

## APPEAL NO. 990407

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 29, 1999. With respect to the single issue before him, the hearing officer determined that the respondent (claimant) had disability from December 2, 1997, through the date of the hearing as a result of his \_\_\_\_\_, compensable injury. In its appeal, the appellant (carrier) argues that that determination is against the great weight of the evidence. In his response, the claimant urges affirmance.

### DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on \_\_\_\_\_, in the course and scope of his employment as a finance director for a car dealership. The claimant testified that his feet became wet from water that had leaked onto carpeting in an office from an air conditioner, that he walked onto the tile floor of the showroom, that his feet slipped out from under him, and that he fell backwards, landing on his back. He testified that he continued working after his injury until August 4, 1997, when his employment with the dealership ended. On cross-examination, the claimant acknowledged that he was suing his former employer for wrongful termination.

The claimant stated that he sought medical treatment with his family doctor about a week after his injury and that he continued to see his family doctor for pain periodically after he stopped working, but he maintained that the pain "was not keeping him from doing much." He testified that by mid-September, his back started hurting worse and he developed pain in his hip and right thigh; that by October the pain was even worse and he began looking for help for the pain. He stated that his family doctor referred him to Dr. G. In treatment notes of October 10, 1997, Dr. G noted that the claimant's back pain "waxes and wanes to some degree" and that the claimant continues to play golf but is "very sore following this." Dr. G's clinical impression was "[s]tatus post fall several months ago with episodic, mainly nonradicular type of low back pain with occasional referred pain into his upper thighs with normal neurologic exam and mildly positive mechanical exam."

The claimant testified that he was next seen by Dr. S, to whom he had been referred by his wife who works for a pharmaceutical company. In an initial evaluation report of October 27, 1997, Dr. S noted that the claimant had pain primarily concentrated in the lumbosacral region with "some radiation of pain towards the bilateral buttocks regions." In addition, Dr. S stated that the claimant "is unable to enjoy activities, such as golfing and working around the house that he previously had been able to perform without low back pain." In progress notes from a December 2, 1997, visit, Dr. S stated that the pain has worsened and that it "now travels down the [right] leg stopping @ knee." The claimant testified that he was not able to do anything at that time secondary to the pain in his back. He stated that he could only walk and drive short distances and that he spent most of his time at home in the recliner or in bed. In his December 23, 1997, progress notes, Dr. S diagnosed chronic low back pain and lumbar radiculitis. In a February 26, 1998, report, Dr. S recommended an MRI to "rule out a discogenic origin of his pain." After he received the

results of the MRI, Dr. S referred the claimant to Dr. Y. On April 14, 1998, the claimant was examined by Dr. Y. Dr. Y reviewed the lumbar MRI results, which demonstrated that the claimant had degenerative disc disease at L4-5 and L5-S1 with slight bulges and herniation at L2-3 "which may well be impinging on the right L3 nerve root." Dr. Y noted that the claimant's low back pain is "aggravated by bending, prolonged sitting, conjugal relations, golf and light household chores as well as other activities of daily living" and that the pain "interferes with his lifestyle, ability to work, and persists at an unacceptable level." Dr. Y started the claimant on a series of epidural steroid injections, which were unsuccessful. In a June 4, 1998, report, Dr. Y stated that claimant "is unable to work at this time and I am placing him in a no-work status as of this date." It is undisputed that the carrier initiated temporary income benefits as of June 4, 1998; thus, the question before the hearing officer, and before us on appeal, is the period of disability, if any, prior to June 4, 1998. On November 5, 1998, Dr. Y performed surgery on the claimant's back. Specifically, he performed a laminotomy, foraminotomy and discectomy right L2-3 and bilateral L4-5 and a laminectomy, foraminotomy and discectomy at bilateral L5-S1. The claimant testified that the surgery was successful in relieving his pain.

On cross-examination, the claimant testified that he was claiming disability from his compensable injury for the period from December 2, 1997, through the date of the hearing. He stated that he chose December 2nd as the starting date of disability because at that point he was no longer able to complete his physical therapy. In addition, the claimant acknowledged that he was hospitalized for a week in March 1998 because of a long-standing problem he had with cluster headaches. Treatment notes from the doctors who treat the claimant's headaches indicate that he was hospitalized for "inpatient IV DHE therapy and detoxification with Methadone," due to his "habituation to Oxycontin." The claimant testified that the doctors who were treating him for his headaches knew about his back problems and that he could not provide an explanation for why his back problems were not referenced in the records of his headache treatment until July 1998. On redirect examination, the claimant testified that he continued to have back pain for the period of time he was hospitalized for the headache treatment and detoxification in March 1998, noting that his back pain did not go away until he had his back surgery.

As noted above, the carrier accepted that the claimant's disability began on June 4, 1998, when Dr. Y took him off work. Therefore, the question is whether, and if so for what period, the claimant had disability prior to June 4, 1998. The hearing officer determined that the claimant had disability from December 2, 1997, through the date of the hearing. In its appeal, the carrier argues that the hearing officer "seems to base his findings of disability beginning on December 2, 1997, solely on the basis of the Claimant's own testimony . . . ." Initially, we note that it is well-settled that the hearing officer can find disability on the basis of the claimant's testimony alone, even when contradicted by medical evidence. Houston General Ins. Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); see also, Gee v. Liberty Mutual Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). Thus, in this instance, the hearing officer as the sole judge of the weight, credibility, relevance, and materiality of the evidence, Section 410.165, was free to find disability based "solely" on the claimant's testimony. However, as the hearing officer noted, he determined that the medical evidence was corroborative of the claimant's testimony that his back condition became progressively worse with the passage of time such that he was not able to work on December 2, 1997. In that regard, the hearing officer stated:

This is practically a text book case of the slowly degenerating back condition from a low back injury, with the symptoms increasing and intensifying with time and physical activity. The medical reports chronologically track the testimony of the Claimant. The medical condition of his back deteriorated from July 1997 until December 2, 1997, to the point that he was physically unable to work in any employment similar to his July 1997 job. Although [Dr. S] does not say the Claimant should not work, possibly because he was already unemployed and not working, his description of the Claimant's condition on December 2, 1997 is sufficient to corroborate and support the Claimant's testimony.

The hearing officer was acting within his province as the fact finder in considering the medical evidence and drawing inferences from that evidence. The inferences drawn by the hearing officer from the medical evidence are reasonable ones, although they are not the only inferences that could have been drawn. The hearing officer considered the claimant's testimony and the medical evidence of the claimant's deteriorating condition and determined that that evidence supported a determination that the claimant had disability as a result of his compensable injury beginning on December 2, 1997. Our review of the record does not demonstrate that that determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, no sound basis exists for us to reverse the disability determination on appeal.

The hearing officer's decision and order are affirmed.

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Judy L. Stephens  
Appeals Judge