

APPEAL NO. 980232
FILED MARCH 23, 1998

Following a contested case hearing (CCH) held in (City), Texas, on January 6, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that appellant/cross-respondent (claimant) sustained a compensable injury on or about _____; had disability resulting from that injury for five and one-half hours on _____; had further disability beginning August 15, 1997, and ending on August 23, 1997; and is entitled to receive one day of temporary income benefits as he did not miss four weeks of work because of his compensable injury. Claimant has appealed the disability determination, contending that the evidence established that his disability continued to the date of the hearing. Claimant also asserts error in the hearing officer's not permitting him to have a second attorney participate in his representation at the hearing and in the hearing officer's exclusion of two exhibits from evidence. The respondent/cross-appellant (self-insured) has appealed the compensable injury issue. Both parties filed a response to the other's appeal.

DECISION

Affirmed.

Claimant testified that he is employed by the self-insured as a recycling collector and that his duties consist of driving a truck around neighborhoods and emptying residential recycling bins. He said that on (prior date of injury) (all dates are in 1997 unless otherwise stated), he injured both knees and his back when he stumbled dismounting the truck, but that the self-insured only accepted liability for his left knee. He indicated that it was later determined in an earlier CCH that his (prior date of injury) compensable injury did not extend to his back. The June 17th report of Dr. C stated that claimant had undergone a left knee arthroscopy after which his dorsal back pain returned and was more intense. On June 27th Dr. C reported that he felt claimant's upper back pain was related to his (prior date of injury) injury. Dr. C's notes of June 24th, July 1st, and July 17th contained references to thoracic pain and interscapular pain. Claimant further stated that in July he reinjured his right knee and the self-insured accepted liability for it. Dr. C's August 7th report stated a diagnosis of right knee strain and released claimant to restricted duty the next day with certain stated restrictions. As the hearing officer noted, there was no evidence introduced at this CCH indicating what evidence was admitted at the prior hearing.

Claimant further testified that on _____, at about 9:30 a.m., he reinjured his back lifting a recycling bin filled with newspapers, that he could not straighten up due to the back pain, and that the back pain after this incident was much "more severe" and "different" than that which he had experienced since (prior date of injury) and included his "whole back" from about three inches below his neck to his waist. He said he was

not able to finish his shift that day, having worked for about two and one-half hours; that he saw Dr. M that day; that Dr. M has referred him to Dr. P, who continues to treat him; that he has not returned to work and cannot work; and that both Dr. M and Dr. P told him not to work. He also said that if he worked for six hours, he would be paid for eight hours.

Dr. M's report of _____ states the diagnosis as lumbosacral strain and that claimant was "unable to return to work until" without stating a date. Dr. M's report of August 18th stated the diagnosis of lumbosacral strain and acute thoracic strain and that claimant was unable to return to work "until further notice." Dr. M reported on September 23rd that claimant was seen on _____ after picking up some recycling bins and injuring his back, that on (prior date of injury) claimant had twisted his neck and lower back getting off the truck and had thereafter been complaining of neck and low back pain, that claimant had an aggravation of his (prior date of injury) injury on _____, and that claimant was later evaluated by Dr. P who found a recurrent disc herniation of the lumbar spine. Dr. M wrote on August 22nd that claimant was totally and continuously disabled from his regular occupation from _____ to August 23rd because of acute thoracic strain, that claimant may return to work on August 23rd, and that claimant was referred to Dr. P for further treatment.

Dr. P's report of September 4th said claimant had a thoracic and lumbar MRI, that at the T8-9 level there is a marked disc herniation and he has lumbar spine disc degeneration with minimal bulging, and that he believes "the herniated lumbar disc is related to his injury at work." The report refers to a (prior date of injury) injury date. Dr. P's report of December 16th, which also refers to a (prior date of injury) injury date, reflects that claimant has some minimal findings suggesting disk herniations at the T7-8 and L3-4 levels, that he does not recommend surgery, that claimant had low back surgery many years ago and was asymptomatic until the _____ injury, and that claimant requires physical and work conditioning to see if he will be able to return to any work and activities.

In her discussion of the evidence, the hearing officer noted the absence of evidence to show that the herniations were the result of some other injury or activity and that a preponderance of the evidence showed that claimant injured his lumbar and thoracic spine on _____.

The self-insured urged below and maintains on appeal that claimant had a preexisting back problem and that his evidence only showed that he had an increase in pain on _____ and not the enhancement, acceleration or worsening of his back condition that is required to prove a new injury by way of aggravation of a preexisting condition (citing to Texas Workers' Compensation Commission Appeal No. 950125, decided March 10, 1995. The self-insured further urges that because the evidence failed to establish that claimant sustained a compensable injury on _____, he cannot, by definition (Section 401.011(16)), have had disability.

The self-insured appeals findings that on _____ claimant lifted a newspaper recycling container, felt pain in his back, and was unable to rise to an erect position, and that the medical records show that claimant has a back injury consisting of herniated discs at the T8-9 and L3-4 levels, which resulted from his lifting the newspapers on _____. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and it is for the hearing officer to resolve the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing tribunal, we will not disturb the challenged fact findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer could infer from claimant's testimony and the medical records in evidence that claimant injured his thoracic and lumbar spinal regions lifting the recycling bin on _____ regardless of whether or not there were preexisting injuries in either of both of these regions. Given the reference to actual or possible herniations at the T8-9 and L3-4 levels, and the absence of evidence of such lesions before _____, the hearing officer could infer that those lesions were sustained on _____ and thus that claimant sustained more on that date than a mere increase in pain from a preexisting condition.

Claimant's appeal of the period of disability found contends that because Dr. M referred claimant to Dr. P for treatment, and because Dr. P, claimant's current treating doctor, has never released claimant to return to work, and because claimant has testified that he cannot work, the hearing officer erred in ending claimant's period of disability on August 23rd. The hearing officer stated in her discussion that other than for the five and one-half hours on _____ and the period from August 15th to the 23rd, the date Dr. M released claimant to return to work, she did not believe that claimant was unable to work because of the _____ injury. We do not view the hearing officer's findings on the disability issue to be against the great weight and preponderance of the evidence. She could credit Dr. M's release of claimant to return to work on August 23rd after having had him off work and could consider the general nature of Dr. P's December 16th report concerning claimant's need for physical and work conditioning in order to determine what activities he can do.

Claimant contends that the hearing officer violated his constitutional right to "due process" by wrongfully excluding his co-counsel from the hearing room. He posits that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 141.5(a)(2) (Rule 141.5(a)(2)), which describes the benefit review conference (BRC), includes as participants "the parties' representatives" and that Section 410.006, which provides for representation at administrative proceedings, states that a claimant "may" be represented by "an attorney," language which is not mandatory. The record reflects that at the outset of the hearing, the hearing officer said she would not permit Ms. G to act as co-counsel for plaintiff, peremptorily stating, "that's the way it works here." The self-insured then

objected to Ms. G's remaining at the hearing as an observer and Ms. G left the hearing room. Claimant's appeal contains a letter dated December 3rd from the attorney who represented him at the hearing to the Texas Workers' Compensation Commission stating that claimant had retained both herself and Ms. G to represent him in his _____ injury case. The Appeals Panel does not generally consider evidence outside the hearing record first submitted with the appeal. Section 410.203(a); Texas Workers' Compensation Commission Appeal No. 950331, decided April 18, 1995. Claimant does not contend that he was not adequately represented by his attorney at the CCH and does not even attempt to articulate just how he was denied "due process" by the absence of Ms. G, let alone cite any authority to the Appeals Panel. Although we do not find merit in this assertion of error under the particular circumstances of this case, we by no means intend to be seen as saying that a party may never have more than one representative at a CCH and, quite frankly, are mystified by the hearing officer's conduct.

Finding that the claimant failed to show good cause for failing to timely exchange the exhibit with the self-insured, the hearing officer excluded from evidence claimant's Exhibit No. 7, the self-insured's response to claimant's request for review in a prior appeal to the Appeals Panel in another claim. Claimant's good cause showing consisted of stating that the exhibit is part of his other case that could go to the district court if he seeks judicial review in that case and that is why it was not earlier exchanged. We find no abuse of discretion in this ruling. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

In the midst of the self-insured's cross-examination of claimant, claimant offered his Exhibit No. 8, a December 16, 1997, certificate from Dr. P stating that claimant was there for an appointment on Friday and was still unable to return to work. The hearing officer excluded the exhibit for claimant's failure to show good cause for not timely exchanging it with the self-insured after claimant acknowledged having obtained the document the previous week and not exchanging it with the self-insured until the date of the CCH. Rule 142.13(c) provides that except as provided in subsection (g), the parties shall exchange evidence no later than 15 days after the BRC, and thereafter, as it becomes available. Since the document is dated December 16th and the CCH was held on January 6, 1998, the hearing officer could reasonably determine that claimant could have earlier obtained and exchanged the document. We find no abuse of discretion in this ruling.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge