APPEAL NO. 991677

On July 12, 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 appellant (claimant) sustained compensable injuries to his chest, neck, left shoulder, and left side in addition to his low back on _____; (2) whether claimant sustained disability after March 22, 1999; and (3) whether the Texas Workers' Compensation Commission (Commission) abused its discretion in approving Dr. S as claimant's new treating doctor. Claimant requests review and reversal of the hearing officer's decision that claimant did not sustain disability after March 22, 1999; and that the Commission abused its discretion in approving Dr. S as claimant's new treating doctor. Respondent (carrier) requests affirmance. There is no appeal of the hearing officer's decision that claimant's compensable injury of _____, is limited to his low back and does not extend to or include his chest, neck, left shoulder, and/or left side.

DECISION

Affirmed.

Claimant testified that on _____, he was at work lifting a 100-pound bag of sand off an uneven pallet when the pallet flipped up, causing him to fall backwards. He said that when he fell he hit his low back on a board and that the bag of sand fell on his chest. He was taken to a hospital that day where x-rays of his lumbar spine, pelvis, and left hip were taken and were reported to be normal.

Claimant began treating with Dr. J on October 7, 1998, and Dr. J diagnosed a lumbar strain and prescribed pain medication and muscle relaxers. On October 23, 1998, Dr. J prescribed physical therapy daily for one week, which claimant undertook beginning on November 3, 1998. Claimant said he had two days of orientation and three days of actual therapy. Claimant continued to complain of back pain so Dr. J recommended a lumbar MRI, which was done on December 1, 1998, and the radiologist reported that no abnormalities were seen. Claimant complained of leg numbness so Dr. J recommended an EMG, which was done on January 14, 1999, and Dr. P reported that it was a normal EMG study of the bilateral lower extremities. Claimant complained of inguinal pain so Dr. J referred him to Dr. SC to have that checked and Dr. SC reported that there was no inguinal hernia but that claimant had a muscle strain. Claimant continued to complain of pain so Dr. J recommended a thoracic MRI, which was done on March 10, 1999, and the radiologist reported that it showed minimal scoliosis but no significant abnormalities. On March 22, 1999, Dr. J wrote that claimant's lumbar strain had resolved; that he could not identify by EMG, thoracic MRI, or lumbar MRI, any cause that would explain claimant's continued complaints; and that claimant was released to return to full-duty work. Dr. J had had claimant on light-duty status since the middle of December 1998.

Claimant said that he wanted to have more physical therapy but that it was denied by Dr. J and the carrier; that medications prescribed by Dr. J eased his pain some but not much; that he did not work or look for work while treating with Dr. J because of his pain; that on March 22, 1999, Dr. J released him to full-duty work; and that he, claimant, did not feel that he was capable of returning to full-duty work.

In an Employee's Request to Change Treating Doctors (TWCC-53) dated April 1, 1999, claimant requested approval to change treating doctors from Dr. J to Dr. S for the reason that he was still hurting and Dr. J was not doing anything for him except giving him pills. Claimant testified that the reasons he changed treating doctors was because he was in pain, the medications prescribed by Dr. J were not helping him, he could not work in his condition, he wanted more therapy, he was not getting good medical treatment from Dr. J, and he disagreed with Dr. J's assessment that he was able to return to full-duty work.

On April 10, 1999, a Commission official actions officer approved the claimant's request. Claimant began treating with Dr. S on April 15, 1999, and Dr. S diagnosed claimant as having a lumbar strain, lumbar radiculitis, and myofascial pain; prescribed physical therapy for eight weeks; and wrote that it was unknown when claimant could return to limited or full-time work.

Claimant testified that he has pain in his low back that radiates down his legs and radiates to other parts of his body; that Dr. S prescribed different medications that eased some of his pain; that Dr. S took him off work after x-rays were done in April; that under Dr. S's treatment he is going to physical therapy three times a week and is seeing Dr. C, D.C., for chiropractic treatment; that Dr. S's treatment and Dr. C's treatment have helped him a whole lot; that he wants to continue physical therapy until he is able to return to full-duty work; that he has not looked for work while treating with Dr. S; that he filed for unemployment benefits with the Texas Workforce Commission (TWC) and Dr. S reported to the TWC that he, claimant, could work light duty; that he believes that, after being treated by Dr. S, he can work light duty because his condition improved with that treatment; and that he is still seeing Dr. S and taking physical therapy.

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 has the burden to prove he has disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. Apparently there is no dispute that claimant had disability to March 22, 1999. The disability issue at the CCH was whether claimant has had disability after March 22, 1999. The hearing officer found that claimant's compensable injury of _____, has not prevented claimant from obtaining and retaining employment at wages equivalent to his preinjury wage at any time after March 22, 1999, and concluded that claimant has not had disability after March 22, 1999. There is conflicting evidence on the disability issue. The 1989 Act makes the hearing officer the sole judge of the weight and credibility of 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. Appeal No. 950084. We conclude that the hearing officer's decision on the disability issue 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).

With regard to the issue regarding a change of treating doctors, Section 408.022(b) provides that, if an employee is dissatisfied with the initial choice of doctor, the employee may notify the Commission and request authority to select an alternate doctor and that the notification must state the reason for the change. Section 408.022(c) provides that the Commission shall prescribe criteria to be used by the Commission in granting the employee's authority to select an alternate doctor and that the criteria may include: (1) whether treatment by the current doctor is medically inappropriate; (2) the professional reputation of the doctor; (3) whether the employee is receiving appropriate medical care to reach maximum medical improvement (MMI); and (4) whether a conflict exists between the employee and the doctor to the extent that the doctor-patient relationship is jeopardized or impaired. Section 408.022(d) provides that a change of doctor may not be made to secure a new impairment rating or medical report. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9(e) provides that reasons for approving a change in treating doctor include but are not limited to: (1) the reasons listed in Texas Civil Statutes, Article 8308-4.63(d) [now Section 408.022(c) of the Texas Labor Code]; and (2) the selected doctor chooses not to be responsible for coordinating the injured employee's health care.

The hearing officer found that, at the time of the request to change treating doctors, claimant was receiving medical treatment appropriate to his compensable injury and appropriate to assist him in reaching MMI and there was no conflict evident in the doctor/ patient relationship between claimant and Dr. J. The hearing officer further found that claimant sought to change his treating doctor from Dr. J to Dr. S because he was not satisfied with Dr. J's full-duty release to return to work, and wished to obtain a new medical report. The hearing officer concluded that the Commission abused its discretion in approving Dr. S as claimant's new treating doctor. Claimant contends that he was not receiving adequate medical treatment from Dr. J and that he changed treating doctors to Dr. S to obtain adequate medical treatment and not to obtain a new medical report to remain off work. We cannot conclude that the hearing officer abused her discretion in determining that the Commission abused its discretion in approving Dr. S as claimant's new treating doctor nor can we conclude that her decision on that issue is not supported by sufficient evidence or is contrary to the overwhelming weight of the evidence. Texas Workers' Compensation Commission Appeal No. 961187, decided July 31, 1996.

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge