APPEAL NO. 991235

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 13, 1999. In response to the issues at the CCH, the hearing officer determined that the compensable injury of the respondent (claimant) extended to and included the lumbar spine and that claimant had disability from February 4, 1998, to September 2, 1998. Appellant (carrier) appeals these determinations on sufficiency grounds. Carrier also contends that the hearing officer erred in requiring that carrier subpoena certain records before she would consider carrier's assertions that medical records were back dated. The file does not contain a response from the claimant.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant's compensable injury extended to his lumbar spine. Carrier asserts that claimant waited four months before seeking treatment for his lumbar condition, which shows that he must have sustained his herniated disc outside the course and scope of employment.

The hearing officer summarized the facts in the decision and order. Briefly, claimant testified that he was injured when a forklift struck him at work on _____. He said he fractured his foot and was knocked back onto his buttocks on a hard gravel floor. Claimant said he was initially treated only for a foot injury. Claimant said that he was on light-duty office work after his injury, that he had "great" pain in his foot, that he was taking pain medications, and that he did not notice any back pain for about six weeks. He said he began noticing back pain and that it began to worsen. He said he began seeing Dr. M in December 1997. Claimant said employer did not turn in his injury to carrier and that they were paying him his regular salary and paying for his medical treatment. Claimant testified that employer eventually decided to turn in the claim and that Dr. M wrote an "initial" report for workers' compensation purposes in February 1998.

An _____ Initial Medical Report (TWCC-61) signed by Dr. F states that claimant's diagnosis is "crush injury of foot" and "cuboid fracture." A February 18, 1998, "Initial report" from Dr. M states that claimant was involved in an accident at work with a forklift, that claimant was forced to the ground, that he injured his foot, and that he has lumbar neuromuscular compression syndrome with lumbalgia. Medical notes from Dr. M dated in December 1997, before the February 1998 "initial report," do not mention that the injury is work related. These December 1997 medical notes say "see initial report for accident details." A May 6, 1998, lumbar MRI report states that at the L5-S1 disc space, there is a "prominent 8 mm right paracentral disc extrusion with causes mass effect upon the thecal sac and the right S1 root sleeve,"

The applicable law and our appellate standard of review are set forth in Texas Workers' Compensation Commission Appeal No. 950537, decided May 24, 1995; Texas Workers' Compensation Commission Appeal No. 951959, decided January 3, 1995; Section 410.165(a); Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); and 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 extended to his lumbar spine. 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 complained-of medical evidence. Campos, *supra*. The fact that Dr. M may have backdated some medical records was a factor for the hearing officer to consider in resolving the fact issues in the case. After reviewing the evidence, as set forth above, we conclude that the hearing officer's determination regarding extent of injury is not so against the great weight and preponderance of the evidence as to be wrong or manifestly unjust. Cain, *supra.*

Carrier next challenges the sufficiency of the evidence to support the hearing officer's disability determination. The hearing officer determined that claimant had disability from February 4, 1998, to September 2, 1998. We apply the Cain standard of review to this challenge. The applicable standard of review and the law regarding disability are set forth in Texas Workers' Compensation Commission Appeal No. 950264, decided April 3, 1995. In its brief, carrier does not raise any argument regarding disability. The only thing carrier states about the disability finding is that the central issue is extent of injury because "it is obvious that any disability the claimant suffered was a result of the low back condition." Carrier does not specifically challenge the hearing officer's disability determinations.

Claimant testified that he worked the same number of hours for the same pay until February 3, 1998. Claimant said that from February 3, 1998, to September 1, 1998, carrier paid him for about one half of his normal hours "for being off work." Claimant said he worked periodically during this time. He said sometimes he was not paid for the week and sometimes he was paid. He said he was never paid for more than 32 hours per week and that, prior to his injury, he had worked and been paid for 60 hours per week.

The claimant's testimony supports the hearing officer's disability determination. We will not substitute our judgment for the hearing officer's because her disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

Carrier contends the hearing officer erred in "requiring" that carrier had to have previously subpoenaed certain records before she would consider carrier's assertions that claimant's medical records from Dr. M were back dated. Carrier asserted and sought to establish at the CCH that Dr. M backdated some records to make it appear that he had

been treating claimant since December 1997, two months after the compensable injury. Carrier's contention was that claimant's lumbar condition was not related to the compensable injury, which it asserts is shown by the fact that he did not seek treatment for a back injury until February 1998, which was four months after the compensable injury. Carrier asserted that claimant's actual first treatment with Dr. M for a back injury was on February 18, 1998. Carrier contends that "the hearing officer simply refused to consider that the chiropractor could have manipulated the dates of treatment unless the carrier could show that a subpoena had been issued" to obtain all of Dr. M's records.

We perceive no reversible error in this regard. In her decision and order, the hearing officer clearly did consider the evidence of alleged back dating, stating that carrier demonstrated apparent back dating. The hearing officer said at the CCH that "clearly" there was some backdating in Dr. M's records. The hearing officer stated that the reason for the backdating was not clear and noted that it did not appear that all of Dr. M's records were before her.

The hearing officer explained her reasoning for determining that claimant's compensable injury did extend to and include his lumbar spine. The hearing officer said she found claimant's testimony about his injury to be "credible." She noted that claimant had a significant lumbar spinal condition that required surgery, and that he had surgery on September 12, 1998. Carrier sought to show that claimant was not credible by showing the evidence of the backdating. Carrier's contention was that claimant must have sustained the lumbar injury outside the course and scope of employment. However, despite evidence regarding the back dating of the records or delay in treatment, the hearing officer still found that claimant's injury extended to his lumbar spine. It does not appear that the hearing officer refused to consider carrier's assertions in this regard.

Carrier asserts that it is more difficult to obtain a subpoena in some field offices and that the policy of the Texas Workers' Compensation Commission (Commission) is not consistent in this regard. It contends that it attempted to use informal discovery methods rather than to obtain a subpoena, which it contends is not an approved-of practice. However, once the question was raised at the CCH about whether all of Dr. M's reports were available, carrier could have asked the hearing officer for a continuance to obtain all of Dr. M's records. Carrier did not ask for a continuance in this case. We have reviewed carrier's assertions in its brief and the record in this regard. We perceive no reversible error.

We affirm the hearing officer's decision and order.

_____
Judy Stephens
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge