

## APPEAL NO. 002251

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 August 8, 2000 (all dates are in 2000 unless otherwise noted). The issues at the CCH were whether the appellant (claimant) had sustained a compensable injury on \_\_\_\_\_, and whether the claimant had had disability resulting from the claimed injury. The hearing officer determined that the claimant had sustained a compensable left knee injury on \_\_\_\_\_ and had had disability as a result of the \_\_\_\_\_ injury from March 27 through July 12. The claimant appealed, alleging that the hearing officer had erred by refusing to grant his motion for additional discovery, by not amending the disability issue as requested, by failing to add an issue on whether the respondent (carrier) had waived compensability, by failing to grant a motion for continuance, by limiting the compensable injury to his left knee, and by finding that disability ended on July 12. The carrier responded that the hearing officer had not erred in denying the claimant's motions for additional discovery and continuance; that the hearing officer's determinations the claimant had not sustained a low back injury and that disability ended on July 12 were supported by the evidence; and that the hearing officer's decision and order should be affirmed.

### DECISION

Affirmed.

The claimant asserts that the hearing officer committed reversible error by denying his motions for additional discovery, by failing to add an issue on the carrier's alleged waiver of the right to contest the compensability of the alleged injuries, by not amending the issue reported out of the benefit review conference (BRC) on disability, and by failing to grant a motion for a continuance. The claimant further asserts that the hearing officer's determinations that he sustained a compensable injury to his left knee but failed to find that the claimant had sustained a compensable low back injury and that the disability resulting from the compensable injury ended on July 12 are against the great weight and preponderance of the evidence. This decision will first address the procedural matters complained of by the claimant.

It is undisputed that a BRC was held in this matter on June 21 and that the following issues were set forth in the BRC report dated July 7:

1. Did the Claimant sustain a compensable injury on \_\_\_\_\_?
2. Did the Claimant sustain disability resulting from the compensable injury sustained on \_\_\_\_\_?

The BRC report indicates that the parties were provided with the Texas Workers' Compensation Commission (Commission) Continuance Policy (H&R 10) at the conclusion

of the BRC. It is inferred from that notation that the parties were aware of the date of the CCH at the time the BRC concluded. On June 29, counsel for the claimant filed a motion for continuance asserting that he had been retained to represent the claimant on June 23 and that he was set for trial in (the district court) on August 7 and would be unavailable for the CCH set for August 8. The hearing officer denied the motion for continuance. At the CCH, the claimant's attorney announced that the trial had been continued, but then the claimant's attorney moved for a continuance because the carrier had failed to respond to interrogatories which had been sent to the carrier on July 21. The hearing officer found that the claimant had served interrogatories on the carrier less than 20 days before the date of the CCH and that no agreement had been reached between the parties for the late service of the interrogatories as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(d) (Rule 142.13(d)). The hearing officer then denied the motion to compel answers to interrogatories and also denied the motion for continuance.

The claimant then moved for the addition of an issue on the carrier's alleged waiver of the right to contest the compensability of the alleged injuries by not contesting such injuries within 7 days of the date the carrier had received written notice of the alleged injuries. The carrier objected to adding the issue. The hearing officer noted that the claimant's response to the BRC report had not been filed with the Commission, although it had been sent to the carrier on July 27, less than 15 days prior to the date of the hearing. The claimant acknowledged that the issue of whether the carrier had waived the right to contest the compensability of the issue had not been presented at the BRC. The hearing officer found that there was no good cause to add the issue requested.

The claimant further requested that the disability issue be amended to include the phrase "and if so, for what period." The hearing officer correctly noted that if disability were to be found it would be incumbent upon her to determine the dates of disability. The claimant's request to amend the disability issue was denied.

The claimant then moved for a continuance to cure the lack of the filing of his response to the BRC report and late filing of interrogatories on the carrier. The hearing officer found that no good cause existed to grant the motion for continuance and the motion was denied.

We address a determination of good cause by the hearing officer on an abuse of discretion standard. See Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986), which refers to a guiding set of rules or principles. Rule 142.7(a) states that a dispute not expressly included in the statement of disputes will not be considered by the hearing officer. The statement of disputes includes the parties' responses to the BRC report (Rule 142.7(b)(2)), and additional disputes by either unanimous consent (Rule 142.7(d)) or by permission of the hearing officer (Rule 142.7(e)). In either case, the hearing officer must find that good cause exists to add the requested dispute (Rule 142.7(b)(4)). Rule 142.7(e) provides that additional disputes submitted by a represented party which are not submitted by unanimous consent must be made in writing, must identify and describe the dispute or disputes, must state the reason for the request, must be delivered to all parties, and must

be sent to the Commission no later than 15 days before the hearing. The claimant, although not represented at the BRC, was represented by counsel within days after the BRC and within the time required for the submission of responses to the BRC report. Rule 142.7(c). The hearing officer did not err in refusing to add an issue and in refusing to amend the disability issue. At the hearing, the claimant requested a continuance in order to cure the late filing of interrogatories and non-filing of a response to the BRC report. Rule 142.10(c)(3) requires that in addition to a showing of good cause, a movant who presents an oral motion for continuance at a hearing must show that the continuance will not prejudice the rights of the other parties. Upon consideration of the oral motion for continuance, we find no error in the hearing officer's refusal to grant that motion.

The claimant asserts that the hearing officer correctly found that he sustained an injury to his left knee, but that her finding of fact that he sustained a left knee injury, with the implied finding that he did not sustain a low back injury at the same time, was against the great weight of the evidence. The claimant further asserts that the hearing officer's finding that he had disability from March 27 through July 12, but not thereafter, was also against the great weight of the evidence. In the statement of the evidence, the hearing officer notes that the medical evidence presented shows complaints of low back pain but no indication of a diagnosis of a low back injury. The hearing officer also notes that the claimant was released to light duty by his doctor on July 12 and accepted a light duty position with his employer. The hearing officer comments that the claimant testified that he worked a while and then was taken off work again because of swelling to his knee. The hearing officer states that there was no medical evidence to support the assertion that the claimant was taken off work because of the swelling of the left knee. We note that there is a July 25 medical record which indicates that the claimant reported that his knee felt loose with some swelling and tenderness and a July 25 work-status report which took the claimant off work.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove an injury, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. *Texas Workers' Compensation Commission Appeal No. 91065*, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony. *Taylor v. Lewis*, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); *Texas Workers' Compensation Commission Appeal No. 93426*, decided July 5, 1993. 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 hearing officer is not bound by the testimony of a medical witness when the credibility of that testimony is manifestly dependent upon the credibility of the information imparted to the medical witness by the claimant. *Texas Workers' Compensation Commission Appeal No. 952044*, decided January 10, 1996. In this case, the medical evidence of a low back injury was dependent upon the subjective reports of the claimant to his doctor and was not supported by objective findings. While medical evidence is not required to prove an injury, the lack of objective medical evidence may be considered by the hearing officer.

A finding of disability may be based upon the testimony of the claimant alone but, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The evidence of disability after July 12, like the alleged low back injury evidence, was based upon the claimant's subjective complaints and was affected by the claimant's credibility. In the present case, the hearing officer found no disability after July 12, contrary to the testimony of the claimant and medical evidence supporting disability. Claimant had the burden to prove he suffered disability. Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992. We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to meet this burden. This is so even though another fact finder might draw other inferences and reach other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Having examined the record and finding no reversible error and sufficient evidence to support the hearing officer's findings, we affirm the hearing officer's determinations that the claimant sustained a left knee injury on \_\_\_\_\_ and had disability resulting from that injury beginning on March 27 and continuing through July 12.

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Kenneth A. Huchton  
Appeals Judge

CONCUR:

\_\_\_\_\_  
Susan M. Kelley  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge