APPEAL NO. 000250

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 4, 2000. The hearing officer determined that the appellant's (claimant) compensable thoracic spine injury of _____, did not extend to the neck; that the respondent (carrier) contested compensability of the claimed neck injury on or before the 60th day after its first written notice of the neck injury; and that the claimant had disability for the thoracic spine injury from February 26 through April 12, 1999. The claimant appeals the disability and extent-of-injury issues, contending they are contrary to the great weight and preponderance of the evidence and that disability was erroneously terminated based on the hearing officer's belief that the claimant had reached maximum medical improvement (MMI). The carrier replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant testified that on _____, at about 2:30 p.m. he reached down to move a cement mixer and that when he straightened up with it, he felt pain from his mid-back to his neck. He worked the rest of the day and the next day. At about 3:00 a.m. the following day, he said, he woke up and could not move; the greatest pain was in the mid-back. According to the claimant, he went once or twice to an emergency room complaining about both his mid-back and neck, but no records of these visits were in evidence. The claimant also testified that he had a prior work-related injury in 1994 as a result of which he was off work for two or three days, but has since recovered and remained without problems until the current injury on _____.

The claimant first received treatment from Dr. K on March 4, 1999. The diagnosis was a possible muscle strain in the portion of the back between the shoulder blades. Although the claimant said he told Dr. K that he was also having neck pain, the records of this visit do not reflect such a complaint. In a report of March 9, 1999, Dr. K commented that the claimant "has some minimal pain when he moves his neck. . . ." He diagnosed a muscle strain and returned him to regular work. On March 18, 1999, Dr. K stated that the claimant had a normal lumbar spine, but did not x-ray his cervical spine. Meanwhile, on March 15, 1999, the claimant completed an injury report for his employer in which he said the nature of his injury was "pain in the upper back." No mention was made of cervical pain.

The claimant then saw Dr. B on March 30, 1999, at the request of the carrier. Dr. B's report of this visit refers to complaints of pain in the mid-thoracic area. The claimant testified that this was the location of most of his pain, but that he also had neck pain and reported it to Dr. B. According to the claimant, Dr. B told him there was no reason why he should be "hurting this way." No mention is made in this report of a neck injury or neck

pain. On April 12, 1999, Dr. B found the claimant "essentially asymptomatic" and returned him to full duty. On April 19, 1999, Dr. B saw the claimant for a "sudden onset of pain over the dorsal spinous process in the mid thoracic area. . . ." Based on an apparently normal examination, Dr. B stated "I do not have an explanation for his current increased symptomatology." Dr. B again released the claimant to return to work and concluded the claimant was at MMI as of April 12, 1999. Again, no mention was made of neck pain.

On April 26, 1999, the Texas Workers' Compensation Commission (Commission) approved the claimant's request to change treating doctors to Dr. C, D.C. In his initial medical report of a visit on May 3, 1999, Dr. C recorded complaints of mid-back pain with upper extremity numbness and tingling. He further stated that there was "no past history of injury related to this current injury including no past history of any related diagnosis, treatment, or disability. There is also no other significant medical history."[1] Dr. C did not indicate awareness of the 1994 work-related injury or the Commission's records of seven other work-related injuries, ranging from a spider bite to a burn and back injuries. His diagnoses were a thoracic sprain/strain, scapulothoracic syndrome, myofascial pain syndrome, and muscular deconditioning. He placed the claimant in an off-work status, which has not been changed. The first mention of neck pain appears in the report of a visit on June 1, 1999, which Dr. C attributes to the injury of _____. He subsequently diagnosed degeneration of the cervical intervertebral disc and referred the claimant to Dr. S.

Dr. F examined the claimant on June 15, 1999, at the request of the carrier. The chief complaint noted was thoracic back pain. His diagnosis was myofascial strain. Dr. F did not record any complaints of neck pain and noted a history of "not having any back difficulties prior to his _____, episode of lifting." The hearing officer commented in his decision and order that the "picture of Claimant's physical examination" by Dr. F was different from that painted by Dr. C.

A cervical MRI on July 15, 1999, disclosed cervical disc bulging at C3-4 and C5-6. A cervical myelogram on September 14, 1999, showed multilevel cervical spondylosis and mild bulging. Dr. S, in a letter of August 6, 1999, wrote that it "appears definitely that the cervical spine has been involved in the injury" and that the MRI demonstrated an "abnormality." The hearing officer commented on this report that Dr. S "mischaracterized the objective findings . . . concerning the MRI," in which Dr. G, the radiologist, "stated he found no abnormalities of Claimant's cervical spine." The text of the report of Dr. G reads: “No abnormal signal in the underlying cervical cord is observed."

[1]The claimant also stated in answer to carrier's interrogatories that the only prior injury from which he received workers' compensation benefits was in 1987 for the lower back. The claimant explained this by saying that he believed he only had to list injuries for which he received a cash payment such as the 1979 injury.

Dr. S proposed cervical surgery. Dr. E provided a second opinion on the surgery question in which he commented that the MRI showed apparent herniation at C3-4 and protrusion at C5-6. The hearing officer commented that he considered this conclusion "inconsistent with the objective findings of [Dr. G]. . . ." Dr. E also noted significant osteophyite causing compression at C3-4 and C5-6.

Dr. B reexamined the claimant on October 18, 1999, and commented on the spinal surgery recommendation. He concluded that the cervical spine reflected "mild degenerative changes" that did not correlate with the claimant's initial symptoms in the mid-thoracic spine.

The claimant had the burden of proving he injured his cervical spine at work on _____, as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. In his lengthy recitation of the evidence in this case, the hearing officer pointed out the lack of full disclosure by the claimant of his medical history to various examining doctors, including Dr. C. The hearing officer also considered significant what the MRI and myelogram did or did not show regarding pathology of the cervical spine and its cause either by injury or degeneration. He concluded that the claimant's evidence did not establish the incident at work as a cause of a cervical injury. In his appeal of this determination, the claimant asserts that the hearing officer overstepped the boundaries of his education and authority in challenging Dr. E's reading of the MRI and that he relied too heavily on Dr. B's opinion. He further relies on our decision in Texas Workers' Compensation Commission Appeal No. 950842, decided July 10, 1995, in which we reversed a decision of a hearing officer that found the claimant did not sustain a compensable injury and rendered a decision that he did. That case involved a claim that a repetitive trauma injury extended to the cervical spine. The hearing officer did not believe the evidence established that there was repetitive trauma to the cervical spine. The Appeals Panel concluded that this determination was against the great weight and preponderance of the evidence. The case we now consider does not deal with repetitive trauma and the dispute here turned more on an evaluation of the claimant's credibility in the context of the claimed injury, the circumstances of which were not in dispute, and the distinction between a traumatic injury to the cervical spine and a degenerative condition of the cervical spine. We would further note that the hearing officer is the sole judge of the weight and credibility of the evidence, including the medical evidence. Section 410.165(a); Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Thus, the hearing officer did not step outside his authority in declining to find the opinions of any particular doctor credible. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). While another hearing officer may well have found otherwise, we believe the evidence in this case deemed credible and persuasive by the hearing officer was sufficient

to support his determination that the claimant's compensable injury did not extend to the cervical spine.

The claimant also appeals the disability determination, contending primarily that the hearing officer arbitrarily ended disability on the date he and Dr. B believed the claimant reached MMI, that is, April 12, 1999. Whether disability exists is also a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In this case, the hearing officer obviously found Dr. B's note of April 12, 1999, particularly persuasive on the issue of disability. That note makes no mention of MMI. We believe the hearing officer fully understood the distinction between MMI and disability and that the former does not determine the latter. In a later letter, Dr. B also concludes that the claimant was at MMI on April 12, 1999. Just as MMI does not determine disability, nothing precludes disability from ending on the date of MMI. The claimant also argues that Dr. C based his determination that the claimant was unable to work on the thoracic injury and that, even if the cervical spine was not part of the compensable injury, the claimant still had disability beyond April 12, 1999, as stated by Dr. C. As the hearing officer commented in his decision and order, the reasons why Dr. C believed the claimant had disability fluctuated between a thoracic and cervical injury and arguably depended on both. Regardless of what Dr. C said, the hearing officer could find it unpersuasive in favor of Dr. B's opinion. Under our standard of review, we find the evidence sufficient to support the disability determination.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge