

APPEAL NO. 000447

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 February 9, 2000. The issues at the hearing were whether the respondent (claimant) had disability for the period from February 17 to October 28, 1999, as a result of the \_\_\_\_\_, compensable injury and whether the appellant (carrier) waived the right to contest compensability of a cervical spine injury by not contesting compensability within 60 days of the date it received written notice that the injury extended to the cervical spine. The hearing officer found good cause to add the issue of whether the claimant had waived the right to raise the issue of carrier waiver with respect to the cervical spine. With respect to those issues, the hearing officer determined that the claimant had disability as a result of his compensable injury for the period from February 17 through October 28, 1999; that the carrier waived its right to contest compensability of the cervical spine injury because it failed to file its contest of compensability within the 60-day period provided for doing so; and that the claimant did not waive his right to raise the issue of carrier waiver by failing to timely pursue that issue. In its appeal, the carrier asserts error in each of those determinations. In his response to the carrier's appeal, the claimant urges affirmance. The claimant also asserts in his response that the hearing officer erred in adding the issue of whether he had waived the right to raise the carrier waiver issue. While the response was timely filed as a response, it was not timely to serve as an appeal; therefore, the issue of whether the hearing officer abused his discretion in adding that issue is not before us on appeal. See Section 410.202 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 143.3 and 143.4 (Rules 143.3 and 143.4).

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable bilateral shoulder injury on \_\_\_\_\_. That issue had previously been resolved in favor of the claimant at a hearing held on August 31, 1998. At that hearing, the hearing officer also found that the claimant had disability as a result of his compensable injury from February 2, 1998, through the date of the hearing. On July 29, 1999, a second hearing was held on the issue of whether the claimant's compensable injury extends to both legs, the cervical and thoracic spine, and the chest. At that hearing, the claimant attempted to add the issue of whether the carrier had waived its right to contest compensability by failing to raise its contest within 60 days of the date it received written notice of those claimed injuries. The hearing officer presiding over that hearing, a different hearing officer than in the case at bar, denied the claimant's motion to add the carrier waiver issue. The claimant filed an appeal and in Texas Workers' Compensation Commission Appeal No. 991875, decided October 4, 1999 (Unpublished), the Appeals Panel affirmed the extent-of-injury determination and determined that the hearing officer did not err in not adding the issue. Thereafter, the claimant again sought to pursue the carrier waiver issue in the dispute resolution process, which resulted in the hearing now under review.

Disability is also at issue in this case for the period from February 17, 1999, to October 28, 1999. On February 16, 1999, the claimant's then treating doctor, Dr. H, certified that the claimant reached maximum medical improvement (MMI) with an impairment rating of zero percent. On December 1, 1998, Dr. H had released the claimant to modified duty with no lifting, pushing, or pulling greater than 35 pounds. On February 17, 1999, the claimant filed an Employee's Request to Change Treating Doctors (TWCC-53) requesting to change from Dr. H to Dr. S, a chiropractor. On February 24, 1999, the Texas Workers' Compensation Commission (Commission) approved the change from Dr. H to Dr. S. The claimant apparently began treating with Dr. S before he requested the change and before the change was approved because on January 15, 1999, the claimant underwent a right shoulder MRI and Dr. S is listed as the referring physician on the MRI report. The MRI revealed a partial thickness rotator cuff tear in the claimant's right shoulder. Dr. S took the claimant off work and began him on a course of conservative treatment, which included steroid injections. On July 2, 1999, Dr. S referred the claimant to Dr. L, D.O., who recommended that the claimant undergo right shoulder surgery because of the failure of the conservative treatment to relieve the claimant's pain. In October 1999, the claimant had right shoulder surgery performed by Dr. L and the carrier again initiated temporary income benefits. As such, the disability period after October 28, 1999, is not at issue in this case. The claimant testified that he did not work anywhere between February 17 and October 28, 1999, because he was not able to work due to his shoulder injury.

Initially, we consider the carrier's challenge to the hearing officer's disability determination. The claimant has the burden to prove that he had disability as a result of his compensable injury. That question presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. Generally, questions of injury and disability can be established based on the claimant's testimony alone, if it is believed by the hearing officer. Gee v. Liberty Mutual Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the hearing officer need not accept the testimony of the claimant at face value; rather, it only raises an issue of fact for the hearing officer to resolve. Campos, supra; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

The carrier contends that the hearing officer's determination that the claimant had disability for the period from February 17 to October 28, 1999, is against the great weight of the evidence. We find no merit in this assertion. On January 15, 1999, the claimant had a right shoulder MRI that revealed a partial thickness rotator cuff tear. In December 1998, Dr. H, the claimant's then treating doctor, released the claimant to modified duty, and he

certified that the claimant reached MMI on February 16, 1999. Dr. S, who was approved as the claimant's treating doctor on February 24, 1999, took the claimant off work. In addition, the claimant testified that he was not able to work because of his shoulder injury during the period at issue. As the fact finder, the hearing officer was charged with the responsibility of resolving the conflicts and inconsistencies in the evidence and deciding what facts had been established. He did so by determining that the claimant had disability from February 17 to October 28, 1999. Nothing in our review of the record demonstrates that the hearing officer's determination in that regard is so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse the disability determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Next, we consider the hearing officer's determination that the claimant did not waive his right to raise the issue of whether the carrier timely contested compensability in this instance in accordance with Section 409.021. In Texas Workers' Compensation Commission Appeal No. 950140, decided March 8, 1995, we considered a case very similar to this one. In that case, the claimant raised a carrier waiver issue at a second benefit review conference (BRC) after the issue of compensability had been raised at a prior BRC and then taken to hearing, appealed to the Appeals Panel and thereafter appealed to the district court. In Appeal No. 950140, the Appeals Panel reversed a hearing officer's determination that the claimant had not waived his right to pursue the carrier waiver issue and issued a new decision that the claimant had waived that issue. Appeal No. 950140 acknowledged that the 1989 Act contemplates "an issue driven system"; however, the case concluded that the issue-driven system did not contemplate that different issues in the same case would proceed separately through the Commission and the courts "resulting in conflicting determinations as to whether or not a claimant is entitled to benefits," noting that "[s]uch a system would obviously be untenable." Appeal No. 950140 stated "[w]e therefore hold that the issues of contest of compensability of the injury and compensability are so interlinked that to have the latter determined without raising and determining the former will constitute waiver of the former." See also Texas Workers' Compensation Commission Appeal No. 950464, decided May 10, 1995; Texas Workers' Compensation Commission Appeal No. 972624, decided February 4, 1998; and the cases cited therein. Appeal No. 950140 is determinative in this case because the issue of the compensability of the claimant's cervical injury was decided in the July 29, 1999, hearing, affirmed by the Appeals Panel in Appeal No. 991875, *supra*, and appealed to the district court. The claimant did not timely raise the carrier waiver issue at that hearing and, as such, he waived the right to pursue that issue. We reverse the hearing officer's determination that the claimant did not waive his right to raise the carrier waiver issue and render a new decision that he did waive the right to litigate that issue.

The issue of the timeliness of the carrier's contest of compensability having been waived, it is not properly before us. Therefore, we need not address the issue on the merits.

We affirm the hearing officer's determination that the claimant had disability from February 17 to October 28, 1999. We reverse his determinations that the carrier waived the right to contest compensability of the cervical injury and that the claimant did not waive his right to raise the carrier waiver issue and render a new decision that the claimant has waived the issue of whether the carrier timely contested compensability of the cervical injury.

Elaine M. Chaney  
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.  
Chief Appeals Judge

Thomas A. Knapp  
Appeals Judge