APPEAL NO. 990229

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). This case is back before us after our remand in Texas Workers' Compensation Commission Appeal No. 982720, decided December 30, 1998. We had remanded the case to obtain the record. On remand the hearing officer reissued his decision and we have been provided with the records from the original contested case hearing (CCH) which was held on September 30, 1998. The issues at the CCH were:

1. Did the Carrier [respondent] contest the compensability of the Claimant's [appellant] herniated nucleus pulposus [HNP] at L5-S1 on or before the 60th day after being notified of the injury and, if not, is the Carrier's contest based on newly discovered evidence that could not reasonably have been discovered at an earlier date?

2. Is the Claimant's [HNP] at L5-S1 a result of the compensable injury sustained on _____?

3. Has the Claimant had disability since November 15, 1997 through present resulting from the injury sustained on _____?

4. Is the Claimant entitled to a subsequent choice of treating doctor pursuant to Section 408.022(e)?

5. Who is the Claimant's treating doctor?

The hearing officer determined that the claimant's _____, injury extends to a defect at L5-S1, that the carrier waived its right to contest te compensability of a defect at L5-S1, that the Texas Workers' Compensation Commission did not abuse its discretion in permitting the claimant to change doctors to Dr. Y, and the claimant does not have disability. The claimant appeals on the issue of disability. The carrier responds that there is ample evidence in the record to support the finding of no disability.

DECISION

We reform the decision of the hearing officer to conform with the disability issue before him. Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

Most of the evidence in this case dealt with issues other than disability. Since the only issue before us on appeal is whether the hearing officer erred in his findings on the issue of disability we will restrict our discussion to this issue. We note that it was undisputed that the claimant suffered a compensable injury on _____. We also note that it is undisputed that the claimant continued to work at his regular wages after this injury

until August 19, 1997. The claimant testified that he could not perform his job after this date due to his injury. The claimant testified that his job as a heavy equipment mechanic and steel fabricator required him to lift 20-50 pounds on a regular basis and 100 pounds or more on occasion. Dr. M, the claimant's treating doctor at the time, took him off work on August 19, 1997. Dr. Y, the claimant's current treating doctor, has never released him to return to work. Dr. B, another doctor who examined the claimant, in a report dated June 5, 1998, continued him off work. Dr. H, the carrier's medical examination order doctor, saw the claimant on July 10, 1998, for the purpose of evaluating the claimant's injury and disability. Dr. H restricted the claimant's work activities. The claimant was released to full duty by Dr. M on September 1, 1997. The carrier put into evidence a surveillance film showing the claimant in January 1998 performing various activities. After reviewing the surveillance film, Dr. S released the claimant to full duty. The carrier also put into evidence a newspaper clipping concerning the claimant's killing a bobcat while hunting.

We note that the hearing officer's determinations on all issues other than disability have become final pursuant to Section 410.169. The hearing officer's findings of fact and conclusion of law on the issue of disability are as follows:

FINDINGS OF FACT

5. Claimant worked at his regular job at his regular wages after his _____ injury.

* * * *

13. In January 1998 Carrier conducted videotape of Claimant. The tape showed Claimant to be capable of some physical activities. Carrier sent copies of the tape to [Dr. M] and [Dr. S].

14. On February 17, 1998 [Dr. M] wrote the Carrier he reviewed the video and it showed no abnormalities. [Dr. M] stated, "I am recommending that [the claimant] continue under [Dr. S's] care and he follow her recommended treatment plan as such I am withdrawing as [the claimant's] treating physician." The Carrier received the letter on February 23, 1998.

* * * *

26. Claimant's _____ injury has not caused Claimant to be unable to obtain and retain employment at wages he earned before _____ anytime thereafter.

CONCLUSION OF LAW

7. Because Claimant has not shown by a preponderance of the evidence that a _____ injury caused him to be unable to obtain and retain employment at his pre-injury wages after _____ he did not have disability within the meaning of the Act.

The claimant argues that the decision of the hearing officer exceeded the issue before him in making determinations about disability outside the period covered by issue at the CCH. We have stated that the 1989 Act provides for an "issue-driven" dispute resolution system rather than one providing for a general verdict. *See* Texas Workers' Compensation Commission Appeal No. 990164, decided March 15, 1999. We have also held that a hearing officer only has jurisdiction to determine the issue of disability up to the date of the CCH. Considering the disability issue in this case was framed as whether the claimant had disability since November 15, 1997, we hold that the hearing officer could not make a determination regarding disability before that date. Also, since the CCH was held on September 30, 1998, and the hearing officer heard no evidence in this case after this date (the record being closed and there being no CCH on remand), we hold that the hearing officer had no jurisdiction to make a determination on disability after September 30, 1998. We therefore reform the hearing officer's decision to reflect a determination that the claimant had no disability since November 15, 1997, until September 30, 1998.

The claimant also argues on appeal that the hearing officer's determination that the claimant did not have disability during this period (November 15, 1997, until September 30, 1998) was contrary to the evidence, pointing to the evidence supporting the claimant's disability during this period. Disability is a question of fact to be determined by the hearing officer and may be based upon the testimony of the claimant alone. 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 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).

While a finding of injury may be based upon the testimony of the claimant alone, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case, the hearing officer found no disability contrary to the testimony of the claimant and medical evidence supporting disability. Claimant had the burden to prove he suffered disability. Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992. We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to meet this burden. This is so even though another fact finder might draw other inferences and reach other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

As reformed, the decision and order of the hearing officer is affirmed.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge