

APPEAL NO. 991509

This case returns following our remand in Texas Workers' Compensation Commission Appeal No. 990724, decided May 24, 1999. In Appeal No. 990724, we reversed the hearing officer's determination that the respondent/cross-appellant (carrier) had timely and sufficiently contested compensability of the claimant's alleged injury and rendered a new decision that it had not done so; thus, the claimant's injury became compensable as a matter of law. We remanded the case for the hearing officer to resolve the issue of whether the claimant had disability. No further hearing was held on remand and the hearing officer, determined that the appellant/cross-respondent (claimant) did not have disability as a result of his compensable injury. In his appeal, the claimant argues that the hearing officer's disability determination is against the great weight of the evidence. In its response, to the claimant's appeal, the carrier urges affirmance of the disability issue. In its cross-appeal, the carrier asserts that the hearing officer erred in finding that the injury was compensable as a matter of law due to its failure to timely contest compensability, citing Continental Cas. Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.). The appeals file does not contain a response to the carrier's cross-appeal from the claimant.

DECISION

Affirmed.

In Appeal No. 990724, we reversed and rendered a decision that the claimant's injury was compensable as a matter of law under Section 409.021(c) because the carrier failed to timely and sufficiently contest compensability of the alleged injury. We remanded for the hearing officer to resolve the issue of whether the claimant had disability as a result of his compensable injury. The claimant testified that he was injured when he was struck on the back of the neck by a rubber mallet that fell from the top shelf of a shelving unit he was assembling.

The claimant initially sought treatment with Dr. F, to whom he was referred by the employer. Dr. F diagnosed a head/face contusion, noting that the claimant gave a history of something falling on his neck. In his Initial Medical Report (TWCC-61), Dr. F noted that his examination of the claimant's neck did not reveal any deformity, swelling or abrasion, and that his neck was "tender to palpation with lateral rotation of neck." The claimant began treating with Dr. K, a chiropractor, on March 19, 1998. Dr. K initially diagnosed cervical IVD syndrome without myelopathy and cervical muscle spasm. Dr. K referred the claimant for MRI testing. The impression of the April 21, 1998, cervical MRI was "[a]nterior spurring at C3-4 which is a remote post-traumatic finding," "[r]eversal of curvature of the C-spine which may correlate with paraspinous muscle spasm," and "2-3mm focal right parasagittal disc herniation at C5-6 that is slightly impinging the C5 nerve root in the right lateral recess. Clinical correlation is advised." On May 11, 1998, Dr. H, D.O., examined the claimant at the request of Dr. K. Dr. H diagnosed cervical, thoracic, and lumbar strain

with somatic dysfunction, cephalgia due to cervical/thoracic injury, and bilateral trapezius spasm, noting that he had to rule out cervical disc dysfunction.

The hearing officer determined that the claimant did not have disability as a result of his compensable injury. The claimant had the burden of proving that he had disability. Generally, the hearing officer, as the fact finder, can find disability based on the claimant's testimony alone, if it is considered credible. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the hearing officer is not bound to accept the claimant's testimony. A review of the hearing officer's decision demonstrates that she was not persuaded by the claimant's testimony that he was unable to obtain and retain employment at his preinjury wage as a result of his compensable injury. To that end, the hearing officer stated "Claimant's testimony that he was unable to work was not persuasive and the medical records in support of disability are not persuasive." The hearing officer was acting within her province as the sole judge of the weight and credibility of the evidence under Section 410.165(a) in rejecting the claimant's testimony, as well as the other evidence tending to support a finding of disability. Our review of the record does not demonstrate that the hearing officer's disability determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Therefore, no sound basis exists for us to reverse that determination on appeal.

In its cross-appeal, the carrier asserts that the hearing officer erred in finding that the claimant's injury became compensable as a matter of law. It argues that the claimant's neck injury could not become compensable as a matter of law because the claimant did not establish that he injured it at work. Only the disability issue was the subject of the remand. The compensability issue was finally resolved in Appeal No. 990724 and we will not revisit that issue in this decision. Nonetheless, we note that the carrier's reliance on Williamson, *supra*, is misplaced. We have previously recognized that Williamson is limited to situations where there is a determination that the claimant did not have an injury, that is, no damage or harm to the physical structure of the body, as opposed to cases where, as here, there is an injury, which was determined by the hearing officer not to have been causally related to the employment. See Texas Workers' Compensation Commission Appeal No. 990223, decided March 22, 1999, and Texas Workers' Compensation Commission Appeal No. 990135, decided March 10, 1999, and the cases cited therein. In this instance, while the hearing officer found that the incident at work did not cause the damage or harm to the physical structure of the neck, she did not find that the claimant did not have damage or harm to the physical structure of his neck. To the contrary, she found that the claimant had a "2-3mm cervical disc herniation at C5-6." As such, the carrier was not relieved of its duty to contest compensability of the neck injury under Williamson and that injury became compensable as a matter of law pursuant to Section 409.021(c).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge