APPEAL NO. 000548

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 February 14, 2000. With regard to the issues before her, the hearing officer determined that the appellant (claimant) sustained a compensable muscle strain injury to her neck on _____ (all dates are 1999 unless otherwise noted), but did not sustain an injury to her cervical spine, right shoulder or thoracic spine. The hearing officer found that claimant had disability resulting from the injury from August 23rd through October 20th.

Claimant appealed, contending that her injuries were much more severe and included injuries to her cervical and thoracic spine and right shoulder as assessed by her doctors; that the hearing officer was, in essence, obligated to accept the evidence from her doctors ("not the place of the hearing officer to diagnose the claimant"); and that claimant had disability continuing to the date of the CCH. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The medical records indicate claimant was employed as a pharmacy technician. Claimant testified that on _____, she was standing on a stool reaching for a prescription bottle when she turned her head to look at a conveyor belt which had jammed and was spilling prescriptions. Claimant testified that she "felt a pop." Claimant continued to work her shift and apparently did not work over the weekend. Claimant testified that on _____, she called the employer, reported her injury and sought medical treatment at the (clinic).

Handwritten progress notes beginning August 23rd recite that claimant was reaching for a "med" when claimant "felt a pop in her neck." Claimant was taken off work. An x-ray report of August 25th has an impression of degenerative disc disease and "straightening of the cervical curvature." Follow-up visits of August 30th and September 8th are documented. A physical therapy evaluation dated September 9th deals only with cervical or neck complaints. An additional follow-up visit of September 16th is in evidence. A neurological evaluation dated September 24th, by Dr. M, has a diagnosis of "[n]eck pain, secondary to cervical strain and bilateral trapezius strain" with "no clinical evidence to suggest acute cervical radiculopathy." An Initial Medical Report (TWCC-61) dated September 27th of the August 23rd visit from Dr. P, a clinic doctor, has a tentative diagnosis of cervical strain. An MRI performed on October 13th, at the request of Dr. P, shows a reversal of the upper cervical curvature and mild disc bulging at C3-4, C4-5, C5-6 and C6-7, with no stenosis or impingement. In a Specific and Subsequent Medical Report (TWCC-64) of an October 15th visit, Dr. P diagnoses sprains/strains of the neck, references the MRI and states claimant is being referred to an orthopedic surgeon because of her continued complaints and "because of

the findings of the MRI." Claimant was returned to work with a 20-pound lifting restriction with no lifting above chest level or working overhead. Claimant testified that she was told that the employer had no light-duty jobs. The section which stated "return to full-time work" was marked "undetermined."

Claimant filed an Employee's Request to Change Treating Doctors (TWCC-53) on November 15th, requesting a change of treating doctors from Dr. P to Dr. S, approved on November 18th, as the employee's alternate choice of doctor. Claimant apparently saw Dr. S on December 21st and, in a work release of that date, Dr. S took claimant off work. In off-work reports beginning December 23rd, Dr. S has impressions of:

> Post traumatic mechanical injury to the cervical spine. Post traumatic mechanical injury to the right neck. Post traumatic mechanical injury to the thoracic spine. Cervical radiculopathy, clinically. Right shoulder anterior impingement syndrome. Possible right shoulder rotator cuff tear. Cervicothoracic and shoulder myofascial pain.

Similar reports, with documentation of manipulation and therapy through February 1, 2000, are in evidence. The hearing officer, in her Statement of the Evidence, comments, "These records are not credible." Claimant was apparently referred to Dr. W for evaluation. In a report dated January 18, 2000, Dr. W diagnosed cervical strain/sprain, neuralgia of the right arm and thoracic myositis/myofascitis.

Claimant, on cross-examination, agreed that she was only claiming a neck and right shoulder injury due to the incident on _____. Claimant's attorney, in closing, stated that claimant is not alleging degeneration or a rotator cuff tear "and there is no attempt to get, you know, that rotator cuff from the softball team fixed under Workers' Comp." The hearing officer quotes the claimant's attorney's "softball team" injury statement and comments:

> Claimant's evidence is minimally sufficient to prove by a preponderance of the evidence that she sustained a muscle strain in her neck on _____. Claimant did not injure her cervical spine, right shoulder, mid-back or thoracic spine. Claimant's evidence is minimally sufficient to prove by a preponderance of the evidence that she had disability from August 23, 1999 through October 20, 1999. Her evidence was insufficient to support disability after October 20, 1999 to the date of hearing.

Claimant, on appeal, contends that the hearing officer ignored the medical diagnoses of four doctors: Dr. P; Dr. S; Dr. D, an associate of Dr. S's; and Dr. W. Claimant recites the various diagnoses of the doctors (including some not mentioned in this opinion) and asserts that all the doctors, after Dr. P, made findings other than only a neck sprain/strain. Claimant contends that "[i]t is not the place of the hearing officer to diagnose the claimant, only to look at the evidence and make the findings." We disagree. Section 410.165(a) provides that the

hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). By statute, the hearing officer has the responsibility to weigh the evidence, including the medical evidence, and a fact finder is not bound by medical evidence when that evidence is manifestly dependent on the credibility of the information provided by the claimant. Rowland v. Standard Fire Insurance Company, 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.).

In this case, claimant was treated by Dr. P at the clinic until around October 15th, when she was released to light duty. Although claimant did request a change of treating doctors in November, she did not actually receive additional treatment until she saw a chiropractor on December 21st, more than two months after last seeing Dr. P. It was only at that time that cervical radiculopathy, right shoulder impingement, a rotator cuff tear and cervicothoracic myofascial pain was diagnosed.

Claimant, in her appeal, states that she does not know why "the rotator cuff tear from the softball team" comment was made and that it was in response to claimant's insinuations that claimant's "injury was incurred elsewhere, say during some hobby or sport." For whatever reason, the remark was made and it was for the hearing officer to assign to it what weight she thought appropriate. We find the evidence sufficient to support the hearing officer's finding that claimant sustained a muscle strain injury to her neck, but no "cervical spine, right shoulder or thoracic spine injury," and we affirm that portion of the hearing officer's decision.

Regarding disability, the hearing officer found that disability ended on October 20th. Disability is defined, in Section 401.011(16), as the inability because of the compensable injury to obtain and retain employment at the preinjury wage. Claimant correctly points out that if an injured employee is returned to light duty "but the employer cannot accommodate that light duty, the claimant's disability continues." Dr. P released claimant to return to light duty with certain restrictions in his TWCC-64 dated October 21st for an October 15th office visit. Claimant's testimony that she approached the employer about light duty and was told that none was available is uncontroverted by carrier. Dr. P, in the October 21st TWCC-64, noted that maximum medical improvement was undetermined and that a return to full-time work was "undetermined." Claimant testified that she was unable to return to work at that time. Texas Workers' Compensation Commission Appeal No. 9 1045, decided November 21, 1991, early on, held that a restricted release to work, as opposed to an unrestricted release, is evidence that the effects of the injury remain and disability continues. *See also* Texas Workers' Compensation Commission Appeal No. 992899, decided February 7, 2000. That case also

held that an employee under a conditional work release does not have the burden of proving an inability to work. *See also* Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. While the claimant has the burden of proving disability, she did so by her testimony as supported by Dr. P's reports (at least through October 15th) and subsequently by Dr. S's reports. We find no indication of any evidence or event which would support the hearing officer's determinations that disability ended on October 20th. We also find no evidence that Dr. S issued a work release on December 18th as the hearing officer recites and, in any event, that does not support an end to disability on October 20th. Dr. S took claimant off work on December 21st (page 15, Claimant's Exhibit No. 6). Consequently, we remand the case to the hearing officer to make findings on disability that are supported by some evidence or the hearing officer's rationale why she picked October 20th as the ending date of disability.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge