officer actions in deciding this case were arbitrary and capricious. This is not the applicable standard of appellate review under the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 92148, decided May 29, 1992; Texas Workers' Compensation Commission Appeal No. 92435, decided October 5, 1992. In any case, we find that while the decision of the hearing officer was not without error for the reasons discussed above, his actions were neither arbitrary or capricious.

We hold that the hearing officer was not barred by *res judicata* or collateral estoppel from determining that the claimant had disability only for periods after December 1, 1992. We reform his decision (Finding of Fact No. 8) to read "Claimant has been unable to obtain and retain employment at wages Claimant was receiving prior to (date of injury), beginning December 2, 1992." We hold the hearing officer's decision regarding accrual of TIBS (Conclusion of Law No. 6) and Conclusion of Law No. 7 which reads: "The Claimant will reach statutory maximum medical improvement on October 17, 1993," are unnecessary surplusage and should be disregarded. We order the section of the hearing officer's decision entitled "Decision & Order" reformed consistent with our decision.

As reformed the decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge