

APPEAL NO. 001806

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 14, 2000, a contested case hearing (CCH) was held. With respect to the three issues before him, the hearing officer determined that the appellant (claimant) had not sustained a compensable (back) injury on _____ (all dates are 2000 unless otherwise noted); that the claimant did not have disability; and that the respondent (carrier) had not waived its right to dispute compensability of the claimed injury.

The claimant appealed, emphasizing medical reports and evidence that support her position; repeating some of the evidence presented at the CCH regarding injury and disability; and asserting that the carrier failed to contest compensability in a timely manner, citing Downs v. Continental Casualty Co., No. _____ (Tex. App.-San Antonio August 16, 2000, no pet. h.) as being controlling. The carrier responds, urging affirmance on all the issues.

DECISION

Affirmed.

The claimant was employed by (employer). The claimant had a minor back injury in 1999 which had resolved in about a day. The claimant worked the second shift, from 3:30 p.m. to midnight. On _____, the claimant was working as a "shaper," which involved lifting or moving 40-pound coils. (The claimant and two other witnesses testified in some detail what this job entailed.) The claimant testified that on that date, at about 10:30 p.m., she "felt an excruciating pain" in her back; that she reported this to her team leader; and that she finished her shift. The claimant testified that the following day, _____, she went to employer's medical services station (dispensary) where "muscle tightness" was noted, and the claimant was instructed to use ice and ibuprofen. The claimant was given a light job and was to see Dr. AS if the condition was not better by Monday. The claimant saw Dr. AS on Wednesday, February 23, and was released to return to work without restrictions. The records indicate the claimant was seen again at the dispensary on February 29. The claimant testified that her job was changed to a "snipper," and subsequently as a "prep 1." Evidence and testimony were presented as to what those jobs entailed and there is some dispute whether those jobs were lighter or about the same as "shaper" duties. In any event, the claimant continued working regular duties until March 16. The claimant said she worked in pain. LW, her supervisor, said she performed her job satisfactorily without complaint. The claimant again sought treatment at the dispensary on March 16 for complaints of "back, upper, lower, middle and [left] wrist, pain in [right] wrist." The progress note states "no new injury," and quotes the claimant as saying "it must be something else[.] I can't sleep @ night. I can't take notes in class, and the people on the line tell me to hurry all the time." The claimant was seen again on Friday, March 17, by Dr. AS, who, in a report of that date, notes, "[s]ubjective discomfort of myalgia after work. I see no evidence here history-wise or on exam that would suggest an acute injury." The

claimant was released to full, regular duty without restrictions with a note "no injury." The claimant testified that she was unable to work and claims disability beginning Monday, March 20.

The claimant subsequently sought treatment with Dr. KS, on March 21 and, in a report of that date, Dr. KS noted "middle back pain, neck pain, lower back pain, right shoulder pain, and bilateral hand pain secondary to a lifting accident at [employer]." Dr. KS's impression was:

Post-traumatic mechanical sprain/strain injury to the cervical, thoracic and lumbar spine regions.

Left sacroiliac joint strain/sprain injury[.]

Cervical facet-mediated pain[.]

Right shoulder strain[.]

Left carpal tunnel syndrome, mild.

The claimant was taken off work and chiropractic treatment was begun. The claimant was referred to Dr. T, for a consultation. In a report dated April 4, Dr. T had an impression of cervical, thoracic, lumbar and right shoulder sprain and recommended a "paravertebral block" injection, which the claimant refused. The claimant was also seen by Dr. W, apparently the carrier's required medical examination doctor, who, in a report dated April 10, noted "an overuse work related injury" and that the claimant was "not at MMI [maximum medical improvement] at this time. She has only had 3 weeks of treatment." When asked if her condition had improved as of the July 14 CCH, the claimant was ambivalent, depending on the expected response.

Regarding the Downs, *supra*, argument, the hearing officer made unappealed findings that the carrier "received written notice of injury on February 18, 2000" and that the carrier "filed a [Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21)] and contested compensability on April 4, 2000." The hearing officer, in his Statement of the Evidence, commented:

Finally, the Claimant urges that the Carrier did not contest compensability of the claimed injury in a timely manner and has waived their right to dispute this injury. The Claimant relies on [Downs] indicating that the Carrier must dispute an injury within seven days or begin payment of benefits. According to Downs, if the Carrier fails to dispute or pay within seven days, the Carrier has waived their right to contest compensability. The Carrier maintains that the Downs case is not controlling or dispositive. Downs is not final at this time and is not binding authority on the Commission [Texas Workers' Compensation Commission].

The unappealed findings determined that the carrier received written notice on February 18 and did not contest compensability until April 4, which was well within 60 days of the date written notice was received, but beyond seven days. The claimant contends Downs is controlling. In Texas Workers' Compensation Commission Appeal No. 001698, decided August 30, 2000, we considered Downs and declined to follow that decision in that Downs has not become final and based on consultation with the Office of the Attorney General, "the Commission understands that the August 16th decision in the Downs case should not be considered as precedent at least until it becomes final upon completion of the judicial process." (Texas Workers' Compensation Commission Advisory 2000-7, August 28, 2000.)

The hearing officer also comments that the "resolution of this case [on the injury and disability issues] involves the credibility of witnesses and weight to be given to their testimony." The hearing officer found that the work-related incident of _____ "did not cause damage or harm to the physical structure to the Claimant's body." (See the definition of injury in Section 401.011(16).) The claimant cites the reports of Dr. KS, Dr. T and Dr. W, which all have impressions of some kind of sprains or strains. However, Dr. AS, in his notes of February 23 and March 17, indicates that the claimant did not have an injury, but rather had "subjective discomfort and myalgia after work." 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). While we do not hold that a sprain or strain is not an injury, the hearing officer apparently gave greater weight to the contemporary opinion of Dr. AS than to evidence to the contrary. As such, we cannot say that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Even though another fact finder may have reached a different conclusion on similar facts does not provide a basis on which to disturb the hearing officer's decision. Salazar, et al. v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

In that we are affirming the hearing officer's determinations that the claimant did not have a compensable injury, the claimant cannot, by definition in Section 401.011(16), have disability.

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:

Kathleen C. Decker
Appeals Judge

Philip F. O'Neill
Appeals Judge