APPEAL NO. 012001
FILED OCTOBER 15, 2001

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 1, 2001. The hearing officer resolved the disputed issues by determining that the respondent (claimant) is entitled to change treating doctors pursuant to Section 408.022, and that the claimant had disability resulting from his compensable injury beginning on March 16, 2000, and continuing through March 27, 2000; beginning on May 1, 2000, and continuing through May 31, 2000; and again beginning on March 15, 2001, and continuing through the date of the CCH. The appellant (carrier) appealed both determinations, asserting that the claimant was not entitled to change treating doctors, and that the claimant did not have disability after May 31, 2000. There was no response from the claimant.

DECISION

Affirmed.

The claimant was employed by the employer as a carpenter. The claimant is right-hand dominant. The claimant sustained a compensable injury to his right elbow on _____, which was eventually diagnosed as a right elbow fracture at the olecranon process.

CHANGE OF TREATING DOCTOR

The hearing officer did not err in determining that the claimant was entitled to change treating doctors pursuant to Section 408.022, and that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in approving the change. The claimant's original treating doctor discharged him from care in June 2000 after giving him a full release back to work. The claimant never saw this doctor again. In March 2001, after being laid off, the claimant requested a change of treating doctor. He testified that because his pain never went away, he had lost confidence in the previous treating doctor.

We have previously held that the standard to be applied in determining whether the Commission improperly approved a request to change doctors is an abuse of discretion standard. Texas Workers' Compensation Commission Appeal No. 94857, decided August 17, 1994. In determining whether there is an abuse of discretion, we look to see if the hearing officer acted without reference to any guiding rules or principals. Morrow v. H.E.B., 714, S.W.2d 297 (Tex. 1986); Appeal No. 94857, *supra*.

In the present case, the hearing officer found that the Commission did not abuse its discretion in granting a request for changing doctors for the reason that the claimant was not improving medically. While we would agree that a change of doctor should not

generally be granted upon a mere assertion of lack of improvement (which would also be consistent with having reached maximum medical improvement), we are satisfied in this case, considering all the facts, that the carrier has not shown that the hearing officer abused his authority in determining that the Commission did not exceed its authority in authorizing the change of treating doctors, and we further conclude that the hearing officer's decision is supported by sufficient evidence and is not against the great weight and preponderance of the evidence. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

DISABILITY

The hearing officer did not err in determining that the claimant had disability resulting from his compensable injury beginning on March 16, 2000, and continuing through March 27, 2000; beginning on May 1, 2000, and continuing through May 31, 2000; and again beginning on March 15, 2001, and continuing through the date of the CCH.

The carrier is only disputing the period of disability beginning on March 15, 2001, and continuing through the date of the hearing. The carrier asserts that the claimant was able to perform his regular job duties from June 1, 2000, through March 14, 2001, when he was laid off due to a reduction in force. The claimant testified that he had constant pain in his elbow throughout the period of time he was working. He further testified that his right elbow injury hindered his ability to do his job, and, in fact, his supervisor spoke to him regarding his drop in production, but he continued to work. The claimant lost confidence in his initial treating doctor because he was not getting better, and he was told to work through the pain. The claimant's new treating doctor determined that the claimant had a prominent olecranon spur in his right elbow, and diagnosed right elbow tenosynovitis. On May 15, 2001, the claimant underwent a functional capacity evaluation which revealed that the claimant could not perform heavy duty work or his regular duties as a carpenter but could perform medium duty work with restrictions.

The carrier asserts that it was at that point that the claimant changed treating doctors and obtained an off-work slip. The carrier further asserts that the claimant began to allege a knee injury, and it is unclear from the evidence which injury kept him off work. The hearing officer's determination as to disability is supported by sufficient evidence and is not against the great weight and preponderance of the evidence. Whether the claimant had disability for a given period of time was a fact issue for the hearing officer to resolve. The hearing officer heard the testimony from the respective witnesses, reviewed the medical evidence, and decided what facts the evidence established.

Testimony on disability need not be limited to experts; a trier of fact may reasonably infer disability from circumstantial evidence or the competent testimony of lay witnesses. *See* Green v. Texas Workers' Compensation Insurance Facility, 993 S.W.2d 839, 844 (Tex. App.-Austin 1999, writ denied). The hearing officer determined that the claimant met his burden of proof on the issue of disability. An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own

judgment for that of the trier of fact, even if the evidence would 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **EMPLOYERS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

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Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Robert W. Potts
Appeals Judge