

APPEAL NO. 990441

On February 2, 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 issue at the CCH was whether the appellant (claimant) had disability from October 6, 1998, through December 1, 1998, resulting from the injury sustained on _____. The claimant requests reversal of the hearing officer's decision that she did not have disability from October 6, 1998, through December 1, 1998. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

Claimant testified that on Friday, _____, while working as the educational center coordinator for the employer's day care center, which was also referred to as a school, she injured her back helping to restrain a seven-year-old child. The parties stipulated that claimant sustained a compensable injury on _____. Claimant said that the employer sent her to Dr. R, that Dr. R released her to return to work, and that she returned to work on Monday, (3 days after the date of injury), and continued to work for the employer in her regular job until she was laid off on May 17, 1998. An employer's supplemental injury report noted that claimant returned to full duty at full pay on (3 days after the date of injury). Claimant said that although she did not feel that she was able to work after her injury because of problems with sitting and walking, she had to work or else she would have been terminated because Dr. R had released her to return to work. On September 19, 1997, Dr. R wrote that claimant could return to modified duty and on October 20, 1997, he diagnosed claimant as having a lumbar sprain and released her to full duty.

Dr. M reported that a lumbar MRI done in January 1998 showed mild disc bulges at L3-4, L4-5, and L5-S1 without compromise of the neuroforamina or central canal. Claimant said that at carrier's request she was examined by Dr. GV. Dr. GV wrote on January 21, 1998, that the MRI did not show evidence of nerve compression or disc herniation and that he did not foresee surgery for claimant. Claimant changed treating doctors to Dr. GV and he wrote on May 14, 1998, that claimant complained of increasing back pain, that her examination was normal, and that the MRI showed a small annular tear at L5-S1 and slight facet arthrosis at that level. Dr. GV noted that claimant was still working at that time.

Claimant said that employees who want to work during the summer must apply to the employer to do so; that she had worked the previous two summers for the employer, apparently in 1996 and 1997; and that if an employee does not apply to work during the summer, then they are laid off and the employer files paperwork with the Texas Workforce Commission (TWC) for unemployment benefits for laid off workers. Claimant said that she was laid off on May 17, 1998. She said that the employer filed paperwork for unemployment benefits for her with the TWC and that she called the TWC, but that she did not receive any unemployment benefits because Dr. B, D.C., took her off work.

Claimant was examined by Dr. B on May 29, 1998, and on that day Dr. B diagnosed claimant as having a lumbar sprain and myofascitis and wrote that claimant is unable to work as a result of her _____, work injury. At carrier's request Dr. W reviewed medical records and the MRI report and he wrote on June 4, 1998, that claimant had a soft tissue injury and that no significant pathology was noted on any tests. Claimant said that she hurt her neck in a motor vehicle accident in June 1998 and was treated by Dr. B once or twice for that injury. On July 6, 1998, Dr. GV wrote that claimant had a "tiny" annular tear at L5-S1 with mild facet arthrosis at that level. Claimant changed treating doctors to Dr. B in July 1998 and he has provided her with chiropractic treatment. Dr. B referred her to Dr. MA, who wrote on August 19, 1998, that claimant has lumbar radiculopathy, myofascial disease, bursitis, and depression.

Claimant said that school started again in August 1998 but that she did not return to work until December 1, 1998, when she was released to light-duty work with restrictions by Dr. B, and that she has worked since December 1, 1998. Claimant said her condition improved with Dr. B's treatment but that she was still unable to work in October and November 1998, and noted that she had problems with walking and bending and that she had undergone work hardening.

Dr. B wrote on September 3, 1998, that claimant had improved significantly but still had room for improvement. Dr. MA wrote that claimant had a lumbar epidural steroid injection on September 11, 1998. Dr. B wrote in October 1998, that claimant continued to have spasms and pain in her low back and that she had a little bit of a limp in her leg. On November 25, 1998, Dr. B wrote that claimant could return to light duty on November 30, 1998, with restrictions of no bending or stooping, no prolonged sitting, no lifting over five pounds overhead, and no lifting over 20 pounds. Claimant said that she returned to work on December 1, 1998, working light duty, and that she felt that her condition had improved to the point where she could return to work because her walking, bending, and stooping were better. She said that she is not completely recovered from her work injury and still sees Dr. B.

Dr. B testified that claimant should not have been working in May 1998 because working was making her condition worse; that he took her off work at that time; that claimant has limitations on lifting, bending, squatting, and kneeling; that claimant was unable to work from October 6 to December 1, 1998; that at the end of November he gave claimant a light-duty release; and that claimant has improved significantly under his care. He said that he treated claimant for her neck injury from the automobile accident for only a short period of time and that she got over that injury fairly quickly.

MS, the employer's workers' compensation and safety officer, testified that she was told by a representative of the TWC that claimant received two weeks of unemployment benefits through June 12th; that only so many of the employer's centers are open during the summer and that employees must request to work during the summer; that she does not know if claimant requested to work during the summer of 1998; that when claimant returned to work with restrictions on December 1, 1998, there were no "ECC" (apparently

educational center coordinator, claimant's job at the time of injury) jobs open; that even with claimant's restrictions, had there been an ECC job open claimant would have been placed in that job; and that claimant was placed in a job as a family service social worker, which, she said, is predominately a desk job.

The issue at the CCH was whether claimant had disability from October 6 through December 1, 1998. "Disability" means "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The hearing officer found that, due to the "claimed injury," claimant was not unable to obtain and retain employment at wages equivalent to claimant's preinjury wage from October 6 to December 1, 1998, and the hearing officer concluded that claimant did not have disability from October 6 to December 1, 1998. 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). As the finder of fact, the hearing officer resolves conflicts in the evidence, including the medical evidence, and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. While Dr. B and claimant testified that claimant was unable to work in October and November 1998, Dr. R had reported in October 1997 that claimant could work full duty and in fact claimant worked at her regular job from (3 days after the date of injury), to May 17, 1998, when she was laid off. In addition, the hearing officer noted that on September 3, 1998, Dr. B had written that claimant was significantly improved and that the evidence did not establish that there was any substantial change in claimant's condition between that date and November 30, 1998, when Dr. B released claimant to light-duty work, and thus the hearing officer noted that the testimony of Dr. B and claimant was not persuasive that claimant's condition was any different in September 1998 than it was in December 1998, when she returned to work. We conclude that the hearing officer's decision is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge