

APPEAL NO. 991389

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 2, 1999, a contested case hearing (CCH) was held. With regard to the only issue before her, the hearing officer determined that as a result of the decision and order in a prior CCH, which had been affirmed in Texas Workers' Compensation Commission Appeal No. 980925, decided June 12, 1998, the Texas Workers' Compensation Commission (Commission) does not have jurisdiction to determine whether a claimed neck and back injury are compensable or whether disability existed prior to April 15, 1998.

Appellant (claimant) appealed, contending as he had at the CCH, that because respondent (carrier) had denied liability at the first CCH (which led to the appeal in Appeal No. 980925, *supra*), he was unable to afford an MRI or diagnostic testing and it was only after carrier's doctor examined him for his neck and back that he realized that he had a neck and back injury and that carrier, by paying income benefits for the claimed neck and back injury, had accepted liability for those injuries. Claimant contends that the "Commission has jurisdiction to overthrow the first decision and order" and requests that we reverse the hearing officer's decision and render a decision in his favor. Carrier responds, citing Lumbermens Mutual Casualty Co. v. Manasco, 971 S.W.2d 60 (Tex. 1998) and urging affirmance.

DECISION

Affirmed.

Claimant had been employed as a delivery driver. On _____, while in the course and scope of employment, he struck a taxicab from the rear. Details involving the accident and testimony about subsequent events are set out in Appeal No. 980925, *supra*. Claimant sought medical care from Dr. M, who took him off work. Claimant testified that carrier denied his claim and at that point claimant saw Dr. M only one time. Dr. M, in a report of a visit on October 16, 1997, diagnosed a contusion of the head, a cervical strain and a lumbar strain. A CCH regarding that incident was held on April 15, 1998, with the issues being whether claimant sustained a compensable injury on _____, and whether claimant had disability, as defined in Section 401.011(16), from that incident. Claimant testified that he had a contusion to the head, a cervical strain and a lumbar strain which caused him to "have left lower back pain." (A transcript of that hearing is in evidence.) In a CCH on April 15, 1998, the hearing officer in that case found:

FINDINGS OF FACT

4. Claimant sustained a head contusion injury in the course and scope of his employment on _____.

5. Claimant did not sustain a back or neck injury in the incident of _____.
6. Claimant was unable to obtain and retain employment at wages equivalent to Claimant's pre-injury wage beginning on October 16, 1997 through December 5, 1997.

It is noted that since disability was an issue at the April 1998 CCH, it was important that the hearing officer define what the compensable injury was in order to know if any of the claimed disability (inability to obtain and retain employment at the preinjury wage) was a result of the compensable injury. Carrier appealed the finding that claimant sustained a compensable head contusion and had some disability. Claimant responded, urging that we "uphold the decision and order of the hearing officer." Claimant did not appeal the findings that he had not sustained a back or neck injury. The appeal resulted in Appeal No. 980925, *supra*, where we affirmed the hearing officer's decision and order. In that decision, we specifically noted that claimant had not appealed the hearing officer's findings that claimant had not sustained a back or neck injury.

Claimant had a lumbar MRI on May 21, 1998 (after the April 15, 1998, CCH), and, for some inexplicable reason, carrier then sent claimant to Dr. N for a medical evaluation "regarding his neck and back." Dr. N notes some preexisting scoliosis and an "L2-3 herniated disc" and assessed a seven percent impairment rating (IR) based on Table 49, Section II C of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association due to the herniated disc. According to a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated September 14, 1998, carrier paid temporary income benefits from July 18, 1998, through September 8, 1998, and then overpaid impairment income benefits (IIBS) ending March 5, 1999. Claimant and Dr. M apparently disputed that rating and Dr. R was appointed as the designated doctor. In a Report of Medical Evaluation (TWCC-69) and narrative, both dated August 31, 1998, Dr. R assessed an 11% IR based on seven percent impairment from Table 49, Section II C and four percent for loss of range of motion.

Claimant testified, without contradiction, that carrier has also paid the additional IIBS based on Dr. R's report. Claimant contends that carrier, by sending him to Dr. N for evaluation of the back and neck and by paying for IRs of the lumbar spine, has accepted liability for a neck and back injury, the hearing officer's decision and our affirmance in Appeal No. 980925, *supra*, notwithstanding. Claimant also contends that at the time of the first CCH on April 15, 1998, he did not know that he had a herniated disc (or discs) and that new testing and the new medical reports establish an injury. Claimant asserts that he was merely reading from medical reports at the first CCH when he testified that he had a cervical and a lumbar strain. The hearing officer, in this decision, does not find that testimony credible, stating:

Though Claimant now asserts that he was merely reading medical reports, the record clearly sets out that Claimant was claiming a low back and neck injury from the accident of _____. At the Benefit Review Conference Claimant stated that his injury included his head, neck and back. Throughout

the hearing Claimant asserted that his injury included his neck and back. The Claimant propounded his position at the first hearing based on his testimony and the medical records. Claimant may not have known the extent of back pain - but did state at the first hearing that it was a result of the accident.

It is of note that medical treatment was received by Claimant in May, 1998. At that time Claimant was continuing to state that he was suffering from low back pain from the compensable injury. By the time of the examination, Claimant had received the decision and order stating that his back was not part of the claim. Claimant still had time to file an appeal and did not do so. There was no mention in that medical report of any heart pain or problems which could have cause [sic] the radiating back pain into the low back. Claimant's testimony was not credible to establish that he was merely reading medical based on the position he took. As the issues Claimant is now bringing forth have been fully litigated, the Commission does not have jurisdiction to re-determine whether the neck and back are compensable or whether disability existed from December, 1997 through April 15, 1998.

Carrier cites Manasco, *supra*, and several Appeals Panel decisions which it asserts generally hold that the Commission "is not authorized to reopen a decision that has progressed through the dispute resolution process of the agency."

We have discussed Manasco, *supra*, and several Appeals Panel decisions in relationship to a maximum medical improvement date and IR as a change of condition. See Texas Workers' Compensation Commission Appeal No. 972332, decided December 29, 1997. In this case, at the first CCH, although the issue was broadly framed in terms of whether claimant had a compensable injury, the hearing officer correctly narrowed the issue, specifically defining the specific claimed injuries, finding that the head contusion was compensable and that the alleged neck and back injuries were not. As the hearing officer notes in her discussion of this case, quoted above, claimant asserted throughout that hearing that he had injured his neck and back. The hearing officer specifically found otherwise and the claimant did not appeal that decision. That matter was at that time *res judicata* ("a matter adjudged"). While claimant may not have known the extent of the claimed injury, he certainly was alleging such an injury. Once that matter had been adjudicated and not appealed, the findings that claimant had not sustained a neck or back injury had become final and were *res judicata*.

It is somewhat disconcerting and worthy of mention that carrier, instead of asserting the finality of the determination that claimant has not sustained a compensable neck or back injury, continued to send claimant to evaluations for injuries found, and affirmed, as not being compensable. Carrier either totally ignores this point, as it did on appeal, or explains it as a "gratuitous payment" at the CCH. It appears unlikely that a carrier would make gratuitous payments so we rather believe the payments to have been oversights. In any event, we find no authority holding that a payment made either gratuitously or in error will reopen an otherwise closed case. What claimant thought the payments meant (*i.e.* that

carrier had accepted liability) is largely irrelevant. Of import is what is the legal consequence of those payments may be. As indicated, we find no authority, at least in this factual situation, holding that an erroneous payment would result in reopening the case.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge