

APPEAL NO. 031027
FILED JUNE 10, 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 March 18, 2003. The hearing officer determined that the appellant (claimant) did not sustain disability beginning on July 24, 2002, and continuing through the date of the hearing, or for any other time period, as a result of the compensable low back injury of _____. The claimant has appealed and argues that the hearing officer erred in not finding that the _____, injury was a producing cause of disability. There is no response from the respondent (carrier).

DECISION

Affirmed.

The claimant has attached to his appeal a copy of the Decision and Order issued after a prior CCH that was held on January 18, 2002. That CCH dealt with an issue of whether the claimant's compensable injury of (subsequent date of injury), extended to and included an injury to the claimant's lower back. The earlier CCH was conducted by the same hearing officer who conducted the hearing in this case, who made the determination that the claimant's compensable right knee injury sustained on (subsequent date of injury), does not extend to and include a right knee meniscus tear and/or a low back injury. The claimant asks that we take "judicial notice" of the prior Decision and Order, arguing that the production of the prior decision "was neither compelled nor ripe" until the contents of the current Decision and Order were known, implicitly arguing that this rationale makes the prior Decision and Order admissible. The purpose of attaching the prior Decision and Order is to support an argument that the hearing officer was "somewhat disingenuous" in finding that the claimant did not suffer a low back injury on (subsequent date of injury), and then finding "that that same (subsequent date of injury) injury **was now a producing cause** of disability." (Emphasis in original.)

We first note that the decision of the prior CCH was appealed to the Appeals Panel and affirmed in Texas Workers' Compensation Commission Appeal No. 020340, decided March 21, 2002. We believe that the claimant's argument as to the prior Decision and Order misses the point of the challenged Finding of Fact No. 5. The hearing officer had found (in Finding of Fact No. 2) that the claimant did not miss any time from work from _____, through the date of his termination from employment on April 13, 2001, as a result of his compensable low back injury of _____. The exact language in Finding of Fact No. 5 is:

5. But for Claimant's termination on April 13, 2001, and the claimed lower back injury Claimant alleged he suffered while working for Employer on (subsequent date of injury), Claimant would have been able to obtain and

retain employment at wages equivalent to the wages Claimant was receiving prior to _____, beginning on July 24, 2002, and continuing through the present date of this hearing on March 18, 2003.

It is clear to us that the hearing officer was finding that the claimant did not meet his burden of proving disability as a result of the _____, compensable injury. The claimant continued to work after the injury, without missing time from the date of injury until his termination in April 2001. The hearing officer's reference to the "claimed" low back injury the claimant "alleged" he suffered on (subsequent date of injury), ties to the paragraph in the Statement of the Evidence where the hearing officer discusses a letter from the claimant's wife to the employer. She refers to the back injury sustained in (subsequent date of injury), the severity of which was unknown to her and the claimant until after his termination in April 2001. We read Finding of Fact No. 5 as simply stating that it was the claimant's termination from employment and his "claimed" and "alleged" (subsequent date of injury) low back injury that kept him from working, not the compensable low back injury of _____. We do not read the finding as saying that there was a compensable (subsequent date of injury) back injury in contradiction to the determination made in the prior CCH.

The claimant has the burden of proving disability, and whether a claimant has disability is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. It is the hearing officer, as the sole judge of the weight and credibility of the evidence (Section 410.165(a)), who resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We affirm the decision and order of the hearing officer.

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

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

Robert W. Potts
Appeals Judge

Edward Vilano
Appeals Judge