

APPEAL NO. 031317
FILED JUNE 25, 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 27, 2003. The hearing officer determined that the respondent (claimant) had disability from October 10, 2002, to February 5, 2003; that the claimant's compensable injury extends to and includes a herniated disc at L4-5 and lumbar radiculopathy; and that the claimant is not barred by (the doctrine of) *res judicata* from litigating the extent-of-injury issue.

The appellant (carrier) appeals, contending that the doctrine of *res judicata* bars relitigation of the lumbar back issue because it had been tried by consent in a prior CCH and if not it could and was litigated. The carrier also appeals the extent and disability issues mainly on a sufficiency of the evidence basis. The claimant responds, urging affirmance.

DECISION

Affirmed.

In a CCH held on October 9, 2002 (the prior CCH), the hearing officer, in response to the two issues before her, determined that the claimant sustained a compensable injury on _____, and had disability from June 19 through July 9, 2002. In a finding of fact the hearing officer identified the compensable injury as a "lumbo-sacral spasm." The claimant appealed the disability determination to the Appeals Panel. In Texas Workers' Compensation Commission Appeal No. 022763, decided December 12, 2002, the Appeals Panel affirmed the hearing officer's decision noting that a Work Status Report (TWCC-73) indicates that the claimant had "a diagnosis of lumbar strain." The carrier now seeks to use the hearing officer's decision in the prior CCH as *res judicata* in limiting the claimant's compensable injury to a resolved lumbo-sacral spasm.

The hearing officer did not err in her interpretation that her decision in Appeal No. 022763 does not barr the claimant from litigating an extent-of-injury issue in the current proceeding. Our review of the record does not indicate that the extent of the injury was tried by consent in the prior CCH. Rather the medical evidence and testimony was to establish that the claimant had a compensable back injury. The hearing officer's determination that the claimant had a compensable lumbo-sacral spasm back injury only identified the compensable injury and does not preclude subsequent litigation on the extent of that compensable injury. Doctors frequently initially diagnose a strain/sprain, which subsequent testing later develops as a herniation or a more serious injury.

Regarding the extent of the injury on its merits, there was conflicting evidence. The hearing officer was certainly aware of her prior decision. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Regarding the disability issue, the hearing officer at the prior CCH limited disability for the period of June 19 through July 9, 2002, implicitly finding no other disability through the date of the prior CCH. The carrier concedes that a claimant may move in and out of disability and have intermittent periods of disability. The carrier argues that the claimant's symptoms have remained the same both before and after October 9, 2002, and therefore there was no change of condition to warrant a disability determination from October 10, 2002, until February 5, 2003, when the claimant returned to work. However, additional medical evidence including the designated doctor's report was presented in this CCH and there was testimony and evidence regarding the light-duty work releases, the claimant's efforts to return to light duty and the employers position that it had no light-duty position except perhaps an unpaid, commission only, sales position.¹ Clearly the employer had not made a Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6) bona fide offer of employment and it is even problematic that the unpaid, commission only, sales position ever progressed past a hypothetical discussion stage. The hearing officer, in her discussion of the Statement of the Evidence, makes fairly clear, at least to us, that her determination on the disability issue was largely premised on the light-duty work releases (specifically the treating doctor's release with work restriction of October 1, 2002) as evidence that disability continued.

We perceive no error in the hearing officer's determination and nothing in our review of the record indicates that the hearing officer's decision is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain.

¹ We note that an end to disability as defined in Section 401.011(16) is premised on an ability to earn the preinjury wage.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATE SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Veronica Lopez-Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge