APPEAL NO. 990755

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 18, 1999. The single issue at the CCH was whether the respondent (claimant) had disability as a result of a compensable injury sustained on _____, and the period of any disability. The hearing officer determined that the claimant had disability from January 24, 1998, to October 14, 1998. The appellant (carrier) appeals, urging that there was no period of disability established by the evidence, that there is no rational basis for the ending date of the disability found, and that the hearing officer prejudicially erred in several evidentiary and procedural rulings by restricting the carrier's right to impeach the claimant. The claimant, in a "Response to Carrier's Request for Review" (not timely filed as an appeal), argues that there is sufficient evidence to support the hearing officer's determination that the claimant suffered disability, urges that the carrier's appeal of disability opens up the entire period of disability through December 28, 1998, but, regarding the relief requested, "prays that the Decision and Order of the Hearing Officer be affirmed." We address only the findings and conclusions of the hearing officer that are appealed.

DECISION

Affirmed.

The claimant testified that she sustained neck and back injuries when she tripped, twisted, and fell backwards over some rolls of carpeting on _____, while in the performance of her duties as an assistant manager at the employer's furniture business. Her duties included some moving of furniture and other activities in designing and turning merchandise from one area to another. The parties subsequently agreed that the claimant sustained neck and low back injuries. The claimant left the employment of the employer a couple of days after the incident, apparently as a result of an earlier agreement that she would be terminated or that she would resign. She was apparently paid severance pay through February 1998. She also testified that she filed for and received unemployment compensation after the carrier's adjuster told her that was the only option. The claimant, who had prior back injuries which she states were different and had resolved, went to her current treating doctor, Dr. G, for her _____ injuries on February 4, 1998. Dr. G initially diagnosed a "cervical lumbar strain and lumbar radiculopathy," put her on light-duty status, and prescribed medication and therapy. Subsequently, she had an MRI in March 1998 which showed disc herniation at both the cervical and lumbar areas for which she underwent a series of epidural steroid injections. A note from Dr. G dated April 15, 1998, indicates that the claimant is not able to work and later medical reports indicate that she continues off duty if conservative treatment fails. A required medical examination report dated July 6, 1998, indicates that the claimant reached maximum medical improvement (MMI) on July 6, 1998, with a seven percent impairment rating (IR), and that the doctor did not see contraindications for her to return to normal employment. Dr. G noted on July 22nd that the claimant still has intermittent pain and opined that if she fails conservative therapy, she would be a candidate for surgery. A Dr. L was appointed to render an opinion on MMI

and IR and in a report dated August 27, 1998, he opined that the claimant was not at MMI at that time. In a report of October 14, 1998, Dr. G reports that the claimant claimed that she had such severe pain that she had been bedridden for several days (this the hearing officer found not to be credible) and rendered a physical examination that was largely negative in supporting continuing disability. Dr. G stated that she might benefit from an EMG to help discern the cause of the diffuse numbness she indicated she was experiencing in the extremities, and stated "I explained to her based on her previous MRI, I cannot localize her pathology to her symptoms" and that "it is really not structurally possible." He indicated he was going to recommend her referral to the restoration/rehabilitation program called PRIDE. Dr. P, a doctor with that program, agreed with this referral and was of the opinion that the claimant was too disabled to work.

Dr. O performed a peer review of the claimant's records which included videotapes and the various medical reports. In a December 3, 1998, report, Dr. O indicates his opinion that the claimant is able to work a full day at a light capacity work level, noting that her MRIs do show objective data that may make the claimant symptomatic. The carrier introduced a report and testimony from a Dr. B, who reviewed the claimant's medical records and videos and stated his opinion that the lumbar condition was not a new situation and is a long-term degenerative condition not caused by the fall of _____. His opinion was that the claimant had recovered completely from her injuries as of June 10, 1998. The carrier also introduced surveillance videos taken in June and November 1998 which show the claimant in various activities of walking, driving her car, running errands, carrying a large load of dry cleaning, stooping, and bending.

During the course of the hearing, the carrier attempted to ask the claimant questions about statements she made in a sworn deposition (involving a totally unrelated proceeding) taken on November 23, 1998, indicating that it was attempting to impeach the claimant. Although the nature of the particular proceeding was not entirely clear, the claimant apparently was questioned about assets she obtained from a divorce in 1992, the total value of the property, property schedules from prior bankruptcy proceedings, some photography self-employment some time earlier, and the statement that she would be employed at the time of the deposition if it were not for that particular litigation. The carrier asserted that the claimant did not truthfully disclose the value of assets in a prior bankruptcy litigation as shown by the deposition and that she had used an incorrect name in an earlier divorce action. The carrier offered the November 1998 deposition in evidence for impeachment purposes and also because it went to the direct issue in the case, as the claimant "admits" in the deposition that she could work and that she was engaged in some self-employed business (not clear from our reading of the deposition). The deposition was not admitted on the basis that it had not been exchanged.

Carrier urges that the great weight and preponderance of the evidence is contrary to the finding of disability, and that reversible error was committed by the hearing officer in improperly prohibiting the carrier from "questioning, impeaching and cross-examining the claimant on issues that were relevant to the issue of disability." Regarding disability, the claimant testified about her job duties, the mechanism of her injury, that she could not

perform those job functions after the injury, and generally described the course of her treatment and activities after the injury. The parties agreed that the claimant sustained injuries to her neck and lower back. There were numerous medical records in evidence which show the course of treatment, including diagnostic tests showing herniation of discs, epidural injections, therapy, prescribed medications and examinations by a number of doctors. The claimant's treating doctor placed the claimant on restricted duty at the first visit and subsequently took her off and maintained her off work. There were contrary medical opinions concerning the effect of a prior back injury and about when any disability ended. Videos taken in June 1998 and November 1998 (the November videos became of lesser significance given the ending date for disability in October, as found by the hearing officer) depict the claimant performing various physical activities such as walking, driving, running errands, carrying dry cleaning, and stooping and bending. While these types of activities may tend to discount any ability to work at all (a concept seen in supplemental income benefit situations), it does not, in and of itself, show that a claimant does not have disability as that term is defined or has been held to encompass. Section 401.011(16). *See* Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, for an early discussion of disability. As a general rule, a claimant does not have to show that he or she actively sought employment under a restricted release to work. Texas Workers' Compensation Commission Appeal No. 950594, decided May 22, 1995; Texas Workers' Compensation Commission Appeal No. 950872, decided July 10, 1995. In any event, whether a claimant has disability is generally a factual determination for the hearing officer to make based on all the evidence before him or her. Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. In this case, we cannot conclude that the determination of the hearing officer that the claimant had disability was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). In this regard, the corroborative medical evidence was obviously persuasive to the hearing officer, as he does indicate in his decision that he did not find the claimant believable in some aspects of her testimony although he apparently believed other aspects. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986).

Regarding the October 14, 1998, ending date of disability as found by the hearing officer, the evidence was again in conflict. As indicated above, the medical opinions varied on the claimant's conditions during the period of time following the incident of _____, with MMI being found by one doctor, not being found by another, and opinions that the claimant had no disability after June 1998, to the opinion that disability still continues. While the evidence concerning the ending date found by the hearing officer is not crystal clear, we cannot hold that there is not evidence in support of the ending date he found. In this regard, although Dr. G, the treating doctor, did not specifically release the claimant from or continue her on disability on October 14, 1998, his report of his examination of that date could reasonably be inferred to reflect a much improved condition that would support an end to physical limitations on claimant's returning to work. Again, the hearing officer had to resolve significant conflicts in the evidence and there is evidence to support the resolution he made. We cannot conclude that his finding is so contrary to the evidence as to be

clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ).

The carrier urges prejudicial error in the hearing officer's restricting its right to impeach the claimant's credibility based on prior inconsistent statements and admissions of false statements in a deposition taken on another matter on November 23, 1998. As indicated, the matters basically related to assets valued and listed in prior bankruptcy and divorce actions. There were also matters relating to the claimant's employment activity at the time, and her business interests and property from previous self-employment endeavors. Regarding impeachment of a witness by prior inconsistent statements under oath, we find error in the hearing officer's limiting the carrier on the basis that the deposition had not been previously exchanged. We have addressed a similar issue in a prior case with the hearing officer (Texas Workers' Compensation Commission Appeal No. 982173, decided October 28, 1998), and we found error to have occurred. Again, we conclude that the hearing officer has misapplied the concepts of impeachment, recognizing that the Civil Rules of Evidence do not strictly apply to CCHs, but do provide guidance in the conduct of a CCH and in preserving due process concepts. Appeal No. 982173. It is entirely appropriate to be permitted to impeach a witness based on prior inconsistent statements under oath. However, we have reviewed the CCH record on this issue, the nonadmitted deposition, and the well-written brief filed by the carrier. Although we find error, we do not find a degree of prejudice from the error that would mandate reversal. In this regard, it is significant that the hearing officer's finding was that disability ended on October 14, 1998, and well before the date of the deposition which, in part, concerned employment attempts or capabilities at that time, and which the carrier felt supported impeachment of the claimant together with evidence on the issue of disability. We also note that the carrier was allowed a certain latitude in examining the claimant and bringing out admissions of misleading statements although the claimant also claimed not remembering certain matters. Further, it was clear that the hearing officer did not find the claimant to be credible in some of her testimony and so indicated in his decision. While greater latitude on impeaching from the deposition was clearly the correct procedure, our review of the deposition and the matters related to other legal proceedings leads us to conclude that the already limited credibility of the claimant, as indicated by the hearing officer, would not have been appreciably affected. We cannot conclude that this rises to the level of prejudicial error under the standards set forth in Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

For the foregoing reasons, the decision and order are affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge