APPEAL NO. 990621

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 16, 1999, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer determined that respondent (claimant) sustained a compensable (right shoulder) injury on _____ (all dates are 1998), that claimant timely reported her injury to the employer and that claimant had disability from July 16th to October 15th.

Appellant (carrier) appealed the adverse findings, contending that claimant's testimony was not credible, pointing to inconsistencies, that claimant had not reported a shoulder injury to her manager and that claimant does not have disability or, in the alternative, claimant's disability is limited to the period claimed by the claimant. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

Claimant was employed (employer). Claimant testified that on _____, as she was cleaning tables, her right shoulder "popped" and she felt immediate pain while she was taking dishes off a table. Claimant said that she was holding four sets of dishes in each hand at the time. Claimant said that she told her manager, Mr. L, about the injury at the time but that he just told her to finish her shift. Claimant said that she worked about four more hours, cleaning tables, but she was in such pain that she was unable to do the evening dishwashing. Claimant admitted that she liked the bussing work better than the dishwashing. Claimant said that when she left, Mr. L had her sign an employment termination form.

Mr. L testified that claimant told him that she had hurt her back on _____ and that he had told her that, if she could not wash dishes, she should go home. Mr. L denies that claimant was asked to sign, or signed, the employment termination form on _____. Mr. L said that claimant did not come in to work the next day and that he had assumed that she had abandoned her employment. Mr. L said that claimant did come in the following week to pick up her last check and at that time he sat down with her and explained the employment termination form and had her sign it.

Claimant testified that her shoulder got worse and became swollen on the evening of _____. She said that she went back to pick up her last check two days later, on Friday, (2 days after the date of injury), and that she did not see or speak with Mr. L at that time. Claimant said that her shoulder continued to bother her and that she went to a hospital on August 10th and saw a doctor. (Claimant testified she did not have money or transportation to see a doctor earlier. Claimant testified that she took a bus to and from work.) Claimant said that some x-rays were taken and the doctor told her she had a "torn

shoulder" and gave her an off-work slip taking her off work for two weeks and light duty for two weeks. There are no medical reports or records in evidence and claimant said that she left the off-work slip at home in spite of having been asked by carrier's adjuster to take it to her manager. The employment termination form signed by claimant is in evidence, but is undated, giving as a reason for termination "walked out in middle of shift." An instruction on that form states "If involuntary, be sure to put dates of counseling reports–at least two." Mr. L testified that he was unaware that claimant was alleging a work-related shoulder injury until mid October 1998.

The hearing officer comments, in the Statement of the Evidence, that he found claimant sustained a right shoulder injury "based mainly on the testimony." The hearing officer obviously believed claimant's testimony that she reported her injury to Mr. L on _____. Claimant testified that she returned to work for another employer in January 1999. At the CCH, claimant's attorney argued that claimant only had 30 days of disability based on what claimant testified that the hospital doctor told her (triple hearsay).

Regarding the injury and notice issues, the evidence is in some conflict and certainly different inferences could be drawn from the evidence. However, the hearing officer obviously found claimant's testimony credible and accepted her version of events. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as 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 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Further, as the carrier has noted, we have frequently held that issues of injury and disability can be proved by the claimant's testimony alone, if believed. Texas Workers' Compensation Commission Appeal No. 950176, decided March 8, 1995. We find the hearing officer's decision on the injury and notice issues supported by the evidence, although another fact finder may have drawn different inferences from the same evidence.

However, on the disability issue, we are unable to determine how the hearing officer arrived at the ending date of the disability. Clearly the hearing officer could infer disability after _____, based on claimant's testimony, but claimant testified that the hospital doctor only took her off work for two weeks and on light duty for two weeks on August 10th. Disability is defined as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). There was no medical evidence of disability and claimant's testimony only established that a doctor told her she was either off work or on light duty for four weeks. Further, claimant, at the CCH, only claimed 30 days disability (presumably from August 10th). There is simply no evidence that we can discern that establishes October 15th as the ending date of disability. Consequently, we remand the case for the hearing officer to determine a date for the ending of disability that has support in the record or to explain how he arrived at the October 15th date.

We affirm the hearing officer's decision and order on the injury and notice issues. We reverse the hearing officer's decision on the ending date of disability as not being supported by the evidence or testimony and remand for the hearing officer to find an ending date of disability supported by some evidence or explain how he arrived at the October 15th date. No further evidentiary hearing or argument is needed and the hearing officer can answer this remand based on the record.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge