

## APPEAL NO. 991433

On June 3, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issue at the CCH was whether the respondent (claimant) had disability resulting from an injury sustained on \_\_\_\_\_, from August 24, 1995, to August 16, 1996. Appellant (carrier) requests that the hearing officer's decision that claimant had disability beginning on August 24, 1995, and continuing through August 16, 1996, be reversed and that a decision be rendered that claimant has not had disability. No response was received from claimant.

### DECISION

Affirmed.

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Claimant had the burden to prove that he has had disability as defined by the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. A claimant may have intermittent periods of disability. Texas Workers' Compensation Commission Appeal No. 962342, decided January 6, 1997. The claimant need not prove that the compensable injury was the sole cause of his disability, only that it was a producing cause. Texas Workers' Compensation Commission Appeal No. 961729, decided October 18, 1996. Whether disability exists is a question of fact that may be established by the testimony of the claimant alone if found credible by the hearing officer. Appeal No. 961729.

Claimant sustained a compensable injury on \_\_\_\_\_, when he was involved in a motor vehicle accident while delivering windshield glass for his employer. On August 23, 1995, a CCH was held on several issues, including, among others, the extent of the compensable injury and disability. The hearing officer, who was a different hearing officer than presided at the June 3, 1999, CCH, decided that on \_\_\_\_\_, claimant sustained a compensable injury to his right knee and back, but not to his neck, shoulders, and chest wall, and that claimant had no disability from his injury of \_\_\_\_\_, from the date of injury to the date of the CCH, August 23, 1995. Both parties appealed that decision and, in Texas Workers' Compensation Commission Appeal No. 951750, decided December 8, 1995 (Unpublished), the Appeals Panel affirmed the hearing officer's decision and, in regard to the disability issue, noted that whether claimant had disability was a question of fact and stated that, while there was certainly evidence to support a finding of disability, the evidence was conflicting and that under our standard of review, we could not say that the hearing officer erred in finding no disability, although were we fact finders, we might have drawn other inferences and reached other conclusions. The parties stipulated at the prior CCH that claimant's preinjury average weekly wage was \$332.16. Our decision in Appeal No. 951750 reflects that claimant continued to work for employer until March 10, 1995.

Claimant began seeing Dr. S on March 13, 1995, and he was treated by Dr. S several times a month until August 22, 1995. Claimant said that Dr. S took him off work as of March 13, 1995. Dr. S's records reflect that she treated claimant for his lower back, neck, right shoulder, and chest wall/rib cage. Dr. S's records reflect that some, but not all, of her medical bills for claimant's treatment were paid by claimant's health insurance with employer. A physical therapist wrote in June 1995 that claimant could likely return to his job without exacerbation of symptoms if no lifting in excess of 25 pounds above shoulder height was required (a 25-pound lifting restriction). Claimant said that the windshields he delivered weighed 75 to 80 pounds.

A radiologist reported that an MRI of claimant's lumbar spine done on August 21, 1995, showed a disc protrusion at L5-S1 and a bulge at L4-5.

In a Report of Medical Evaluation (TWCC-69) dated December 21, 1998, Dr. S reported that claimant reached maximum medical improvement on August 16, 1996, with a 14% impairment rating. The issue at the June 3, 1999, CCH was whether claimant had disability from the injury of \_\_\_\_\_, from August 24, 1995 (the day after the August 23, 1995, CCH), to August 16, 1996. Claimant testified that during that period his physical condition got worse.

Claimant testified that Dr. S released him for light-duty work on February 9, 1996, with restrictions of no lifting and no bending because of his back injury. Claimant said that Dr. S told him that he has a herniated disc and needs back surgery to have his pain go away. Claimant said he has not had back surgery but is trying to find out procedures for that. Claimant said that he returned to his employer and was informed that there was no light-duty work for him there and he was terminated from employment. Claimant said that his health insurance was cut off when he was terminated. Claimant said that after he was terminated, he applied for and received unemployment benefits. He said that he received only three or four weeks of unemployment benefits. He indicated that his unemployment benefits were terminated due to a contest of those benefits by employer.

Claimant said that, in order to qualify for unemployment benefits, he had to look for work and that he looked for jobs that would not require lifting, such as a forklift driver. Claimant also said that after his release to light duty, he did odd jobs for pay, such as painting rooms and probably some janitorial work. He said the janitorial work involved sweeping and that the odd jobs he performed did not involve heavy physical work. He said that he also played drums for his church's choir and was paid for that, but not every week. Claimant said that he earned about \$800.00 from August 24, 1995, to August 16, 1996.

Claimant said that during the period of August 24, 1995, to August 16, 1996, he was under Dr. S's care and that he went to Dr. S, but that Dr. S would not treat him because Dr. S was not being paid for her medical services. He said that Dr. S told him that she would have to stop treating him because carrier was not paying her. Dr. S's records reflect that she did not see claimant from August 23, 1995, to January 19, 1996. No visit to Dr. S in 1996 after the January 19, 1996, visit is noted in Dr. S's records. Claimant said that

Dr. S would not treat him in 1997 and 1998 because of his lack of medical insurance. He said carrier did not pay Dr. S even though the prior CCH decision had ordered carrier to pay benefits.

In what appears to be part of Dr. S's TWCC-69 of December 21, 1998, Dr. S wrote, among other things, that she saw claimant on December 28, 1998, that the lumbar MRI of August 21, 1995, shows a herniated disc at L5-S1, that claimant had to discontinue treatment due to a dispute by carrier, and that claimant will need an orthopedic consultation and surgery for his low back. Dr. S also noted that she had treated claimant for a cervical strain and a shoulder strain. Dr. S wrote in April 1999 that, while she had received payments from claimant's health insurance, she had not received payment for services billed for claimant's workers' compensation injury. Dr. S wrote on April 27, 1999, that claimant was taken off work as of March 13, 1995; that he was released for light duty on February 9, 1996; that claimant was terminated from employment because no light-duty work was available; and that claimant "is disabled to perform his regular duty due to his persistent back pain since the date of injury till this date." Dr. S also wrote that claimant's employer (apparently the health insurance provided by employer) had paid for medical services related to claimant's neck, shoulder, and chest wall; that she had not been paid for medical services for claimant's lower back; and that she has never been paid for claimant's "back injury related bills."

There is evidence that in November 1995 claimant settled a third-party claim involving the \_\_\_\_\_, accident for \$6,000.00. It is unclear whether claimant actually received the total amount of that settlement. Subrogation was not an issue.

Carrier appeals the hearing officer's findings that Dr. S stopped treating claimant on August 22, 1995, because she was not being paid for her services and that "due to the claimed injury" claimant was unable to obtain and retain employment at wages equivalent to claimant's preinjury wage beginning on August 24, 1995, and continuing through August 16, 1996. Carrier also appeals the hearing officer's conclusion that claimant had disability beginning on August 24, 1995, and continuing through August 16, 1996.

Carrier contends that claimant has not shown any change from the time of the prior CCH when no disability was found. However, Dr. S has now opined that claimant needs low back surgery. As previously noted, a claimant may have intermittent periods of disability. The 1989 Act makes the hearing officer the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its opinion for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084. We should set aside the decision of the hearing officer only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's findings, conclusion, and decision are supported by sufficient evidence and

that they are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Judy L. Stephens  
Appeals Judge