

APPEAL NO. 991658

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 12, 1999, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer determined that respondent/cross-appellant (claimant) sustained a compensable (lumbar strain/sprain) injury on _____ (all dates are 1998 unless otherwise noted), and that claimant had disability (as defined in Section 401.011(16)) from April 8, 1999, until July 12, 1999.

The appellant/cross-respondent, a self-insured hospital district, referred to as self-insured or carrier, appealed, pointing out inconsistencies in claimant's statement and testimony, noting contradictions in the medical evidence and asserting that claimant had sustained neither an aggravation of a prior injury or a new injury. Self-insured requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds and, in a timely response and appeal, urges affirmance of the injury issue and requests a reversal on the disability issue, contending that she had disability from October 26th "to present," arguing that if the hearing officer found the medical evidence credible on compensability, "he should also accept the doctors' medical opinion that claimant could not work from October 26, 1998 until April 1999."

DECISION

Affirmed in part and reversed and remanded in part.

Claimant was employed as a phlebotomist for the self-insured. Claimant testified that on Friday, _____, after having drawn blood from 20 patients, she started to get up with her tray of blood samples, lost her balance and felt pain in her back. Present in the room at the time was a coworker, Ms. M. In a transcribed statement Ms. M said that claimant had a tray of bottles in her hand and, as she stood up, "[s]he kind of lost her balance but that's it." Claimant sought medical treatment from Dr. TH on Monday, October 26th. In an Initial Medical Report (TWCC-61) dated October 26th, Dr. TH diagnosed a "Lumbosacral Spine Strain and Sprain [and] Aggravated Degenerative Disc Disease." In an off-work slip dated "Oct 26 1998," Dr. TH stated "remain off work," and noted "Diagnosis: Aggravated degenerative disc disease with possible herniated disc. MRI pending." No MRI was apparently ever performed. In another off-work slip dated February 25, 1999, Dr. TH ordered claimant to "remain off work." In a report dated March 5, 1999, Dr. TH recites a history of claimant bending over on October 26th and, when "she straightened up she developed a sudden sharp pain" Dr. TH commented that claimant had been "doing well and functioning well until her most recent episode."

Claimant was referred to Dr. RH by her attorney in April 1999. In an initial medical report of a visit on April 7, 1999, Dr. RH diagnoses thoracic/lumbar intervertebral disc syndrome, lumbar disc disorder, lumbar neuritis/radiculitis and muscle spasms. Dr. RH took claimant off work on April 7, 1999. At the CCH Dr. RH testified that he was aware that claimant had had a prior workers' compensation back injury in 1994, but that because she

had been asymptomatic for about two years, he considered this a new injury. Dr. RH testified that the injury was caused by repetitive bending, twisting and standing (claimant is not pursuing a repetitive trauma theory). Dr. RH testified that he agrees with Dr. TH's assessment and opinion that claimant suffered a new injury on _____. (We note that Dr. RH did not bring claimant's records with him when he testified and that most of his opinions were based on the medical records in evidence.)

The hearing officer made findings of fact that when claimant got up from the table on _____, "she temporarily lost her balance, grabbed the table to steady herself, and felt pain in her back." The self-insured appealed that finding, and others, contending that claimant, for the first time at the CCH, gave a history of losing her balance and that that testimony "is inconsistent in a significant way" with her prior transcribed statement. The self-insured also contends the history given the doctors was inconsistent and contradictory.

Self-insured argues that claimant did not suffer a new injury or an aggravation of her preexisting degenerative disc disease. Self-insured cites some aggravation cases and contends the evidence is insufficient to support the hearing officer's decision. We disagree.

Claimant testified about losing her balance and that testimony is supported by Ms. M. Although claimant had a prior workers' compensation injury, the hearing officer could believe that injury had resolved. Further, it does not appear that claimant is pursuing either an aggravation theory or a repetitive trauma injury theory, but, rather, a new, specific incident when she got up holding a tray and lost her balance, causing a back injury. There is scant medical evidence to the contrary. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

On the issue of disability, although Dr. TH took claimant off work on October 26th and kept her in an off-work status in February 1999, the hearing officer found that disability did not begin until April 7, 1999, when Dr. RH took her off work. Claimant testified that she had not worked since _____, and disability, as defined in Section 401.011(16), is supported by the reports of Dr. TH. Inexplicably, the hearing officer does not reference, much less comment on, Dr. TH's off-work slips of October 26th and February 25, 1999, as well as claimant's testimony, and in the absence of any medical or testimonial evidence to the contrary, why he found disability did not begin until April 7, 1999, when Dr. RH took claimant off work. Claimant, in her appeal, quite logically states that since the hearing officer accepted the medical reports as credible evidence that the claimant sustained a compensable injury, "he should also accept the doctor's medical opinion that claimant could not work from October 26, 1998 until April 1999." We are mindful that the hearing officer is the sole judge of the weight and credibility of the evidence and may believe all, part or none of the testimony of any witness, but we are at a loss to understand why the hearing officer disregarded Dr. TH's off-work slips in the absence of any evidence to the contrary and why

he found claimant's disability did not begin until April 7, 1999, over five months after the compensable injury. Consequently, we remand for the hearing officer to reconsider the disability issue and/or explain his finding.

We affirm the hearing officer's decision on the injury issue and we remand to the hearing officer for further findings on the disability issue. No further hearing on remand is necessary. The hearing officer, at his discretion, may request further oral and/or written argument from the parties on the disability issue only.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge