APPEAL NO. 931088

This appeal arises under 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*.) On October 13, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issue recited and agreed upon by the parties to be resolved was: does claimant have disability for this injury and, if so, is the City of (city) (self-insured) entitled to credit for any payment already made? The hearing officer determined that the claimant's disability began on (date), and has not ended as of the date of the CCH. Appellant, City of (city), City herein, contends that the evidence is factually insufficient to establish that claimant had disability, as defined by the 1989 Act, from (date), to the date of the CCH, and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified that in the early morning hours (3:30 a.m.) of (date), he injured his back lifitng a 400 pound box into the back of a truck while employed by the City. Claimant testified he immediately felt pain in his lower back and his legs went numb. Claimant said his supervisor told him to go to a doctor in the morning. Claimant stated that the box in question was the last box to be loaded and that he went home and went to bed. Claimant testified that when he woke up he was unable to get out of bed. Eventually the next day, claimant said, he went to the emergency room (ER) of a hospital, complaining of pain in his lower back and numb legs. The hospital ER record indicates complaints of lumbar back pain, numbness, "tingling down" left leg and pain on standing. After x-rays, claimant was diagnosed as having "acute lumbar strain." Claimant was given medication, taken off work and advised to follow-up with his regular physician.

Claimant's condition did not improve and he returned to the hospital ER on (date), with essentially the same complaints as before. The ER record of the (date) visit indicated lumbar strain and "question lumbar disc disease" with radiculopathy and a treatment plan to include an MRI "in a.m." Claimant was released for "limited/restricted work . . . no lifting, may sit and work." The limitations were effective "date thru date." The "impression" of the December 15th MRI was: "Central L4-5 disc herniation producing mild effacement of the adjacent thecal sac." Claimant testified that he continued to have pain in his back. By letter dated February 12, 1993, the City asked claimant to contact it regarding claimant's availability for work. As reflected in a letter dated March 8, 1993, claimant had been contacted and was asked to bring in information from the doctor regarding his condition. As a result of a conversation between claimant and the City's claim administrator, claimant was sent to (Dr. M), (also referred to as Dr. M in the transcript) at the Industrial Health Center. Dr. M's examination revealed some decreased range of motion (ROM) and "Tender over lower right L5-S1 doesn't correlate with MRI findings from (hospital) report of January 1993." Dr. M released claimant to work on light duty. The City verbally offered claimant some

unspecified light duty and claimant responded that he was not able to work even light duty. Claimant was advised by the City claim's administrator to seek treatment from his own specialist instead of going to the hospital ER. Subsequently, claimant was seen by (Dr.P), a neurosurgeon, who took claimant off work effective July 1, 1993. In an Initial Medical Report (TWCC-61) dated July 15, 1993, referring to examination and tests done on July 8, 1993, Dr. P stated:

> The MRI shows a significant midline central disc herniation at L4-5. The myelogram made 7-8-93 shows significant bulging of the L4-5 disc and the CT scan confirms a midline disc herniation at L4-5. I feel the patient will need surgery for removal of the herniated disc.

Because spinal surgery was recommended, claimant was sent to (Dr. T), a doctor selected by the City, for a second opinion regarding possible spinal surgery. Dr. T, by report dated August 16, 1993, stated "[c]linically the patient has evidence of chronic lumbosacral sprain. For this reason, surgery is probably indicated but more than likely in the form of a lumbosacral fusion." In the body of the report Dr. T stated that claimant "[a]t this point in time . . . is disabled and has been so since his injury." Claimant was admitted for surgery on August 26, 1993, the herniated disc at L4-5 was removed and claimant was discharged August 29, 1993, and is recovering from the surgery. Claimant contends he has been unable to work since his injury on (date), and that the difficulty in getting medical reports through the ER was that he was constantly being seen by different doctors.

Carrier contended that claimant did not have disability after December 15, 1992, when the ER light duty restriction expired, until July 1, 1993, when Dr. P took claimant off work. Carrier contends that Dr. M placed claimant on light duty in March 1993, and that the City had offered claimant light duty in accordance with Dr. M's restrictions and claimant had refused this bona fide offer of light duty employment. Basically, carrier/City's argument, both at the CCH and on appeal, is that since claimant did not have a medical excuse to be off work and that the City had offered light duty in accordance with Dr. M's restrictions, claimant did not have disability as defined by the 1989 Act.

The hearing officer determined, in pertinent part, the following challenged findings of fact and conclusions of law:

FINDINGS OF FACT

14. Claimant was unable to obtain or retain work at his pre-injury wage from (date), until the date of this hearing because of a work related back injury.

15. Claimant was not physically able to perform the light duty employment offered by the Employer and, therefore, the Carrier is not entitled to a credit for the overpayment of temporary income benefits.

CONCLUSIONS OF LAW

2.Claimant has disability which began on (date), and has not ended as of the date of this hearing.

As previously indicated, the carrier challenges the hearing officer's determinations contending that "there was no evidence presented at the hearing other than the claimant's subjective opinion that he was not able to work from that period of time between December 15, 1992, and July 1, 1993." Carrier emphasizes "there is absolutely no evidence, and certainly no medical evidence" of claimant's disability and that claimant "has presented absolutely no evidence to controvert the findings of Dr. M or his ability to work . . . . "

Disability is defined in Section 401.011(16) as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage." Whether claimant had disability, as defined, is a factual determination, based on all the testimony and medical evidence, to be made by the hearing officer. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility to be given to the evidence. Although the carrier emphasizes that disability should be proven by medical evidence, we note that in a workers' compensation case the issue of disability may be based on the sole testimony of the injured employee. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394, 397 (Tex. 1989). In this case, claimant's testimony is supported in part by another lay witness and claimant's documented consistent complaints of pain and leg numbness. The report and findings of Dr. P in July 1993 are consistent with the MRI done by the hospital ER in December 1992. Claimant's complaints during this period of time were consistent, and the hearing officer in reading the medical reports, together with claimant's complaints, could and did find that claimant had disability during the December 15, 1992, to July 1, 1993, time frame. The hearing officer may believe all, part, or none of the testimony of a witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-(city) 1977, writ ref'd n.r.e.) The hearing officer could and did, accept claimant's testimony that he was unable to work during the time frame in question. If the claimant's testimony is believed, as it apparently was, no medical evidence is required to support claimant's contention of disability.

City alleges that it made a bona fide offer of employment to claimant consistent with Dr. M's release to light duty in April 1993. The hearing officer, as the sole judge of the weight and credibility of the evidence could, and apparently did, believe claimant when he testified that he could not perform whatever duties the City was offering as light duty. A review of whether the City's offer of unspecified light duty complied with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5) bona fide offer of employment requirements is unnecessary, given the hearing officer's determinations, supported by sufficient evidence, that the claimant was unable to obtain or retain any employment during that time frame. We would, however, note that since the City's offer was not made in writing, the City/carrier is required to provide clear and convincing evidence that a bona fide offer was made. Rule 129.5(b). The record submitted for review is very sketchy as to the requirements of the light duty offered, the duration and wage.

In that the hearing officer found, and is supported by the evidence, that claimant had disability from the date of injury to the date of the CCH, carrier did not overpay temporary income benefits (TIBS) and is not entitled to a credit for any TIBS paid. The hearing officer's determination on disability is dispositive of this issue.

In reviewing a case for sufficiency of the evidence, we will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. 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). Finding no reversible error and the decision supported by sufficient evidence, the decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge