

APPEAL NO. 000385

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 19, 2000. The hearing officer found that the respondent (claimant) sustained a compensable injury to his thoracic spine on _____, and a compensable injury to his lumbar spine by having aggravated a preexisting lumbar spine injury while undergoing physical therapy (PT) in August 1999 for his _____, compensable injury. The hearing officer further determined that claimant had disability from June 3, 1999, through November 8, 1999. The appellant (carrier) has requested our review, challenging the sufficiency of the evidence to support the lumbar spine aggravation injury and the evidence to support disability after July 15, 1999, when it asserts that disability from the thoracic spine injury ended. Claimant's response urges the sufficiency of the evidence to support the lumbar spine injury and thus the period of disability through November 8, 1999.

DECISION

Affirmed.

The hearing officer's Decision and Order contains a thorough summary of the evidence with which neither party takes issue and is adopted for this decision. Accordingly, only so much of the evidence will be recounted as is necessary for this decision.

Claimant testified that he has been a truck driver since 1973; that on _____, while attempting to lift the cab of a truck to check the oil level, he felt a burning sensation in his right rib cage; that he reported the injury to the employer a week later and was admitted to a hospital that day by Dr. T who had previously treated him; that while in the hospital for 10 days, he was diagnosed with a herniated disc at the T11-12 level; and that although surgery was considered, his thoracic spine injury was treated with an injection and PT and that Dr. T had him off work. Claimant further stated that in August 1999 while in a PT session involving weight lifting, he tried to pick up the bench press weight and felt a pinch and pain in his low back, developed pain down a leg, stopped the PT, and was diagnosed with an injury at L5-S1. Claimant acknowledged having missed work in 1983 due to back pain but indicated he had not missed any work due to low back pain for a long time. He also acknowledged that he may have told Dr. T he was having back pain for about two months before _____, but said it was not as severe and was totally different from the new pain. He also stated that he agreed with Dr. T's having released him for return to work without restrictions as of November 8, 1999. He said he obtained a job driving a truck for a new employer the week before Christmas but that the job pays only \$8.00 an hour as compared with the \$14.20 per hour he was earning at the time of the injury. The parties agreed during closing statements that claimant commenced the new employment on December 20, 1999. There are numerous medical records in evidence reflecting that claimant is off work and that the injury is both the herniated disc at T11-12 and the disc at L5-S1.

Dr. T wrote on October 22, 1999, that claimant had an old injury to the lumbar spine, a herniated disc at L5-S1, then sustained a new injury to the thoracic spine, and that due to the new injury, "claimant sustained a cramping position making his lower back pain reoccur." Dr. T further stated that it was his opinion "that the old injury was re-occurred by the new injury."

Dr. M, whom claimant described as an occupational medicine specialist, reported on November 22, 1999, in his "Fitness For Duty Evaluation" that his assessment of claimant is as follows: "1. Thoracic herniated disk at T11/12. 2. Aggravation of prior L5-S1 symptomatic herniated disk with radiculopathy while in [PT] for treatment of No. 1 above."

The hearing officer's recitation of the evidence sets forth additional medical evidence including the difference between a December 9, 1997, lumbar spine MRI and of the lumbar spine and more recent testing.

Relative to this request for review, the hearing officer found that in August 1999 claimant was undergoing PT for his _____, compensable injury when he aggravated a preexisting lumbar spine injury and that he has had disability from June 3, 1999, through November 8, 1999.

The carrier argues that the medical evidence shows that claimant had a preexisting lumbar spine condition; that he complained of lumbar spine pain in June 1999 before the aggravating incident during PT; and that there was not much difference between the 1997 and 1999 lumbar spine MRIs and, thus, the evidence fails to establish the claimed aggravation injury. The carrier further contends that claimant's inability to obtain and retain employment at wages equivalent to his preinjury wages as a result of his compensable thoracic spine injury ended by June 15, 1999, based on a record of Dr. T.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Claimant described the lumbar spine pain following his weight lifting incident during PT as much more severe and "different" than his previous lumbar spine pain. Further, both Dr. T and Dr. M expressed opinions that claimant's preexisting lumbar spine injury was aggravated.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge