

APPEAL NOS. 000288
AND 000289

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 January 14, 2000. It has been determined that the CCH joined the two disputes because it was anticipated that a substantial portion of evidence at the CCH would overlap. The hearing officer has determined that the respondent (claimant) sustained a compensable injury on _____, and on (subsequent date of injury), and has had disability for the (subsequent date of injury), compensable injury from October 1, 1999, through the date of the CCH.

The appellant (carrier) has appealed findings against it on both claims. The carrier goes through the evidence, pointing out inconsistencies, and asserting that the hearing officer, obligated to review credible evidence, has erred. There is no response to either appeal from the claimant.

DECISION

Affirmed.

It must be frankly stated that the clarity of the claimant's testimony was undermined by a failure of recollection on many dates or time intervals, notwithstanding the pendency of this matter and the fact that the parties have already been through a benefit review conference. There is only the briefest summary of facts in the decision. We will set out the facts as we understand them.

The claimant contended he had two work-related injuries, within roughly a six-week time period. Disability was claimed only with respect to the second injury, which was a back injury. The claimant worked for (employer) as a welder. He agreed that he had a previous inguinal hernia repair performed the previous year at some point prior to the date he began working for the employer (June 1998).

The claimant contended that on _____ (all dates are 1999 unless otherwise stated), as he was lifting a heavy item he felt a cramp in his lower stomach. The claimant agreed he did not report a work-related injury to his supervisor until around September 6th (which was Labor Day) and he continued to work. The claimant indicated that he had gone to see his regular family doctor on August 20th concerning treatment for a shoulder injury which resulted from an automobile accident (the details of which were not further developed). Although the claimant testified that his hernia area was examined and the family doctor said it felt okay, he also indicated that this doctor referred him to Dr. B to check the area further. He said that Dr. B told him he had a hernia. The date this occurred was September 3rd and Dr. B's report of that day diagnosed a recurrent right hernia and a new left-sided hernia (inguinal). This was the only time that the claimant was examined by Dr. B. The claimant said he did not discuss any specific _____ incident with Dr. B,

but generally told him he lifted a lot at work. The claimant said that he took what the doctor said to his supervisor. He said he was asked if he was going under his insurance, and he said "yes," but later that day thought it was not fair since this was a work-related injury and changed his mind. The claimant's hernia surgery was scheduled for September 13th, but he did not have it after he informed Dr. B's office that this would be a workers' compensation claim. He was interviewed by the adjuster on September 13th and told the adjuster that he had reported his hernia as work related to Dr. B.

The claimant was apparently put on "no lifting" light duty, doing essentially the same job with assistants to lift. Concerning the alleged (subsequent date of injury) back injury, we note that the claimant testified that due to bad lighting, he had to bend over a lot to see his marks and that it was bending over a lot that caused back pain, which he said he first noticed on (subsequent date of injury). The claimant said at first that he promptly reported his injury to the company nurse, Ms. M, rather than his supervisor. On cross-examination, he said that he told Ms. M that his back was hurting and assumed she would ask him how it happened. She did not and therefore the claimant did not tell her he was hurt on the job. He said that the failure to notify his supervisor of injury promptly on this second occasion eventually led to his termination on a date he could not recall. However, it was ultimately developed that (subsequent date of injury) was his last day of work.

The claimant said he went to Dr. H, D.C., the next day and was taken off work. The claimant said that aside from back strain, Dr. H indicated that his hernias were a complicating factor leading to his back strain (because he did not have normal front abdominal support and therefore "used" his back more). Dr. H's Initial Medical Report (TWCC-61) of October 1st discusses only the hernias and a back injury is not mentioned. Dr. H's office treatment notes show that the claimant was treated every few days in his office throughout October, November, December, and January, up to the date of the CCH. The claimant reported his pain on a ten-point scale as a four or five, going down to a three through much of November, four through December, and then five in January. It appears that the claimant complained of back soreness with occasional reported radiation into one or both legs. An October radiographic report cites spurring, mild degenerative narrowing, and findings in the thoracic spine suggestive of muscle spasm.

The record has no testimony by the claimant as to whether he felt he was able or unable to work. He was asked how his back felt as of the day of the CCH and he said that it felt a little worse, but then said Dr. H's treatments made him feel better. He agreed that he drew unemployment benefits for six weeks, including the month of December, and that he looked for work three times a week, at least. The claimant said that Dr. H told him he could look for work. He was unable to find employment and was not given an interview. He said that his job searching stopped (as did the unemployment benefits) when he broke his foot on December 23rd from falling off a small stepladder while stringing exterior Christmas lights at his mother's house.

Dr. H's notes are nearly devoid of any statement, one way or the other, as to ability or inability of the claimant to work, prior to January 2000. However, his December 1st treatment note states that the claimant reported "having almost no problems in personal care, lifting, walking, sitting, standing, sleeping, and traveling." On January 7th, Dr. H noted that although the claimant had a new traumatic injury and renewed soreness in his back due to his crutches, he was still unable to work due to his low back condition. The January 12th note continues the claimant off work.

Ms. M testified that the claimant initially contended he was unable to recall any specific incident leading to his hernias, which were reported on September 7th to her. He later asserted the _____ date. Ms. M said that the claimant reported only a sore back to her and she did not discover that a work-related injury was asserted until contacted by the carrier around October 6th. Ms. M said she never thought about the fact that he could have injured his back at work because he was on restricted duty.

The carrier has raised several alternative ways that the evidence could be construed in this case to be inconsistent with occurrence of either injury on the job or subsequent inability to work. That the same set of facts could be viewed and opposing inferences drawn is indicated by the fact that the recommendation of the benefit review officer (BRO) was the opposite of what the hearing officer eventually found. The function of the Appeals Panel is not, however, that of a hearing officer compared to the BRO. We will not refind facts, but review the record to determine if the fact findings of the hearing officer are sufficiently supported by the record or are so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust. From our review of the record, and applying our standard of review of factual issues, we cannot conclude that the decision is so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust.

Our review of the record indicates that there is support for the hearing officer's decision, which is more than a mere scintilla, on all appealed points. We affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge