

APPEAL NO. 991030

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 March 15, 1999. The issues at the CCH were whether the compensable injury sustained by the respondent/cross-appellant (claimant) on _____, extended to the head, right shoulder, and back; whether good cause, based on newly discovered evidence, exists to relieve the appellant/cross-respondent (carrier) from the effects of the agreement signed on October 7, 1998; and whether the claimant had disability resulting from the injury sustained on _____, and if so, for what periods. The hearing officer determined that the compensable injury extended to the head, but did not extend to the right shoulder and back; that good cause has not been shown to relieve the carrier from the effects of the agreement signed on October 7, 1998; and that the claimant had disability from January 8, 1998, through July 9, 1998, and from October 7, 1998, through November 20, 1998. The carrier appeals findings of fact going to the determination that the injury extended to the head, that the claimant had disability for the periods found, and that the carrier did not show good cause to be relieved of the effects of the agreement, asserting that the findings were not supported by the evidence. Claimant appeals the findings of fact of the hearing officer that the injury did not include the right shoulder and back, and that the latter part of the period of disability ran from October 7, 1998, through November 20, 1998, urging that the overwhelming evidence presented established that the injury included the right shoulder and back and that the periods of disability were from October 2, 1998, through February 2, 1999, and from February 19, 1999 (claimant was incarcerated from February 2, 1999, to February 19, 1999) to the present time. Both parties responded to the others appeal.

DECISION

Affirmed.

The decision and order of the hearing officer sets forth fairly and adequately the evidence in the case and it will only be briefly summarized here. The claimant caught his index finger in a large printing machine on _____, and when he jerked back to free his finger, he hit his head forcefully on the machine. His finger was nearly severed at the joint and subsequently required surgery. The claimant testified, and is supported by a witness, that he screamed out, hit his head very hard, and was so dazed by the force of the contact with the machine that he did not realize he had severely injured and nearly severed his finger until it was called to his attention by the witness. He states he was taken to an emergency room where treatment was rendered on his finger, but other injuries were not mentioned or noted then or at the time of the subsequent surgery on his finger according to medical records. The claimant had sustained an earlier head injury although he stated he had recovered from the effects of that injury at the time of the _____ incident. In any event, the claimant states that after the incident he developed blurred vision, memory loss, headaches, nausea, and pain in his right shoulder, neck, and back, with some numbness in his legs. The claimant saw a number of doctors concerning his symptoms including Dr. C and Dr. H, both neurologists. Dr. H had treated him for his prior head injury and an MRI of

July 1996 indicated an unremarkable study. An MRI of the brain and cervical spine taken on January 13, 1998, showed "foci of vascular insult in the left frontotemporal periventricular area consistent with ischemic lesion" and herniated nucleus pulposus at C5-6 with bilateral foramina stenosis. Later medical records show that the claimant also complained of shoulder and low back pain. The claimant changed treating doctors in May 1998 to a chiropractor, Dr. B, who testified that he did not release the claimant to work, and that he diagnosed his injuries from the _____, incident as including post concussion syndrome secondary to a closed head injury, post-traumatic stress disorder, vascular brain lesion, partial loss of finger, shoulder pathology, herniated cervical disc, and lesion in the lumbar spine. He states he took him off work in May 1998 and has not released him to return to work.

The claimant testified and other evidence supports that he started working with a new employer on July 10, 1998, and that he essentially worked in a full-time position (although he states his hours were somewhat irregular including times that he was treating with Dr. B) until October 1, 1998. Claimant states that because of his injuries he was not able to continue working; however, he told the employer that he was off because of his personal legal matters, and that when he requested several weeks off, the employer decided to terminate him. Claimant also testified that because of his injuries he is not able to work in that he does not feel "confident doing my old job" and "I lose track of what I'm doing" and "I have pain in the right shoulder."

The claimant attended a benefit review conference (BRC) on October 7, 1998, concerning the extent of injury and disability. At that conference, the parties entered into a BRC agreement which provided that the carrier agreed to pay 45 days of temporary income benefits beginning October 7, 1998, and that further periods of disability remain at issue. The claimant also agreed to sign releases for work and medical information. Testimony was taken from the attorney who represented the claimant at the BRC (not the current attorney) and the adjuster who represented the carrier. There was direct conflict in the evidence with the claimant's attorney stating, on the one hand, that the fact that the claimant had worked during the July-October time frame was discussed and that only the amount of time worked was not known and that was the reason for agreeing to sign a release, to the adjuster testifying, on the other hand, that the claimant did not disclose that he was essentially working full time during July-October, and that but for the lack of candidness and withholding information, the carrier would not have entered into the agreement. However, also in evidence was a carrier-generated investigative report dated October 2, 1998 (the BRC was on October 7th), with a stamp that it was faxed on October 2, 1998, and a fax verification at the top of the report showing a fax on October 6, 1998, to the carrier. This report clearly contains the investigator's note that "[t]he claimant is employed on a full-time basis at (company)" and "[t]he claimant is employed as a book binder on a full-time basis."

From the evidence, the hearing officer found that the claimant's injury did extend to a head injury but that there was not sufficient evidence to establish an injury to the right shoulder and back. Although there was a prior head injury, the medical evidence, together

with the testimony of the claimant and the witness, is sufficient to show that the claimant's injury extended to his head from the _____, incident. However, there was no compelling or overwhelming evidence that the claimant sustained a right shoulder or low back injury that would mandate a reversal of that part of the hearing officer's finding as being so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Lopez v. Hernandez, 595 S.W.2d 180, 183 (Tex. Civ. App.-Corpus Christi 1980, no writ); Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). Although Dr. B's testimony concerning the constellation of injuries he diagnosed lends some support to the claimant's assertion that his injuries extended to the right shoulder and back, the hearing officer was not bound by this testimony. Hartford Accident and Indemnity Company v. Hale, 400 S.W.2d 310 (Tex. 1966). The hearing officer could consider other medical reports not showing this complaint or injury, the circumstances surrounding the incident of _____, together with the claimant's return to work activity as discounting these particular body parts as being injured from the incident. We are not able, from our review of the evidence, to conclude that the hearing officer erred in this finding.

It is also apparent that the hearing officer, although apparently believing the claimant's testimony regarding the head injury, did not find it persuasive regarding disability continuing after the period agreed to in the BRC agreement of October 7, 1998. A hearing officer can believe all, part, or none of the testimony of any given witness, including the testimony of a claimant. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). The claimant was apparently able to, and did, return to work during July-October. He gave different versions as to why he stopped working in October, one to his employer based on legal matters, and another to the hearing officer that he was not able to do the work. Under these circumstances, it is apparent the hearing officer was not persuaded that the claimant proved disability continued after the 45-day period agreed to at the BRC. Claimant has the burden to prove that disability continued and he failed to carry that burden of proof. Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. We affirmed this finding and conclusion of the hearing officer.

Carrier asserts that it should be relieved of the effects of the BRC agreement based on newly discovered evidence and that the claimant essentially perpetrated a fraud on the carrier leading to the agreement. If fraud had indeed been proven, or it was established that there was newly discovered evidence that supported relieving the carrier of the effects of the agreement, there would be good and sufficient reason to set aside a BRC agreement. Section 410.030(a). The hearing officer determined that the carrier knew that claimant had returned to work at some prior time and was aware of it at the time of entering into the agreement on October 7, 1998. From our review of the evidence, we cannot conclude that the hearing officer abused her discretion or otherwise committed error in determining that good and sufficient cause was not shown to relieve the carrier of the effects of the agreement. Texas Workers' Compensation Commission Appeal No. 971604, decided September 30, 1997. Not only could the hearing officer believe the testimony of the claimant's attorney who was present and signed the agreement (he testified that the fact that the claimant had been employed was discussed prior to the agreement being

reached but that specific hours and days were not known at the time), but it was clear that the carrier had an investigative report available to it dated and received by it prior to the BRC on October 7, 1998. The report clearly indicated that the claimant had been employed in a full-time position. Under these circumstances there is no sound basis to set aside the agreement. The hearing officer in her decision on disability gave effect to the period agreed upon by the parties in the BRC agreement.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge