

APPEAL NO. 001433

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On May 24, 2000, a contested case hearing (CCH) was held. With regard to the only issue before her, the hearing officer determined that the appellant (claimant) did not have disability resulting from the _____, injury.

The claimant appeals certain of the findings of fact and the conclusion on which those findings are based, contending that the early records of Dr. S do indicate a thoracic injury and that Dr. S testified that the claimant has disability due to the thoracic spine injury. The claimant also recites the explanation given to the hearing officer regarding some of Dr. S's testimony. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) responds, rebuts the claimant's arguments, and urges affirmance.

DECISION

Affirmed.

This case makes much more sense when placed in context. The claimant had been a counter person at an automobile dealership when he sustained a back injury on _____. On November 8, 1999, another hearing officer conducted a CCH, with the issues being timely contest of compensability by the carrier of a thoracic injury; whether the claimant had sustained a compensable injury; and whether the claimant had disability from June 8 to November 8, 1999. That hearing officer's decision was appealed and resulted in Texas Workers' Compensation Commission Appeal No. 992730, decided January 20, 2000, where the Appeals Panel affirmed the first hearing officer's decision that the carrier had not timely contested compensability of the thoracic spine injury; that the claimant had sustained a compensable thoracic spine injury but not a compensable lumbar spine injury on _____¹; and that the claimant did not have disability resulting from the compensable thoracic spine injury from the date of the injury through the date of the first CCH, November 8, 1999. The issue in this case is whether the claimant had disability due to the thoracic spine injury (which we affirmed in Appeal No. 992730) from November 8, 1999, the date of the first CCH, through the date of this CCH. The hearing officer sets out these circumstances in her Statement of the Evidence, together with the parties' positions.

The claimant testified that his back pain has worsened since the date of the injury and, presumably, since November 8, 1999, the date of the first CCH, and that his low back pain is not as severe as his mid-back pain. Dr. S testified at the CCH saying that he began treating the claimant on June 17, 1999; that he took the position at the November 1999 CCH that the _____, incident had caused both a lumbar and thoracic spine injury;

¹Appeal No. 992730 references a _____, injury. There is only one injury and it appears that the correct date of injury is _____ because Appeal No. 992730 references a doctor's visit on June 9, 1999. Further, both Appeal No. 992730 and the testimony in this case reference a prior compensable low back injury in 1997 when the employer had a different insurance carrier.

and that the claimant had disability due to "both of those areas." Dr. S testified that he now agrees with "the Commission[']s [Texas Workers' Compensation Commission] findings [that] there is no disability to the lumbar region." Dr. S now attributes the claimant's disability mainly to the compensable thoracic injury. As the hearing officer notes, progress notes dated before December 17, 1999, found in Claimant's Exhibit No. 1, refer only to cervical and lumbar complaints (thoracic complaints are mentioned beginning December 17, 1999), while progress notes of those same visits found in Claimant's Exhibit No. 8 (the hearing officer says Exhibit 5) mention only thoracic complaints with no mention of cervical and lumbar. Dr. S explained that after the first CCH he split up his records "so that he could properly bill the carriers." In a December 8, 1999, report, Dr. S opines that the claimant "remains on a disability status due to the injury in his thoracic spine."

The claimant was examined by a number of other doctors, including Dr. A, who, in a report dated December 7, 1999, referenced chronic back pain and, in another note dated February 1, 2000, commented that the claimant "has a herniated disk in the thoracic spine as well as the lumbar spine" and that the claimant's "disability is related to the herniated disk in his spine." (Dr. A does not specify which herniated disc.) The claimant was also examined by Dr. L, the carrier's independent medical examination doctor, on a neurosurgery consult. In a report dated December 16, 1999, Dr. L states that the MRIs "are grossly over read" and that the "pain is low back, and it really is not thoracic pain."

The hearing officer, in her Statement of the Evidence, commented about the quality of Dr. S's medical reports and testimony and Dr. S's efforts to "separate the injuries for two carriers," stating:

The primary change was complaints from neck and lumbar to thoracic areas. These medical records are suspicious and lack credibility. So does the testimony of the doctor. Though [Dr. S] tried hard to answer the questions posed, he often was defensive and guarded in his responses. Counsel for Claimant argued that [Dr. S] indicated disability for both the thoracic and lumbar areas, the actual testimony was that there was no disability for the lumbar and all the disability was for the thoracic. This testimony flies in the face of the other medical records which reveal a significant problem at the lumbar spine area.

The claimant disputed the following findings:

FINDINGS OF FACT

3. The early medical records from [Dr. S] (Claimant's Exhibit 1) indicated complaints of continuing low back and neck pain. The thoracic area could have been included in the medical records but were not.

4. Claimant's Exhibit 5 [sic, should be 8] were altered records, after the lumbar claim was dropped, and are not credible based on the prior finding of fact.

* * * *

6. Due to the thoracic injury, Claimant was not unable to obtain and retain employment at wages equivalent to Claimant's pre-injury wage from November 8, 1999 through the date of the hearing.

The claimant points to certain reports from Dr. S's SOAP (subjective, objective, assessment plan) notes to support his position that his disability is caused by the compensable thoracic injury. The claimant also repeats Dr. S's position that Dr. S changed the progress notes to be "consistent with making the file injury specific" for the two carriers. The claimant argues that he was able to return to work after his lumbar injury but that now, after his thoracic injury, he is unable to work and that Dr. S is of the medical opinion that the claimant "is unable to work due to the thoracic spine injury."

The only issue here is disability after November 8, 1999. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Obviously, the evidence is in conflict and even the claimant's treating doctor, Dr. S, has changed his opinion based on the first hearing officer's decision in Appeal No. 992730, *supra*. Equally clearly, the hearing officer did not find the claimant's and Dr. S's testimony persuasive. 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). The hearing officer apparently found Dr. L's report regarding the cause of the claimant's problem more credible than the reports of Dr. S which apparently appeared to the hearing officer to be an effort to alter the records to fit the findings of the prior CCH. The hearing officer was free to believe all, part or none of the explanations and testimony.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Robert W. Potts
Appeals Judge