

APPEAL NO. 001823

On July 20, 2000, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury on _____, and that the claimant had disability from March 22, 2000, through May 13, 2000. The hearing officer also decided that the claimant had disability from May 14, 2000, through the date of the CCH. The appellant (carrier) requests that the hearing officer's decision be reversed and that a decision be rendered in its favor. The claimant requests that the hearing officer's decision be affirmed.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that on _____, the employer's truck that he was to use to deliver uniforms broke down; that he had to remove a washer and a dryer from the employer's spare truck that he was to use to deliver the uniforms so that he could put the uniforms in the truck; and that as he was moving the washer from the spare truck, he injured his right elbow. The claimant said that sometime before February 7, 2000, he had fallen on his right side while working for the employer; that he had had pain from his right wrist up to his right shoulder; and that he saw Dr. C for that injury.

Dr. C's notes of February 7, 2000, reflect that claimant complained that he had fallen and that he had had right elbow pain for three weeks. Dr. C wrote on February 7 that the claimant could return to work on February 10 and he diagnosed the claimant as having a sprain of the right shoulder and elbow. The claimant's note of February 10 states that his arm started hurting again after working in the warehouse. The claimant saw Dr. C again on February 10. Dr. C wrote on February 10 that the claimant had a severe contusion and strain of the right shoulder and that he could return to work on February 15.

Dr. C's notes of February 28 state that the claimant sprained his right elbow and arm at work that day when he pulled a heavy washing machine and Dr. C diagnosed the claimant as having an acute sprain of the right arm and elbow. Dr. C wrote on March 3 that the claimant could resume his normal work on March 7. The claimant said that he returned to work, worked a few days, and was then terminated from employment.

The claimant began treating with Dr. S on March 21, 2000, and Dr. S noted that the claimant had fallen on his right elbow in January while working and that the claimant aggravated his elbow condition on _____, when lifting a washing machine at work. Dr. S diagnosed the claimant as having post-traumatic joint instability, joint inflammation, and ulnar nerve entrapment neuropathy.

Dr. SA examined the claimant on May 10, 2000, apparently at the request of the Texas Workers' Compensation Commission (Commission), and Dr. SA noted that the claimant had had wrist, elbow, and shoulder pain when he fell in January 2000; that the claimant was left with elbow discomfort; and that on _____, the claimant had a severe increase in elbow pain when moving a washer inside a truck. With regard to the claimant's right elbow, Dr. SA wrote that the claimant has resolving lateral epicondylitis and mild radial tunnel syndrome and that he explained to the claimant that he had a degenerative disease process.

Documents in evidence reflect that the claimant received an unsatisfactory work evaluation on January 10, 2000; that he was given warnings regarding his work performance; and that he was terminated from employment on March 7, 2000, for poor job performance and insubordination. The claimant generally disagreed with the substance of those documents. The employer's district manager gave a recorded statement, stating that there had been no mention of a fall at work and that the claimant had been having problems with his shoulder when the claimant went to the doctor on February 7.

The claimant testified that Dr. S took him off work when he first saw Dr. S on March 21, that Dr. S subsequently released him to return to work with a 25-pound lifting restriction, that he was offered a job by another company but was unable to accept that job because it involved lifting more than 25 pounds, and that he did not return to work until May 14 when he began working for a third company. In response to questions from the hearing officer, the claimant said that he makes \$150.00 less than his preinjury wage at his current job.

The benefit review conference (BRC) report states that the disputed issues are whether the claimant sustained a compensable injury on _____, and whether the claimant had disability from February 29, 2000, through May 13, 2000, as a result of the compensable injury. The parties agreed at the CCH that the two issues to be decided by the hearing officer were the two issues stated in the BRC report. With regard to those issues the hearing officer decided that the claimant sustained a compensable injury on _____, and that the claimant had disability from March 22, 2000, through May 13, 2000, because of his compensable injury.

The carrier appeals the hearing officer's decision, contending that the evidence did not establish that the claimant sustained a compensable injury on _____, and that the claimant did not have disability. The hearing officer is the sole judge of the weight and credibility of the evidence. As the trier of fact the hearing officer resolves conflicts in the evidence. In workers' compensation cases the issues of injury and disability may generally be established by the testimony of the claimant alone. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). We conclude that the hearing officer's decision that the claimant sustained a compensable injury on _____, and that he had disability from March 22, 2000, through May 13, 2000, is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer also decided that the claimant had disability from May 14, 2000, to the date of the CCH. The carrier contends that the hearing officer exceeded her jurisdiction in deciding disability after May 13, 2000, because that was not an issue at the CCH. Section 410.151 pertains to the scope of a CCH and subsection (b) provides that an issue that was not raised at the BRC or that was resolved at a BRC may not be considered unless: (1) the parties consent, or; (2) if the issue was not raised, the Commission determines that good cause existed for not raising the issue at the conference.

In the instant case, the BRC report reflects that no issue regarding disability after May 13, 2000, was raised at the BRC. In addition, neither party requested that the hearing officer add an issue regarding disability after May 13, 2000, and the hearing officer made no mention at the CCH of adding an issue of disability after May 13, 2000. Since there was no request to add an issue concerning disability after May 13, 2000, neither party was asked if they consented to such an issue. The claimant's attorney stated in opening statement and in closing argument that claimant had disability to May 14, 2000, and only at the very end of her closing statement mentioned that disability continued until the date of the CCH. While the hearing officer asked the claimant about his wages at the job he obtained on May 14, 2000, and the carrier asked a few follow-up questions about the nature of that job, we do not agree with the claimant's assertion in his response that an issue of disability after May 13, 2000, was tried by the parties. The carrier correctly states that it had no notice that the hearing officer would consider a time period beyond that stated in the issue. We reverse the hearing officer's decision that the claimant had disability from May 14, 2000, to the date of the CCH and we render a decision that an issue regarding disability after May 13, 2000, was not properly before the hearing officer. Either party may request a BRC regarding an issue of whether the claimant had disability after May 13, 2000.

We affirm the hearing officer's decision that the claimant sustained a compensable injury on _____, and that the claimant had disability from March 22, 2000, through May 13, 2000. We reverse the hearing officer's decision that the claimant had disability from May 14, 2000, to the date of the CCH and we render a decision that an issue regarding disability after May 13, 2000, was not properly before the hearing officer.

Robert W. Potts
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge