

APPEAL NO. 991204

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 May 12, 1999. The single issue at the CCH was whether the respondent (claimant) sustained disability as a result of the compensable injury of _____. The hearing officer determined that the claimant sustained disability as a result of the compensable injury of _____, from February 16, 1998, through the date of the CCH. The appellant (carrier) appeals, urging that the hearing officer incorrectly applied the standard of disability, and that the evidence supported that the claimant was working at a store during the period in issue. The claimant responds that there is sufficient evidence to support the decision and asks that it be affirmed.

DECISION

Affirmed.

Unfortunately, the matter of what injures the claimant sustained on _____, had not been resolved at the time of this CCH on disability. It would seem axiomatic that the injury would be resolved before or at the time of the resolution of a disability issue for the injury. Nonetheless, the parties stipulated that the claimant sustained a compensable injury on _____, "that includes at least injury to the left shoulder, left knee, and lumbar area," and leaving a hernia injury in question. In any event, the claimant sustained injuries in a 30-foot fall from a bucket cage on a bucket truck in which he was working on _____. He has not worked for the employer since February 16, 1998, and has undergone surgeries for his knee, shoulder, and a hernia (which has recurred). According to his testimony, claimant has not been treated for his lumbar area because the carrier denied or refused treatment for the lumbar area. In any event, medical records show the course of claimant's treatment, including surgery, and the lack of any meaningful diagnostic tests for the lumbar area which claimant says has not gotten any better. He testified that he has not been able to work, that his doctors have not released him to work and have told him not to work, and that he did spend some time at the grocery store his wife ran until they had to dispose of it because of her health and losing money several months in a row. Claimant's wife testified and confirmed that the claimant did not work at the store at any time and that he would come in and did, occasionally, do some paperwork, for example for the lottery.

Medical records in evidence document the knee and shoulder injuries and the surgery therefor, and indicate the need for diagnostic tests and treatment of the lumbar spine. Also, the records show a hernia repair that appears to have recurred. Claimant's treating doctor states that the claimant is severely restricted in his activity because of the lumbar problem and that he is not able to work. A required medical examination report from a carrier doctor dated May 4, 1999, shows a diagnosis of a lumbar problem, states that further diagnostic studies of the lumbar region are needed, and concludes that the claimant has not reached maximum medical improvement.

In a singularly unimpressive "investigative report," and through the testimony of the investigator, it was suggested from a five-minute observation of the claimant in a grocery store that the claimant was working. He was observed sitting at a desk or table and apparently remained in the store for some four hours. There were "assumptions" from this investigation that the claimant had an ability to work that would defeat any claim of disability.

We find the carrier's appeal in this case totally lacking in merit. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. In our opinion, the evidence, including the medical evidence from both the claimant's doctor as well as the carrier-selected doctor, the testimony of the claimant, and the testimony of the claimant's wife, was rather compelling that the claimant suffered disability during the period, particularly when contrasted with the "investigative report." The hearing officer, as the sole judge of the relevance and materiality of the evidence as well as the weight and credibility to be given the evidence (Section 410.165(a)), apparently believed the testimony of the claimant and his wife, particularly when considered in light of the medical evidence. This he was free to do, particularly contrasted to the investigation evidence. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). From our review of the evidence, we conclude there is sufficient evidence to support the findings and conclusions of the hearing officer, and nothing to suggest that an improper legal standard was applied in the case. Accordingly, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge