

APPEAL NO. 990957

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 16, 1999, with the record closing on April 2, 1999. The issues at the CCH were whether the respondent's (claimant) compensable injury of \_\_\_\_\_, extended to include a cervical injury, and whether claimant had disability as the result of his injury. An issue was added as to whether the Texas Workers' Compensation Commission (Commission) abused its discretion in allowing claimant to change his treating doctor to Dr. M.

The hearing officer held that claimant injured his neck and right wrist on \_\_\_\_\_, in addition to the agreed injuries to his head and low back, and that he had disability from October 14, 1998, until the date of the CCH. The hearing officer further held that there was no abuse of discretion in allowing a change to Dr. M.

The appellant (carrier) argues that there is either no evidence or insufficient evidence to support the hearing officer's decision. The carrier argues that the employer made an offer to accommodate any of claimant's physical restrictions and claimant "decided he could make more money obtaining short term disability payments from his employer and obtain temporary income benefits [TIBS] from the carrier." The carrier further argues that the hearing officer had no jurisdiction to argue compensability of the right wrist. Claimant responds that the evidence more than supports the decision of the hearing officer.

DECISION

Affirmed.

Claimant was employed by (employer) on \_\_\_\_\_, as a floorhand. He said that he had been employed in the oilfield or construction for most of his working life, had only a ninth-grade education, and did not read, write, or speak English. On the day in question, a high pressure hose whipped around and hit him in the back right side of the head, knocking his hard hat off. He jumped to a lower platform (the operator's floor) and when he landed, felt pain in his low back. A low back injury (notwithstanding the considerable testimony elicited about it) was stipulated as part of the compensable injury, along with an injury to the head and radiating right leg pain. (We would note that most of the testimony ultimately developed attributed his inability to work, or his restricted ability to work, to this stipulated injury.)

Claimant saw a doctor and was taken off work for a day and then returned from August 7 to 12, 1998, when he went to the emergency room (ER). Claimant was treated for his injury for the first few months by Dr. D. He was put on light duty and assigned light-duty work by the employer which consisted of cleaning the shop, trimming weeds with a machine that he moved from side to side, and driving a truck. He said he continued to have pain and complained to his supervisor. Although the disability issue was argued in

terms of when claimant left work entirely, he testified that he was limited to 40 hours work on light duty, so although he was paid the same hourly wage, the limit on hours resulted in less weekly pay than he had been making at the time of his injury. He said that while the employer had him listed as working 55 hours light duty one week, he was not paid for that amount of time nor did he work it.

Claimant changed to Dr. M when he felt that Dr. D was not helping him. He said he requested referral to Dr. S, a back specialist, but that Dr. D did not assist him. Claimant said the pain he had after his injury included neck and shoulder pain, and this was substantiated by testimony from Dr. M at the CCH.

Dr. M described at length the examination and objective testing he had done and we will not repeat this here for sake of brevity. Dr. M did not think there was a separate injury to claimant's shoulders, but only reflected referred cervical pain. He said that if there was preexisting degenerative disease in the spine, it was clearly aggravated by the incident of \_\_\_\_\_. It was his opinion that claimant was appropriately taken off work by him on October 14, 1998, and kept off work entirely because he could otherwise risk further damage. Dr. M was reluctant to release claimant until further evaluation by Dr. S had been conducted. Dr. M said that the light-duty work performed by claimant was bad for his back to the extent it involved twisting motions. Dr. M said that the spinal injury was more than a sprain and represented "segmental dysfunction." He indicated that payment for treatment, even for the accepted low back injury, had not been made.<sup>1</sup> He stated that the neck pain claimant complained about was right below the point of contact of the hose with his head. Dr. M first saw claimant on October 14, 1998.

Although Dr. M was allowed to somewhat freely testify that he thought claimant had "disability" under the 1989 Act, Dr. M said that his assumption of disability was that it meant an inability to perform the job done at time of injury. He said it was "possible" that claimant could do light work that would consist of light office work allowing him to move around at his leisure.

Claimant testified as to his injury; he said that he changed treating doctors because Dr. D was not helping him. On October 12, 1998, when he saw Dr. D, Dr. D told him that because the MRI said he was okay, he would keep him on light duty for only one more week. Claimant said he told Dr. D that he wanted to see another doctor because he still had pain.

Claimant spoke to Mr. S on October 13, 1998, about light duty. Claimant was asked if he also told Mr. S that he had heard he would be better off drawing workers' compensation benefits. He denied this and said at that time he did not know about the Commission and had only been told that he should have gone there right away. He said

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<sup>1</sup>This was not denied by the carrier's representative at the CCH, who became somewhat argumentative when the hearing officer pointed out that dispute over the appointment of Dr. M (made in the form of a Commission order) was not a basis for refusal to pay for medical treatment of the accepted injury.

that Mr. S told him he would be better off financially going through the company than coming to the Commission, and would not get as much money by going through the Commission. Claimant pointed out, and it was not refuted by the carrier, that he had received no TIBS. He had drawn some short-term disability through the employer, which was enough to cover his truck payment.

Asked as to why he could not, as of the date of the CCH, perform any work, he said that his low back continued to hurt him, with radiating pain down his right leg. He said that if he were given the choice of having his health back and being able to work versus how he was now, he would choose being at work and being well. Claimant said his hand injury had resolved and that Dr. M's treatment to him was making him feel better.

Dr. D's records reflect that claimant asked for a referral to a specialist in September and October because he was not feeling better. Dr. D treated claimant and kept him on light duty for what he described as an acute sprain. Dr. D found tenderness in the lumbar area at his September 25th examination. On October 12th he noted that claimant once again requested referral to Dr. S. The notes go on to state, "referral denied," and that claimant said he would find another doctor. An October 12, 1998, report noted a calcified lumbar herniation. There were records that claimant did not attend some September and October physical therapy sessions.

Mr. S testified about the injury and said his investigation determined that the hose had not been properly connected by a third party and, in fact, injured claimant. (Claimant's attorney agreed that there was also a third-party lawsuit.) Mr. S observed a large knot on the back of claimant's head. Mr. S was also questioned about his observations of claimant's movements and motions, and objection was made (and overruled) on the basis that Mr. S was not a doctor. Mr. S said that claimant was moving normally at the ER. He said that claimant was given a day's rest and told at the ER to report back to full duty thereafter. Mr. S said that while claimant told him he initially felt all right, he was worried that complications could arise. Mr. S agreed that claimant's right hand was hurt as well. Mr. S said that he would not dispute it if the doctor recorded pain in other regions of the body.

Mr. S said that claimant reported back to full duty; Mr. S went on vacation a few days later, and he returned on August 18th, he found that claimant was working on light duty. He essentially concurred with claimant's description of light duty and added that the job entailed taking out trash as well and driving a truck with chains around the yard to "drag" the yard. He went to claimant's house on October 13th after claimant had not reported to work as expected. He maintained that claimant was not satisfied with the compensation he had gotten. Mr. S said that more or less, claimant was still getting what his hourly wage had been when injured, overtime included (the hourly wage was apparently calculated based upon 13 weeks prior to his injury). Mr. S said that he agreed that he told claimant that he would be better off going through the company rather than workers' compensation after claimant said he had heard he'd be better off on compensation. Mr. S agreed that claimant was not happy with Dr. D and wanted to change, and Mr. S said that was all right

with the employer. Mr. S said he had no complaints about claimant's job performance. He said that there was lighter duty available, had claimant complained about what he was doing, in the nature of filing papers. At first, Mr. S said that claimant did not contend he was unable to do the light duty he had been doing, but then he (Mr. S) agreed that when claimant came in the next day, claimant said he was feeling lightheaded and having some difficulty driving, would be going to another doctor, and was in pain while doing the light duty (his back).

Mr. S said that he called "J" and was told that the only way claimant could be released from light duty would be with a doctor's excuse and this was conveyed to claimant. There was no evidence that lighter duty alternatives were conveyed to claimant. Mr. S agreed that jobs were created in order to keep injured employees working 40 hours. Testimony from Mr. S was somewhat confusing as to what claimant was paid during light duty; Mr. S stated both that claimant was paid the same weekly amount, and then stressed that he was paid the same hourly amount. However, as explanation for why claimant complained he was not making enough money to pay his truck payment, Mr. S appeared to agree that the final week claimant worked light duty he was not paid as much as he made at the time of injury.

It is axiomatic that issues involving the extent of injury and the issue of disability are matters of fact to be determined by the hearing officer and the Appeals Panel will not set aside the decision simply because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.- Houston [1st Dist.] 1987, no writ).

At the CCH, the carrier's representative objected to characterization of Dr. M's testimony or records as "medical" evidence. This is raised again on appeal to the extent that the carrier pointedly describes "testimony of a chiropractor" as insufficient evidence to support occurrence of a cervical injury. Medical evidence is not required to prove a cervical injury. To the extent that the carrier argues that the opinion of a chiropractor is not entitled to credence as medical evidence, we see no basis in the 1989 Act, which defines a chiropractor as a "doctor" (Section 401.011(17)), a "health care practitioner" (through Sections 401.011(19) and (21)), to whom a medical benefit is payable (Section 401.011(31)), for discounting the weight given to the evidence provided by a chiropractor. Concerning the jurisdictional argument raised about the right hand injury, there was no objection made to any evidence proffered on a hand injury, part of which came in carrier's case in chief. Claimant testified that this injury was resolved. The hand injury having been actually litigated without objection, we cannot agree that there was "jurisdictional" error in the hearing officer's inclusion of this as part of the extent of injury.

Finally, disability is the inability to obtain and retain employment equivalent to the preinjury average weekly wage. Section 401.011(16). The fact that someone is under restrictions or a light-duty release is evidence in favor of disability. Likewise, a hearing officer may consider, but is not bound by, the fact that a claimant was able to perform a light-duty task for some period of time for the employer. However, when a claimant contends he can no longer perform such light duty, the offset against any TIBS must lie in proof that a *bona fide* job offer was made and rejected, and TIBS can be reduced under Section 408.103(e). This did not occur in this case, nor was an issue brought forward. There is no requirement, as there is in provisions relating to supplemental income benefits, for a good faith job search to be made in order to receive TIBS.

While claimant was questioned at considerable length about his understanding of whether he would be better off financially if he stopped working and drew workers' compensation, the focus of the disability inquiry was appropriately on whether there was an inability to obtain and retain employment equivalent to claimant's preinjury average weekly wage. Part of the assessment of credibility of the hearing officer would involve evaluating the demeanor of claimant to conclude whether he could sit down and devise many of the calculations of financial advantage underlying the carrier's argument that he voluntarily left light-duty work he could otherwise have performed. And, as claimant had not actually drawn TIBS in the months prior to the hearing, the effect of any perceived "financial advantage" to claimant as an explanation for staying off work (rather than the effects of his injury) had evidently not been realized, and the hearing officer could give scant weight to this testimony as an explanation for claimant remaining off work.

Finally, we cannot agree that the hearing officer's finding that the Commission did not abuse its discretion in allowing a change of doctor to Dr. M was against the great weight and preponderance of the evidence in this case. The hearing officer could believe that the reasons for the change came within the scope of the criteria set forth in Section 408.022(c), rather than Section 408.022(d).

We affirm the hearing officer's decision and order and point out that this decision and order are binding hereby, pending any further appeal. See Section 410.205(b).

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge