

APPEAL NO. 000800

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 March 21, 2000. The hearing officer determined that the respondent/cross-appellant's (claimant) compensable injury of _____, extended to his head, face, left eye, top lip, left hand, left shoulder, both knees, lower left calf and shin, left ribs, neck, and back; that the claimant had disability from April 21, 1998, through the date of the hearing, March 21, 2000; that the claimant has not reached maximum medical improvement (MMI); and that the appellant/cross-respondent (carrier) waived its right to contest that the claimant's compensable injury extended to the head, face, left eye, top lip, left hand, left shoulder, both knees, lower left calf and shin, left ribs, neck, and back by failing to raise its dispute within 60 days of the date it received written notice of those claimed injuries. In its appeal, the carrier asserts that the hearing officer's extent-of-injury, carrier waiver, disability, and MMI determinations are against the great weight of the evidence. The carrier also argues that pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3), which became effective March 12, 2000, the carrier cannot waive the right to dispute extent of injury. In his response to the carrier's appeal, the claimant urges affirmance. In his cross-appeal, the claimant asserts error in the hearing officer's not having found that his compensable injury also included a chest injury. In its response to the claimant's appeal, the carrier urges affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

It is undisputed that the claimant sustained a compensable injury on _____, when the 18-wheeler he was driving was involved in a motor vehicle accident. The claimant testified that he hit something in the road; that he bounced up and hit his head on the cab; that as he came back down the truck was going off the side of the highway; and that his truck was then hit by another truck. The claimant was taken from the scene by ambulance to the hospital where he remained overnight. The claimant then returned home and began treating with Dr. W, his family doctor. In progress notes of April 22, 1998, Dr. W diagnosed cervical and lumbar strain and multiple lacerations. He ordered a chest x-ray for the claimant. In an April 27, 1998, progress note, Dr. W noted that the lacerations were to the claimant's face, left hand, and left lower leg. On April 29th, Dr. W noted that the claimant also had a chest contusion, while on May 4, 1998, Dr. W noted complaints of left rib and sternum pain. Dr. W's May 6, 1998, progress notes add a diagnosis of a fractured sternum and his May 12, 1998, progress notes include a diagnosis of a right knee contusion. The claimant explained that he stopped treating with Dr. W in February 1999 because the carrier denied all of the referrals to specialists that Dr. W was recommending.

On April 26, 1999, the claimant had his initial appointment with Dr. R a neurosurgeon. At that appointment, Dr. R referred the claimant for a cervical MRI. The claimant's May 21, 1999, cervical MRI revealed a mild posterior disc bulge at C3-4. In a

June 3, 1999, progress note, Dr. R described the finding on the MRI as a "small extradural defect at the level of C3-C4." In an October 7, 1999, progress note, Dr. R explained that "when I described the extra dural defect I meant herniation." In addition, Dr. R noted that his examination of the claimant's lumbar spine demonstrated limitations; thus, he recommended a lumbar MRI.

On _____, the claimant completed an accident report for his employer. On that form the claimant identified the parts of the body injured as top of the head, face, left eye, top lip, left hand, left shoulder, both knees, lower left calf and shin, left ribs, neck, and back. On May 14, 1998, the claimant completed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) identifying the body parts injured as his head, face, left hand, left shoulder, left eye, fractured ribs, back, chest, and left leg.

The carrier had Dr. B examine the claimant. In a December 2, 1998, report, Dr. B opined that the claimant had reached MMI; however, he also recommended a cervical and left shoulder MRI to rule out the possibility of a cervical disc injury and rotator cuff tear. Apparently, the claimant disputed Dr. B's certification that he was at MMI and Dr. H was selected by the Texas Workers' Compensation Commission (Commission) to serve as the designated doctor. In a report dated March 17, 1999, Dr. H opined that the claimant had not yet reached MMI. The carrier requested permission from the Commission, which was given, to forward a Deposition on Written Questions to Dr. H. On November 22, 1999, Dr. H responded to the deposition questions by reasserting that the claimant had not yet reached MMI based upon Dr. H's assessment that the claimant "has not had an adequate work-up of this left shoulder." In response to a question of whether certain claimed injuries were causally related to the claimant's compensable injury, Dr. H responded that he believed the claimant had a left shoulder sprain and possible left rotator cuff tear, a cervical soft tissue injury, low back pain and a possible herniated lumbar disc, chest contusion, and abrasions about his head, knees and arms as a result of the compensable injury. However, Dr. H further opined that the problems with the claimant's eyes and brain and his cardiologic and pulmonary problems were not caused by the compensable injury.

Initially, we will consider the carrier's challenge to the hearing officer's determination that the claimant's compensable injury of _____, extends to include his head, face, left eye, top lip, left hand, left shoulder, both knees, lower left calf and shin, left ribs, neck, and back. The claimant had the burden to prove by a preponderance of the evidence that he sustained a compensable injury and the nature and extent of his injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App. -Texarkana 1961, no writ). 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 her. 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 determined on the basis of the claimant's testimony

alone if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the testimony of the claimant, as an interested party, raises only 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).

In arguing that the claimant had not sustained his burden of proving that his injury extended to the body parts found by the hearing officer, the carrier emphasized the delayed onset of those problems. In addition, the carrier argues that the medical evidence of causation should have been discounted because it was dependent on the credibility of the information imparted by the claimant. The carrier emphasized those same factors at the hearing. It was a matter for the hearing officer, as the fact finder, to determine the significance, or lack thereof, of those factors. The hearing officer was acting within his province as the fact finder in deciding to credit the claimant's testimony and the other evidence supporting a causal connection between the claimed body parts and the compensable injury. Our review of the record does not reveal that the hearing officer's extent-of-injury determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that 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).

In his cross-appeal, the claimant argues that the hearing officer erred in not finding that his compensable injury extended to a chest injury. At the hearing and on appeal, the carrier conceded that the claimant's compensable injury included a chest/sternum contusion. However, the claimant maintained that his chest injury also included a sternum fracture. There was conflicting evidence on the issue of whether the claimant's sternum was fractured. It was the hearing officer's responsibility to resolve that conflict. He apparently did so by determining that the claimant did not sustain his burden of proving that he had a chest injury beyond a contusion. As the fact finder, the hearing officer was privileged to so find. Nothing in our review of the record reveals that his determination in that regard is so contrary to the great weight and preponderance of the evidence as to compel its reversal. Pool; Cain.

The success of the carrier's argument that the claimant did not have disability is largely premised upon the success of its argument that the claimant's compensable injury did not extend to the body parts found by the hearing officer. Given our affirmance of the extent-of-injury determination, we likewise affirm the determination that the claimant has disability as a result of his compensable injury from April 21, 1998, through the date of the hearing, March 21, 2000. We note in addition, however, that the hearing officer's disability determination is supported by the claimant's testimony that he has not been able to work since the date of his injury and the medical evidence taking the claimant off work. The hearing officer was free to credit that evidence and find disability based upon that evidence.

The disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and, as such, it will not be disturbed on appeal.

Likewise, the carrier's argument that the hearing officer erred in determining that the claimant has not reached MMI is premised upon the success of its challenge to the extent-of-injury determination. Specifically, the carrier argues that the great weight of the other medical evidence is contrary to the designated doctor's conclusion that the claimant had not yet reached MMI because the designated doctor "improperly considered injuries and conditions not related to the compensable injury and that were non-occupational in nature."

Based upon our affirmance of the hearing officer's extent-of-injury determination, we dismiss its assertion of error in relation to the MMI determination as being without merit.

Lastly, we consider the carrier's assertion that the hearing officer erred in finding that it had waived the right to contest compensability of the body parts claimed by the claimant in this instance under Section 409.021 and Rule 124.6 because it failed to raise its dispute of the extent of injury within 60 days of the date it received written notice of the claimed injuries. In Texas Workers' Compensation Commission Appeal No. 000713, decided May 17, 2000, the Appeals Panel was called upon to consider the effect of new Rule 124.3 on carrier waiver issues in extent-of-injury cases. In that case, we held that "new Rule 124.3 is applicable to those cases in which a [hearing] is convened on or after March 13, 2000 [the effective date of Rule 124.3], to address a disputed issue of carrier waiver in the context of an extent of injury question, because it precludes the Commission from imposing a waiver after that date." The hearing in this case was held on March 21, 2000; thus, the hearing officer's reliance on prior law was error. Accordingly, we reverse the determination that the carrier waived its right to contest compensability and render a new decision that it did not waive its right to contest compensability in this instance.

The hearing officer's extent-of-injury, disability, and MMI determinations are affirmed. His determination that the carrier waived its right to contest compensability is reversed and a new decision rendered that no such waiver occurred. However, our reversal of the waiver determination does not have any practical effect herein because the hearing officer found, and we affirmed, that the compensable injury extended to the claimant's head, face, left eye, top lip, left hand, left shoulder, both knees, lower left calf and shin, left ribs, neck, and back.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge