APPEAL NO. 030700
FILED MAY 6, 2003

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 February 26, 2003. The hearing officer determined that the compensable injury of _____, extends to include a disc herniation at C5-6 and C6-7 but "does not extend to include a congenital block vertebra at C4-5 with rudimentary discs and disc desiccation/degenerations throughout the cervical spine," and that the appellant/cross-respondent (claimant) did not have disability. There is no appeal of the determination that the compensable injury does not extend to the congenital block vertebra and other named conditions.

The claimant and subclaimant appeal the disability determination on the basis that a doctor took the claimant off work on April 4, 2002, and that the claimant, at that time was unable to continue performing the light duty offered by the employer. Both the claimant and subclaimant also assert error in that the hearing officer denied the claimant's request to subpoena two former coworkers. The respondent/cross-appellant (carrier) appeals the hearing officer's determination that the compensable injury extends to the cervical disc herniations. The claimant and the carrier respond to the other's appeal, urging affirmance on the issue on which they prevailed.

DECISION

Affirmed.

It is undisputed that the claimant was employed as a "truck loader" and that he sustained a compensable injury on _____, when he was struck on the head by an overhead door. The claimant was seen in a hospital emergency room on January 28, 2002, and was released to work with restrictions. The claimant saw Dr. N on January 29, 2002, and was diagnosed with "Cervical pain/strain" and released to light-duty with a five- to ten- pound lifting restriction. The claimant had continued to work after the compensable injury and the employer had accommodated the claimant's restrictions. The claimant testified that his condition continued to get progressively worse. An MRI performed on March 8, 2002, indicated a mild disc herniation at C5-6, which impinges on the thecal sac and a "mild disc bulge at the C6-7 level probably representing a second small herniated disc." The claimant was taken off work on April 6, 2002, by his then treating doctor. The claimant was referred to Dr. W a Texas Workers' Compensation Commission (Commission)-required medical examination (RME) doctor. In a report dated October 16, 2002, Dr. W answered the Commission's question on causation that the compensable injury "could certainly cause an impaction injury" to the cervical vertebra. On the disability issue, Dr. W commented:

> Between 4/6/02 and currently, the patient was probably capable of returning to work in a sedentary physical demand level position. A

> "sedentary" in this case implying that the patient limit lifting to no greater than 10 pounds on an occasional basis (less than 1/3 of the day) and less than that on a more frequent or constant basis. Sedentary physical demand level jobs do not imply that the patient sits the whole time, however, allows the patient flexibility between sitting, standing and allows frequent position changes.

On the extent-of-injury issue there was conflicting evidence. Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer's decision on this issue is supported by sufficient evidence and is not so against the overwhelming right of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

On the disability issue, the claimant continued to work after his compensable injury and after the initial treating doctor imposed some restrictions, the employer accommodated those restrictions, and modified the claimant's duties. Although the claimant testified that he got progressively worse, the hearing officer is free to 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). After the March MRI was done, the claimant's then treating doctor took him completely off work on April 6, 2002. At issue is whether the claimant had disability after April 4, 2002, (the claimant's last day at work). Disability is defined in Section 401.011(16) as the inability because of the compensable injury to obtain and retain employment at the preinjury wage. While it is true that a release to light duty is evidence that disability continues, in this case, the claimant returned to work in a position within his restrictions at the preinjury wage. The hearing officer specifically found that the claimant did not have a change in his medical condition on or after April 4, 2002. We do not read that finding as requiring a change in medical condition to establish disability but only making a factual determination that the claimant was able to continue working, albeit in a light-duty capacity, at his preinjury wage, after April 4, 2002. The claimant appeared to think that light duty meant a clerical desk job and his duty counting merchandise, which required him to be on his feet, did not meet the definition of light duty. The hearing officer's determination on disability is supported by Dr. W's definition of what sedentary duty would entail.

Regarding the claimant's and subclaimant's appeal on the denial of the subpoenas, we note that the requests are not in evidence; we do not know when the requests were made and the only stated purpose for the subpoenas for former coworkers were that they could verify the nature of the claimant's work. Although the claimant's attorney did reurge the issuance of the subpoenas at the CCH, and requested a continuance, which was denied, we cannot conclude that the hearing officer abused her discretion in denying the request for the subpoenas, particularly when we do not know when they were requested.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

CT CORPORATION
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Margaret L. Turner
Appeals Judge

_____
Edward Vilano
Appeals Judge