

APPEAL NO. 991466

On June 14, 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 issues at the CCH were: (1) whether the compensable injury of _____, extends to the cervical spine; and (2) whether respondent (claimant) has disability resulting from a compensable injury of _____. Appellant (carrier) requests that the hearing officer's decision that the compensable injury of _____, extends to claimant's cervical spine and that claimant has had disability from the compensable injury of _____, from August 1, 1998, through the date of the CCH, June 14, 1999, be reversed and that a decision be rendered in its favor on the disputed issues. No response was received from claimant.

DECISION

Affirmed.

Claimant, who is 65 years of age, testified that on _____, he was injured at work when he and a coworker turned over a 300-pound bale of compressed foam. The parties stipulated that claimant sustained a compensable injury on _____. Carrier accepted a compensable low back injury but disputes that claimant sustained a compensable neck injury or that he has had disability. Claimant said that at the time of injury, he felt pain in his back and, in describing his injury, pointed to his low back and up towards his neck. He said he told employer that his back was hurting. Claimant said he was sent to a company doctor who referred him to another doctor. On November 26, 1997, Dr. P diagnosed claimant as having a left thoracic sprain and strain and wrote that claimant could continue working modified duty with no heavy lifting.

Claimant said that the company doctor or the doctor the company doctor sent him to released him to light-duty work; that the employer provided him with light-duty work; that he worked light-duty work until August 1, 1998, when, he said, he was hurting so badly that he could not continue to work; and that he went to Dr. E, D.C. Claimant said that the light-duty work involved moving plastic seats and putting materials onto a belt. Claimant testified that when Dr. E tells him he can perform his normal job duties again then he thinks he would be able to do that; that while he thinks he could probably go back to light-duty work, he is not sure of that; and that he might have been able to do light-duty work for the past six months, but that he was unable to continue to do the light-duty work as of August 1, 1998. The employer's office manager testified that the employer has light-duty positions available at claimant's preinjury wage that would accommodate claimant's problems. A document states that claimant was terminated on July 30, 1998, because he failed to return to work after taking a vacation for one week.

Dr. E wrote on September 18, 1998, that the _____, injury caused claimant to yank his left arm, upper back, and neck when the weight of the bale shifted to claimant, and that as a result of that accident, claimant was complaining of upper back pain radiating

down the left upper extremity and up to his cervical spine, and lower back pain radiating to the right lower extremity. Dr. E noted that the light-duty work involved repetitive bending. Dr. E also noted that cervical range of motion was restricted and painful. Among other things, Dr. E diagnosed claimant as having cervicobrachial syndrome and wrote that it is his opinion that claimant's symptoms are consistent with the type of accident he had. Dr. E noted that it was undetermined when claimant would be able to return to limited or full-time work. Claimant said that Dr. E has treated his back, neck, and waist and that with that treatment he is getting better.

Dr. PA, D.C. wrote on September 22, 1998, that he had reviewed documentation sent to him by carrier, that he had had a telephone conversation with Dr. E about claimant, and that in his, Dr. PA's, opinion claimant's then current complaints were not consistent with any material work-related injury.

Dr. E wrote on October 30, 1998, that claimant is to remain off work until further notice. He issued several more off-work statements and wrote on December 28, 1998, that claimant needs to remain off work in order not to exacerbate his condition. A radiologist reported that a lumbar MRI done in December 1998 showed a disc herniation at L4-5. At Dr. E's recommendation, claimant undertook a rehabilitation program and then entered a work conditioning program. Dr. E noted in March 1999 that the claimant's shoulder, arm, and neck symptomatology reappeared with the increased intensity of the work conditioning program and that that program had to be modified to accommodate claimant. Dr. E has recommended an MRI of claimant's cervical spine and an EMG of claimant's upper extremities. Dr. E diagnosed claimant as having disc disruption syndrome at L4-5 with right radiculopathy, left cervicobrachial syndrome, scapulocostal syndrome, and cervical spondylolisthesis.

Claimant had the burden to prove the extent of his compensable injury. Texas Workers' Compensation Commission Appeal No. 960733, decided May 24, 1996. In Western Casualty and Surety Company v. Gonzales, 518 S.W.2d 524, 526 (Tex. 1975), the court noted that the site of the trauma and its immediate effects are not necessarily determinative of the nature and extent of the compensable injury and that the full consequences of the original injury, together with the effects of its treatment upon the general health and body of the worker are to be considered. Claimant also had the burden to prove that he had disability as defined by the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. 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."

The hearing officer determined that the compensable injury of _____, extends to claimant's cervical spine and that claimant has had disability as a result of his compensable injury of _____, from August 1, 1998, through the date of the CCH, June 14, 1999. Carrier contends that the evidence does not support the hearing officer's determinations. Carrier also contends that the hearing officer applied a wrong standard in determining disability and references remarks made by the hearing officer at the CCH regarding an

ability to do only light-duty work and disability. In Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, the Appeals Panel stated that, where a medical release is conditional and not a return to full-duty status because of a compensable injury, disability has not ended unless the employee is able to obtain and retain employment at wages equivalent to the preinjury wage. However, in the instant case, even if light-duty work at preinjury wages was available to claimant after August 1, 1998, there is evidence that claimant was taken completely off work by Dr. E and thus there is evidence that claimant was unable to perform even light-duty work. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier 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 judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is 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.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge