

APPEAL NO. 991778

On July 26, 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 a compensable injury on or about \_\_\_\_\_; and (2) whether claimant sustained disability. Claimant appeals the hearing officer's decision that he did not have disability. Respondent (carrier) requests affirmance of the hearing officer's decision on the disability issue. There is no appeal of the hearing officer's decision that claimant sustained a compensable injury on \_\_\_\_\_.

DECISION

Affirmed.

Claimant worked as an assistant manager at the employer's tire store. He said that most of the time he worked at the counter making sales and that sometimes he would have to pull a tire from a rack to show it to a customer. He also said that he would do other physical labor at work such as taking tires off cars and off wheel rims, putting new tires on cars, and unloading tires from trucks. He said that on \_\_\_\_\_, he injured his left shoulder and neck at work when pulling a tire off an overhead rack to show to a customer. Claimant said that he continued to work and that on February 22, 1999, employer sent him to a medical clinic after he informed employer that he was claiming a work-related injury. The doctor at the clinic diagnosed claimant as having left shoulder tendinitis, prescribed medication and physical therapy, and released claimant to modified duty, with restrictions of no tire lifting and no lifting or reaching above the left shoulder.

Claimant said that he did counter sales work on February 23rd and then went on his own to Dr. L office where he was seen by Dr. K. Dr. K noted that x-rays showed no fracture or dislocation of the cervical spine or left shoulder; diagnosed claimant as having left shoulder impingement syndrome, post-traumatic injury to the cervical spine, and thoracic myofascitis; and prescribed physical therapy and medications. Dr. K wrote that claimant's injury is related to his work. A radiologist reported that an MRI of claimant's left shoulder done on May 3, 1999, showed a tiny left shoulder joint effusion, no rotator cuff tear, and no evidence of shoulder impingement. Claimant saw Dr. L after the shoulder MRI was done and Dr. L diagnosed claimant as having cervical radiculopathy and an improving left shoulder soft tissue injury. A radiologist reported that an MRI of claimant's cervical spine done on May 17, 1999, showed a mild disc protrusion at C5-6 and loss of the normal cervical lordosis likely related to muscle spasm. Dr. L diagnosed claimant as having a cervical disc herniation and wrote that claimant would benefit from rehabilitation.

Claimant said that he did not return to work with employer after February 23, 1999; that Dr. K took him off work; that he had physical therapy for his injury; that Dr. K released him to work supervisory work; and that since April 5, 1999, he has been working as a dock supervisor for another employer at higher wages than he made at employer. Claimant said

that the dock supervisor job is within his doctor's restrictions. The reports of Dr. K and Dr. L in evidence do not state that claimant was taken off work by them or that they placed claimant on light-duty or modified-duty work. The only things noted in those reports about work status was that claimant had returned to full-time work between the date of his injury and the date he saw Dr. K on February 23, 1999; that claimant's work at employer required mild to moderate labor-type work; that claimant reported that he had missed time from work since the date of injury; and that his work status by the time the shoulder MRI was done was noted as "working." EC, who worked as an assistant manager for employer, testified that at times the job of assistant manager can be physically demanding. It is not disputed that claimant did not work for employer after February 23, 1999, and that he began working for another employer as a dock supervisor at higher wages than his preinjury wage on April 5, 1999.

WW, the employer's store manager, testified that employer has a light-duty policy; that as an assistant manager claimant would be aware of that policy; that counter sales work that claimant did for the employer sometimes involves pulling a tire to show to a customer or carrying out a tire for a customer; that the light-duty policy would have allowed claimant to perform only counter sales work without having to pull or carry tires; that light-duty work was available for claimant, but that claimant did not return to work for employer after February 23rd; and that he did not terminate claimant from employment. Claimant noted in his recorded statement that employer offers light duty.

There is no appeal of the hearing officer's decision that claimant sustained a compensable injury on \_\_\_\_\_. 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 had disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. The hearing officer found that, due to the claimed injury, claimant was not unable to obtain and retain employment at wages equivalent to claimant's preinjury wage and he concluded that claimant did not have disability.

The issue of whether claimant had disability presented a fact question for the hearing officer to determine from the evidence presented. 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 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 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).

Claimant's complaint about the adequacy of representation provided by his attorney at the CCH does not present grounds for reversal of the hearing officer's decision. It has been held that an attorney employed to prosecute a claim for workers' compensation is the agent of the client, and his action or nonaction within the scope of his employment or agency is attributable to the client. Texas Employers Insurance Association v. Wermske, 349 S.W.2d 90 (Tex. 1961). The medical document dated February 23, 1999, attached to claimant's appeal will not be considered on appeal as it was not made a part of the CCH record. Section 410.203. That document does not constitute newly discovered evidence. Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983).

The hearing officer's decision and order are affirmed.

---

Robert W. Potts  
Appeals Judge

CONCUR:

---

Thomas A. Knapp  
Appeals Judge

---

Dorian E. Ramirez  
Appeals Judge