APPEAL NO. 990392

On January 21, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were: (1) whether the appellant (claimant) sustained a compensable injury to his back on _____; (2) whether the injury was reported to the employer within 30 days of the injury; and (3) whether claimant has had disability from August 29, 1998, "to date and continuing." There is no appeal of the hearing officer's decision that claimant sustained a compensable back injury on or about _____; and that claimant timely reported the work-related injury to the employer. The claimant requests review and reversal of the hearing officer's decision that claimant has not had disability through the date of the CCH, January 21, 1999. Respondent (carrier) requests affirmance.

DECISION

Affirmed.

Claimant testified that he worked as a mold maker for the employer for 20 years; that that work was heavy work; that he injured his back at work on _____, when he picked up a heavy piece of steel; that he saw Dr. G on the day he was injured; that Dr. G released him to light duty the next day; that he returned to work the day after his injury; that the employer gave him light-duty work at his preinjury wage; that he continued to work for the employer in a light-duty position until he was laid off with other employees in a reduction in force on August 28, 1998; that he applied for and received unemployment benefits; that he received a few weeks of workers' compensation income benefits after he was laid off; that he canceled his unemployment benefits when he received the workers' compensation income benefits; that when the carrier denied his claim and stopped his workers' compensation income benefits, he reapplied for and obtained unemployment benefits; that he continues to receive unemployment benefits; that those benefits will stop in three more months; that he has to look for work to receive unemployment benefits; that he told the unemployment office that he is on light-duty status; that he looks for light-duty work in grocery stores; that he has not been offered a job; that he changed treating doctors to Dr. K; that Dr. K has him on a light-duty status; that the employer sent him to Dr. P; and that he has had a light-duty release since his injury. MP, the employer's personnel manager, testified that claimant was given light-duty work after his injury; that at the time of the reduction in force, when 45 employees were laid off, claimant was still working light duty; that another 70 employees were laid off after that; and that the employer's business is dependent on oil prices and low gas prices adversely effect its business.

Dr. G diagnosed claimant as having a lumbosacral strain and noted on February 2, 1998, that claimant could return to work with no bending, no lifting over 20 pounds, and no climbing. A radiologist reported that an MRI of claimant's lumbar spine done on March 5, 1998, showed a probable hemangioma at L3, mild disc bulges at L2-3 through L4-5, without evidence of a disc protrusion or significant neural foraminal narrowing, and degenerative disc disease at L5-S1, with a disc bulge/protrusion. Dr. P examined claimant on March 11, 1998; noted the MRI findings; diagnosed claimant as having degenerative disc disease,

nonsurgical in nature; wrote that claimant should continue with conservative care; and recommended that claimant return to work with no restrictions in approximately two weeks. A note from Dr. G's office dated June 24, 1998, reflects that claimant had been instructed to return to work with no limitations and to go to physical therapy two times a week for three weeks. On September 10, 1998, Dr. K wrote that claimant could return to work with no lifting over 20 pounds and no excessive bending and twisting. Dr. K diagnosed claimant as having lumbosacral radiculitis and lumbar vertobrogenic pain syndrome. Dr. B noted on October 1, 1998, that an EMG was relatively unremarkable regarding entrapment neuropathy or radiculopathy, although there was evidence of an underlying peripheral neuropathy of unknown etiology.

"Disability" means "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wages." Section 401.011(16). It was undisputed that claimant worked at his preinjury wage from the day after his injury to August 28, 1998, when he was laid off in a reduction in force and thus would not have disability for that period. The issue was whether claimant had disability after August 28, 1998. The hearing officer determined that claimant did not have disability through the date of the CCH, January 21, 1999. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). In determining the disability issue, the hearing officer could consider, among other things, the conflicting medical evidence concerning claimant's work status, claimant's testimony, and claimant's representations to the Texas Workforce Commission. As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's decision on the disability issue is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge