APPEAL NO. 990174

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 28, 1998, a contested case hearing (CCH) was held. The issues concerned whether appellant's (claimant) injury of _____, was a "producing cause" of his current low back and neck injuries, whether he had disability from his _____, injury beginning on March 1, 1998, and thereafter, and whether the respondent (carrier) waived its right to dispute this disability.

The hearing officer found that the claimant's current medical problems with his neck and lower back resulted from his _____, injury, or that he had disability from that injury. The hearing officer also held that a dispute to disability could not be "waived" by the carrier under the provisions relating to timely disputes of compensability of an injury.

The claimant has appealed. The claimant argues that his _____, injury has persisted and there was only a temporary exacerbation of that condition from a 1994 motor vehicle accident (MVA). He argues that the carrier failed to present any evidence refuting his claim and the fact he presented medical and testimonial evidence should preponderate against no evidence. He argues the evidence he believes to be favorable to his claim. He argues that the carrier failed to timely dispute his current conditions and the hearing officer erred by failing to add this as an issue. The carrier responds that the medical records presented indicate a number of intervening injuries between _____, and March 1, 1998, when claimant was taken off work for the first time. The carrier points to long gaps in medical treatment at a time when the claimant was also gainfully employed. The carrier finally asserts that it was not required to dispute the existence of disability.

DECISION

Affirmed.

Because income benefits were also at issue, this claim was not a "medical only" case over which the Medical Review Division would have primary jurisdiction. *Compare* Texas Workers' Compensation Commission Appeal No. 990211, decided March 10, 1999.

The claimant was employed by (Employer 1) when he injured his back while making deliveries on _____. He did not explain exactly how he was hurt, but said his entire back was affected.

It was stipulated that the claimant did not lose time from work prior to March 1, 1998, and no income benefits (apparently including impairment income benefits) were paid by the carrier. Claimant's first treating doctor was Dr. R, with whom he treated beginning February 1991 (before his injury) through December 13, 1991. Claimant had also injured his back in a 1989 MVA (apparently a compensable injury according to medical records tendered at the CCH) and said he saw Dr. R in February 1991 relating to exacerbations of his back. Claimant agreed he was examined by a carrier doctor in January 1992.

Claimant went to work for (Employer 2) in August 1992 and worked for them until March 1, 1998, when he was taken off work by his new doctor, Dr. N. He had not worked since this date, although he agreed that his work for Employer 2 was much less strenuous than for Employer 1 at the time of his injury. Claimant said that his back was exacerbated on a weekly basis while employed by Employer 2 through repeated light lifting and/or driving long distances.

Claimant said he was involved in a parking lot MVA which did not actually cause injury, just general "discomfort," in August 1994. The claimant contended that he understood that this incident caused an "insult" to his preexisting condition, which had not resolved since _____.

Claimant asserted that he had been denied medical care until July 1994 when he began treating with Dr. P. He said the carrier would not pay Dr. P either, and that the carrier took the position that the file was closed. (There was some support for this in the record in the form of the office manager's statement). Next month, after the MVA, Dr. P treated him for the effects of that as well and was paid some unknown amount of money by claimant's automobile insurance company.

When asked why the records of Dr. P noted that claimant reported injury to his back, claimant explained that he would not be surprised if such notations were in Dr. P's notes because of the confusion doctors had over the "legal terminology." He indicated in his testimony that doctors and lawyers had different definitions of what constituted an “injury.”

A report by one Dr. H regarding the 1989 MVA found that the claimant had some compression fractures at T10, T11, and L1 levels of the spine.

A report from Dr. P dated August 8, 1994, concluded that the claimant's condition involved cervical whiplash and thoracic and lumbar dysfunction or joint disorder that Dr. P concluded was "directly caused by the automobile accident" of August 8, 1994. A report dated April 8, 1998, by Dr. E, a consulting doctor to whom he was referred by Dr. N, stated that claimant had a herniated cervical disc and a herniated lumbar disc at L2-3. This report notes the _____ injury but does not mention the 1994 MVA. Likewise, reports from Dr. N's office filed in 1997 do not note the 1994 accident. A letter from Dr. P dated October 27, 1998, stated that the claimant had been discharged from treatment for the effects of the 1994 MVA and that the injuries sustained in the 1994 accident were just a "temporary insult" to his underlying condition. Dr. P said that claimant sustained an exacerbation of his _____ injuries at an unspecified time after discharged from the MVA.

At the beginning of the CCH, the parties stipulated that 401 weeks after the date of injury would be November 9, 1998. Claimant was taken off work and resigned from Employer 2 effective March 1, 1998. He said that Dr. N had not authorized him to return to work.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). 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 of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). While the claimant argues that the carrier did not prove that the condition was not related to the _____ accident, the carrier did not have that burden; rather, it was the burden of proof of the claimant to establish the relationship between the current inability to work and the distant accident. However, the carrier does have the burden to prove that an intervening accident was the "sole cause" of disability. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). The hearing officer, by findings of fact the occurrence of, the accident after a long period that claimant was without medical treatment, appears also to have made an implied finding that the 1994 accident was the sole cause of disability.

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.). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). In this case, the hearing officer evidently did not believe that the effects of the _____ injury would have survived several years of work and an intervening MVA to cause disability nearly seven years later. She could well believe from the medical records around the time of the 1994 accident that more than an "insult" resulted from that occurrence. Furthermore, claimant's testimony that his work with Employer 2 regularly aggravated his back served to complicate his assertion that it was the _____ injury that led to his inability to work.

Finally, we agree Section 409.021(c) requires the carrier to dispute "compensability" of an injury on or before the 60th day after an injury. However, the state of "disability," or inability to obtain and retain employment equivalent to the preinjury wage, may occur beyond this date for an injury whose compensability is conceded. An argument that a compensable injury has not resulted in disability is not waived.

In reviewing the evidence, we cannot agree that the hearing officer's decision was so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust and we affirm her decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Alan C. Ernst
Appeals Judge