

APPEAL NO. 990875

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 March 30, 1999. With respect to the issues before her, the hearing officer determined that: (1) the _____, compensable injury of the cross-appellant (claimant) did not extend to and include the thoracic and lumbar spine, and left rib cage. The hearing officer determined that claimant broke his left femur, sustained facial lacerations, and injured his left ring finger in the _____, incident, but that he did not injure any other portion of his left hand. The hearing officer also determined that: (1) "the question of whether the claimant sustained a closed head injury and lost the sight in his left eye as a result of the compensable injury of _____, cannot be determined from the evidence"; and (2) "the evidence is insufficient to determine if the claimant has reached [maximum medical improvement (MMI)]." The hearing officer further determined that claimant did not have disability after March 23, 1998.

Claimant appeals the determinations regarding extent of injury and disability on sufficiency grounds. Cross-respondent (carrier) responds that the Appeals Panel should affirm these appealed determinations. Carrier appealed the determinations that the hearing officer is "unable to determine" the date of MMI and whether claimant's compensable injury extended to a head injury and loss of sight in his left eye. The appeals file does not contain a response from claimant.

DECISION

We affirm in part and reverse and remand in part.

In its cross-appeal, carrier contends the hearing officer erred in determining that "the question of whether the claimant sustained a closed head injury and lost the sight in his left eye as a result of the compensable injury of _____, cannot be determined from the evidence." We would note that claimant had the burden of proof regarding extent of injury.

Texas Workers' Compensation Commission Appeal No. 950537, decided May 24, 1995. If claimant did not meet his burden of proof, then the hearing officer should make a determination in carrier's favor on the issue. We must remand this case to the hearing officer for reconsideration of this issue. We note that the hearing officer may choose to seek a report from a required medical examination (RME) doctor on the issue of extent of injury.

Carrier next contends that the hearing officer erred in determining that "the evidence is insufficient to determine if the claimant has reached [MMI]." The hearing officer determined that the designated doctor, Dr. E, stated that claimant had attained MMI if the compensable injury did not include the thoracic and lumbar spine, left shoulder, left hand, closed head injury, and left rib cage. The hearing officer further determined that the designated doctor did not address the claimant's loss of sight in his left eye when he examined claimant. The hearing officer determined that the issues of whether claimant sustained a closed head injury and partially lost the sight in his left eye were not ripe for determination. Given the posture of this case, with a portion of the extent of injury issue left

undecided, we conclude that the hearing officer did not err in making her determination that MMI cannot be determined. We affirm the hearing officer's determination regarding MMI.

In his appeal, claimant contends the hearing officer erred in determining that his compensable injury did not extend to the thoracic and lumbar spine, left shoulder, and left rib cage. Claimant testified that he fell out of the bed of a truck that was traveling at a rate of about 50 miles per hour. He said he was knocked out and he woke up in the hospital. Claimant said he did not explain to the doctors that he had injuries to his head, left shoulder, left rib cage, left hand, and left knee. When asked about his head injury claimant said he "hit [his] eye" and that he cannot see. Claimant said he told Dr. SA about his head injury and that he also told the designated doctor, Dr. E, about the head injury. Claimant said he told Dr. SO about pain in his left knee. Claimant indicated that he sustained the claimed injuries in the _____, accident and that he has been unable to work since March 23, 1998, because of pain in his spine and rib area.

Claimant apparently began treating with Dr. SO on the date of his accident. In an August 8, 1997, report, Dr. SO diagnosed a femur fracture and multiple facial lacerations and contusions from falling out of a truck. Dr. SO noted a superficial laceration of the left eyebrow and upper lip, moderate swelling to the left side of claimant's face, and severe pain to the face and left thigh. An August 9, 1997, report states that claimant's left eyelid laceration had been repaired. In an August 10, 1997, report, Dr. SO noted that claimant fractured his "proximal third left finger." While in the hospital, claimant apparently experienced respiratory failure, was intubated, and placed on a respirator, but later recovered. Claimant underwent surgery on August 19, 1997, to place a pin in his femur. In January 1999, in answers to a deposition on written questions, Dr. SO: (1) stated that, as of his last examination of claimant, claimant's condition was "muscular pain"; (2) when asked whether claimant complained of his left shoulder, left knee, rib cage, thoracic spine, lumbar spine, or a head injury, replied that claimant complained of his left knee on April 23, 1998, (which was approximately eight months after his compensable injury); (3) indicated that, although he understands some Spanish, it is his procedure to have an interpreter with him; and (4) he did not experience any difficulties understanding the extent of claimant's injuries. Dr. SO further indicated that he did not have reason to believe that claimant failed to apprise him of his condition. In September 1998 medical report, Dr. SA indicated under "working diagnosis," that claimant has a "musculoskeletal ligamentous injury of the thoracic and lumbar spine"; and strain/sprain of the left shoulder; a strain/sprain of the left knee; and head and facial trauma with facial laceration. In a November 1998 medical record, Dr. SA stated that claimant has limited shoulder mobility, left knee tenderness and pain on flexion and extension, limited spinal range of motion (ROM), and muscle spasms in his back.

Under the 1989 Act, the claimant has the burden of proving that he sustained a compensable injury and the extent of the injury. Appeal No. 950537, *supra*. The 1989 Act defines injury, in pertinent part, as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Existence and extent of injury are fact questions for the hearing officer. Texas Workers' Compensation Commission Appeal No. 951959, decided January 3, 1996. The hearing officer is the sole judge of the weight and credibility to be given to the evidence and the relevance and

materiality to assign to the evidence. Section 410.165(a). As the fact finder, the hearing officer is charged with the responsibility to resolve the conflicts in the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer may believe all, none, or any part of any witness's testimony and may properly decide what weight she should assign to the evidence before her. Campos, supra. We will not substitute our judgment for the hearing officer's where her determinations are supported by sufficient evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this case, the hearing officer weighed the evidence and determined that claimant's injury did not extend to thoracic and lumbar spine, left shoulder, and left rib cage. This extent of injury issue involved a fact question for the hearing officer, which she resolved. Appeal No. 951959, *supra*. The hearing officer could decide to believe all, none, or any part the evidence and properly decided what weight to give to the evidence, including the medical evidence. Campos, supra. The evidence that claimant did not immediately complain of these additional injuries was a factor for the hearing officer to consider in resolving the fact issues in the case. After reviewing the evidence, we conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be wrong or manifestly unjust. Cain, supra. We affirm the hearing officer's determination that claimant's compensable injury did not extend to the thoracic and lumbar spine, left shoulder, and left rib cage. The hearing officer could also find from the evidence that claimant's left hand injury was limited to a left ring finger injury, and we affirm that determination. In affirming these determinations, we would note that there is nothing in the record to indicate that the hearing officer "did not consider all the evidence" in making her determinations.

Claimant contends the hearing officer erred in determining that claimant's facial lacerations from his compensable injury do not include a laceration of his left eye. Claimant contends that the hearing officer did not have jurisdiction over this issue, that the issue is not "ripe for adjudication," and that it has been forwarded for a benefit review conference (BRC) so that an required medical examination (RME) doctor may be consulted. Because we are remanding the determination regarding extent of injury and the alleged closed head injury/loss of sight injury, we also remand the issue regarding the eye laceration for reconsideration.

Claimant contends the hearing officer erred in determining that he did not have disability after March 23, 1998. The hearing officer determined that: (1) "claimant was unable to work because of his compensable injury, beginning _____, and ending March 11, 1998, when he returned to work"; and (2) "the medical records do not show . . . that the claimant was unable to work after March 23, 1998, as a result of his compensable injury" When asked why he was unable to work after March 23, 1998, claimant indicated that it was because of pain in his spine and rib area. A January 11, 1998, medical report from Dr. SO stated that claimant could return to light-duty work. A May 27, 1998, medical report from Dr. SO stated that claimant was still on light duty. A May 27, 1998, work release slip from Dr. SO stated that claimant could return to regular duty. A Supplemental Report of Injury (TWCC-6) stated that claimant returned to work on March 11, 1998, working his

regular hours, for “reduced pay.” Considering this evidence and claimant’s testimony, the hearing officer could consider that claimant was actually working after March 11, 1998, and that any claimed disability after March 23, 1998, was due to claimed injuries that were not part of the compensable injury. Therefore, we affirm the hearing officer’s disability determination in this case.

We affirm the hearing officer’s determinations regarding MMI and disability. We also affirm the hearing officer’s determination that claimant’s compensable injury did not extend to the thoracic and lumbar spine, left shoulder, left rib cage, and left hand, except for the left ring finger. We reverse the hearing officer’s determination regarding extent of injury and the closed head injury/loss of sight in claimant’s eye, and remand that issue to the hearing officer for reconsideration.

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.

Judy Stephens
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge