

APPEAL NO. 991797

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). A contested case hearing (CCH) was held on July 27, 1999. The issues at the CCH were whether the appellant/cross-respondent (claimant) sustained a compensable injury on _____, and whether he had disability. The hearing officer determined that the claimant sustained a compensable injury and that he had disability from December 1 through December 8, 1998. Claimant appeals the period of disability, urging that his disability runs up to the current date and attaching evidence not offered or admitted at the CCH in support of his position. The respondent/cross-appellant (self-insured) appeals the determination that the claimant sustained a compensable injury urging that there is no evidence the claimant suffered any additional harm to his body on _____. The self-insured responds to the claimant's appeal, first objecting to any new evidence being considered for the first time on appeal and urging that there was sufficient evidence to support the limited disability determination of the hearing officer.

DECISION

Affirmed.

The claimant testified that he felt a burning sensation in his groin and lower back when he attempted to lift an elevator gate on _____; that he told a coworker about it when the coworker attempted to help him lift the gate (corroborated by the coworker); that he subsequently reported the matter to his supervisor; and that he was sent to a hospital used by the employer. He was subsequently diagnosed with a left inguinal hernia and back strain. Medical records show that he had an earlier back injury, that he was under continuing treatment for that earlier injury up to the time of the current injury, and that he had been working under restrictions from that injury at the time of the _____, incident. Although surgery is recommended, the claimant states he is still undecided; that it is his body and his decision and right to decide when he has any surgery. He states he is on medications and that he feels the hernia is getting better. Medical records from the claimant's doctor show that he was released to restricted duty on December 9, 1998, the restrictions being the same as the restrictions he was on prior to _____. Claimant attached additional documents to his appeal; however, they are not considered in this review as they are not part of the record of the CCH, they have been objected to by the self-insured, and there is a lack of showing that the evidence was newly discovered and not previously obtainable. Texas Workers' Compensation Commission Appeal No. 93463, decided July 19, 1993; Texas Workers' Compensation Commission Appeal No. 92201, decided June 29, 1992; Section 410.203(a). See also Holgin v. Texas Employers Insurance Association, 790 S.W.2d 97 (Tex. App.-Fort Worth 1990, writ denied).

Contrary to the assertions of the self-insured of no evidence of an injury on _____, there was the testimony of the claimant, corroboration of a coworker, a report to the supervisor, and the medical records showing a diagnosis of a hernia (aside from any

back strain). This, if believed by the hearing officer, as it obviously was, formed a sufficient evidentiary basis to support the finding of a compensable injury on _____. We cannot conclude the evidence is factually insufficient. Lopez v. Hernandez, 595 S.W.2d 180, 183 (Tex. Civ. App.-Corpus Christi 1980, no writ).

Regarding the period of disability, we similarly find that there is sufficient evidence to support the decision of the hearing officer. Evidence was before the hearing officer showing that the claimant had been released to restricted duty on December 9, 1998; that he had been performing that type of restricted duty prior to _____; that the restrictions were the same as the pre-December 1st injury; and that the self-insured had a program for restricted duty of which the claimant was advised. While it would appear that surgery is the appropriate treatment for the hernia, and the claimant has elected not to have surgery at this time and feels that his hernia is improving, this does not preclude a finding that disability, as defined in Section 401.011(16), has ended under these circumstances. Disability means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. The burden of proof to establish disability is on the claimant and the issue is one of fact for the determination of the hearing officer. Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995; Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer concluded that the claimant did not sustain that burden here. Her determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). Accordingly, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Elaine M. Chaney
Appeals Judge