

APPEAL NO. 990786

On March 23, 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 respondent (claimant) sustained a compensable injury on _____; and (2) whether claimant has sustained disability. The appellant (carrier) requests reversal of the hearing officer's decision that: (1) claimant sustained a compensable injury on _____; and (2) claimant had disability from September 14 to November 30, 1998, and from "March 16, 1998 [sic] until at least the date of this [CCH]."

DECISION

Affirmed as reformed herein.

Claimant has worked for (employer) since July 1988. He has had various jobs with employer and has sustained several work-related injuries, for which he has been treated by Dr. B. Claimant said he injured his lower back in a vehicle accident in 1989 or 1990. Dr. B wrote in November 1992 that about three years earlier claimant had been off work for one week following a lumbosacral strain and that claimant had responded to conservative care for that injury. Dr. B also wrote in November 1992 that claimant had lower back pain on November 3, 1992, when he lifted a bale of rubber onto a conveyor belt, and Dr. B diagnosed claimant as having a lumbosacral sprain and possible herniated disc and noted that claimant was disabled from returning to his regular duties. An MRI of claimant's lumbar spine done on November 19, 1992, was negative without evidence of disc herniation. Dr. B noted in January 1993 that claimant was experiencing minimal lower back pain and suggested a trial return to his regular duties. Dr. B wrote in May 1993 that claimant had recurrent lower back pain and in July 1993 wrote that claimant had minimal lower back pain and that he advised claimant to continue with his regular duties. Claimant was treated with medications and therapy for his 1992 injury.

Dr. B wrote in March 1994 that claimant had lower back pain following an injury that occurred on (prior date of injury), when claimant picked up a plug and that claimant had been placed on light duty. An MRI of claimant's lumbar spine done in March 1994 was normal. Dr. B noted in April 1994 that claimant had improved with conservative care.

Dr. B reported in October 1995 that by September 1995 claimant was doing well, with only occasional lower back pain with excessive activity, but that on July 13, 1995, claimant had an onset of cervical pain and numbness in the fingers of his left hand while digging at work and Dr. B provided conservative treatment for that injury. Dr. B wrote in January 1996 that an EMG was within normal limits but that claimant complained of paresthesias in the fingers of his left hand. Dr. B noted in February 1996 that a bone scan was within normal limits and that claimant was no longer experiencing numbness or cramping in his left hand and no longer had neck pain.

With regard to the current claim, claimant testified that on _____, he was working as a lab technician in the employer's laboratory and that, while he was in a squatting position, he felt sharp pain in his lower and mid back when he reached out to get a sample to test. Claimant was seen at the employer's dispensary on July 16th and on several occasions after that with complaints of back pain. Claimant first went to Dr. B on September 17, 1998, for his claimed injury of _____, and Dr. B wrote that claimant's previous lower back sprain had previously completely resolved, that, in his opinion, the recent injury was a new injury, that claimant's lumbar range of motion was markedly decreased, and that claimant sustained an acute lumbosacral sprain.

Claimant and carrier entered into a benefit review conference (BRC) agreement on October 13, 1998, which states that the compensability issue concerning a _____, injury is still in dispute and has not been resolved, and that the parties agree that the carrier will approve an MRI and that the claimant will see a doctor of the carrier's choice "in an effort to attempt to resolve the issue." Claimant underwent a lumbar MRI on October 19, 1998, which Dr. S reported was normal. Carrier chose Dr. BU to examine claimant. On November 25, 1998, Dr. BU examined claimant and reviewed claimant's medical records and diagnostic tests. He reported that claimant reached maximum medical improvement on November 25, 1998, with a zero percent impairment rating. Dr. BU also reported that claimant could return to work without limitations on November 25, 1998, that, in his opinion, claimant demonstrated no evidence of lumbar spine pathology, and that he believes that claimant suffered a repetitive strain to his thoracic spine. In a subsequent report, Dr. BU wrote that he believes that claimant did not have a new injury on _____.

Claimant testified that, prior to his injury of _____, his previous back problems had resolved; that he has not had any surgery on his lower back; that Dr. B told him that a lumbar sprain/strain would not show up on an MRI; that after _____, until September 14, 1998, he worked as an operator for the employer and was seeing the company doctor in the employer's dispensary during that time; that his pain got to the point where it would not go away; that he then saw Dr. B on September 17th; that Dr. B took him off work; that he has not had therapy recommended by Dr. B because carrier denied his claim; that, at his request, Dr. B reluctantly released him to return to work on December 1, 1998; that when he returned to work on December 1st he made less wages than he made before his injury of July 14th but that the reduction in wages was due to a change in jobs due to a line shutdown; that a week before the CCH, Dr. B put him on light-duty status; and that he makes less wages when working light duty because light duty does not permit the overtime work he had previously worked.

The hearing officer found that on _____, claimant sustained an injury while he was engaged in the exercise of his job duties with employer; that from September 14 until November 30, 1998, claimant's compensable injury of _____, prevented him from obtaining and retaining employment at wages equivalent to the wage he earned prior to _____; and that from "March 16, 1998 [sic], until at least the date of the [CCH], claimant's compensable injury of _____, has prevented him from obtaining and

retaining employment at wages equivalent to the wage he earned prior to _____." The hearing officer concluded that claimant sustained a compensable injury on _____; that claimant sustained disability from September 14 through November 30, 1998; and that "claimant has sustained recurrent disability from March 16, 1998 [sic], until at least the date of this [CCH]." The hearing officer's decision states in part that "claimant sustained a new compensable injury on _____, which injury resulted in disability from September 14 until November 30, 1998, and again from March 16, 1998 [sic], until at least the date of this [CCH]." The carrier contends that the hearing officer's decision on the injury and disability issues is against the great weight and preponderance of the evidence.

Claimant had the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Claimant also had the burden to prove that he had disability, which the 1989 Act defines as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). 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 trier of fact, the hearing officer resolves conflicts in the 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. The hearing officer states in her decision that she found claimant to be a credible witness. Generally, in workers' compensation cases, the issues of injury and disability may be established by the testimony of the claimant alone. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.).

Although there is conflicting evidence, claimant's testimony and Dr. B's opinion support the hearing officer's decision that claimant sustained a new compensable injury on _____. Any inconsistency between claimant's testimony and his recorded statement was for the hearing officer to resolve as the finder of fact. Carrier mentions the BRC agreement in its appeal. The stated purpose of the MRI and being examined by a carrier's doctor was to attempt to resolve the compensability issue, and claimant complied with the agreement by having the MRI and going to Dr. BU. We do not view the results of the MRI or Dr. BU's opinion as being dispositive on the issue of whether claimant sustained a compensable injury on _____, in light of claimant's testimony and Dr. B's opinion. Strains and sprains sustained in the course and scope of employment are compensable. Hanover Insurance Company v. Johnson, 397 S.W. 2d 904 (Tex. Civ. App.-Waco 1965, writ ref. n.r.e.). Dr. B's opinion was that claimant sustained a new injury, which he diagnosed as an acute lumbosacral sprain.

Claimant's testimony supports the hearing officer's decision that he had disability from September 14 through November 30, 1998. However, the hearing officer obviously made typographical errors in finding and concluding that claimant had disability from March 16, 1998, until the date of the CCH, because his new injury was on _____, and there is no evidence of disability from a prior compensable injury beginning on March 16,

1998. In addition, with regard to the disability issue the hearing officer first concludes that claimant had disability from September 14 to November 30, 1998, and then concludes that he had "recurrent" disability from March 16, 1998, to at least the date of the CCH, which shows that the latter period of disability, termed "recurrent," was to come after November 30, 1998. Furthermore, the hearing officer decides that claimant had disability from September 14 until November 30, 1998, and following that decides that claimant "again" had disability from March 16, 1998, until at least the date of the CCH, which demonstrates that the March 16, 1998, date was in error. The evidence reflects that the latter period of disability actually began on March 16, 1999, a week before the CCH, when claimant was put on light duty. We reform the hearing officer's finding, conclusion, and decision on disability to replace the March 16, 1998, date with a date of March 16, 1999, and, thus as reformed, the decision on disability is that claimant had disability from September 14 to November 30, 1998, and again from March 16, 1999, until at least the date of the CCH.

We conclude that the hearing officer's decision on the issues of injury and disability, as reformed herein, is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

As reformed herein, the hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge