

APPEAL NO. 032661
FILED NOVEMBER 13, 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 was held on June 24 and September 9, 2003, with (hearing officer 2) presiding as hearing officer. Hearing officer 2 determined that respondent (claimant) had disability from March 12, 2002, through September 9, 2003. Appellant self-insured (carrier herein) appeals this determination contending that: (1) the issue of whether claimant had disability from March 12 through September 3, 2002, was litigated in a prior hearing and the decision and order in that case is *res judicata* on that issue; and (2) the evidence is insufficient to show that claimant had disability. Claimant responded that the Appeals Panel should affirm hearing officer 2's decision and order.

DECISION

We affirm in part and reverse and render in part.

A discussion of the procedural background of this case is necessary. The record reflects that on April 19, 2002, a hearing was held in this case and the stated issues concerned bona fide offer of employment, proper selection of the designated doctor, and, "did the claimant have disability, and if so, for what period." At that hearing, claimant claimed disability due to the _____, injury from "September 12, 2001, forward." At that hearing, carrier refused to stipulate that claimant sustained a compensable injury and also said it was not prepared to litigate that issue. After a discussion in this regard, the hearing officer (hearing officer 1) declined to add the issue of whether claimant sustained a compensable injury. Hearing officer 1 noted that there was a March 11, 2002, surveillance videotape in evidence. Hearing officer 1 signed a decision on April 25, 2002, finding, among other things, that claimant had disability from September 10, 2001, through March 11, 2002. The Appeals Panel reversed hearing officer 1's decision regarding disability on another ground not relevant to the issues before us today. Texas Workers' Compensation Commission Appeal No. 021303, decided July 11, 2002. In that Appeals Panel decision, the Appeals Panel noted that compensability is a threshold issue to the issue of disability. The Appeals Panel remanded the case back to hearing officer 1 to address compensability and also remanded the disability determination.

On September 3, 2002, hearing officer 1 held a hearing on remand and claimant testified. At that hearing, claimant stated that he claimed disability from "October 30, 2001, to the present." Hearing officer 1 signed a decision on remand on September 9, 2002, and determined, among other things, that claimant had disability from September 10, 2001, until March 11, 2002. Carrier appealed that decision on various grounds and the Appeals Panel affirmed. Texas Workers' Compensation Commission Appeal No. 022474, decided November 19, 2002.

Carrier contends that the issue of whether claimant had disability from March 12 through September 3, 2002, was litigated in two prior hearings and the decision and order on remand signed after the September 9, 2002, hearing is *res judicata* on that issue. We agree that hearing officer 2 erred in determining that claimant had disability from March 12 through September 3, 2002. The issue of whether claimant had disability during that period was actually litigated at the April 19, 2002, hearing and the September 3, 2002, hearing on remand. The hearing officer presiding at those two hearings did not expressly find that claimant did not have disability from March 12 through September 3, 2002. However, because claimant claimed disability for that period and because it was actually litigated, *res judicata* applies. Texas Workers' Compensation Commission Appeal No. 971369, decided August 25, 1997. We reverse the hearing officer's determination that claimant had disability from March 12 through September 3, 2002, and render a decision that claimant did not have disability from March 12 through September 3, 2002.

Carrier contends that hearing officer 2 erred in determining that claimant had disability from September 4, 2002, to the date of the hearing, in this case: September 9, 2003. Carrier asserts that: (1) claimant's testimony was inconsistent; (2) carrier's evidence shows that claimant earned income selling cars in 2002 and the hearing officer ignored this evidence; (3) claimant was not credible; and (4) the March 11, 2002, surveillance videotape showing claimant playing basketball established that claimant was able to earn his preinjury wage. The applicable law regarding reestablishing disability is discussed in Texas Workers' Compensation Commission Appeal No. 980487, decided April 23, 1998.

There was evidence developed at the April 19, 2002, hearing regarding whether claimant actually worked or rendered any personal services selling cars as opposed to earning what is akin to investment income.¹ Claimant said he did not perform any work selling cars and that he has not worked since September 2001. There was also evidence developed at the hearing in this case about whether income reported to the Internal Revenue Service in 2002 was solely from claimant's wife's employment. Although carrier pointed to evidence to the contrary, the tax return for 2002 states that claimant's occupation is "none" and that his wife's occupation is "customer service."

The hearing officer could consider claimant's testimony that he finished work hardening in March 2002 and that though this improved his condition, he was still not able to go back to his prior job. Claimant testified that his former work involved heavy lifting. An MRI from September 12, 2001, indicated that claimant had a protrusion at L4-5 that touched and slightly displaced the nerve root and a protrusion at L5-S1 that touched and effaced the thecal sac at the level of the proximal S1 nerve root sleeves. In a November 2001 report, Dr. P stated that he discussed surgical alternatives with claimant. A March 6, 2003, letter from Dr. B stated that claimant has "not engaged in any activity that is outside of his prescribed treatment, [nor] has he engaged in any activity that is inconsistent with his injuries, specifically as relates to the videotape of

¹ The tapes from the prior hearings were admitted into evidence.

March 2002.” A post-discogram CT scan performed in April 2003 indicated that at the L4-5 level:

there is a posterolateral tear present with extension of contrast material up to the annular periphery along its left posterolateral and lateral aspect. This . . . constitutes a left posterolateral and left lateral Grade IV tear. An associated broad based bulge is present. There is flattening of the ventral margin of the thecal sac.

At the L5-S1 level, it was also noted that there was a posterior Grade IV tear and an “associated posterior protrusion present.” Medical records indicate that claimant has been treated with epidural steroid injections in 2003. Work Status Reports (TWCC-73) from Dr. B dated through March 2003 state that claimant is unable to work. Claimant said he has been unable to return to work because he could not do the required lifting and pushing with his diagnosed lumbar disc conditions. Given the seriousness of claimant’s condition and his continued treatment and diagnostic testing from 2003, we conclude that hearing officer 2 did not err in determining that claimant had disability from September 4, 2002, through September 9, 2003. Texas Workers' Compensation Commission Appeal No. 031193, decided June 30, 2003. Hearing officer 2 reviewed the record and decided what facts were established. We conclude that hearing officer 2’s determination that claimant had disability from September 4, 2002, through September 9, 2003, is supported by the record and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We reverse that part of hearing officer 2’s determination that claimant had disability from March 12 through September 3, 2002, and render a decision that claimant did not have disability from March 12 through September 3, 2002. We affirm that part of hearing officer 2’s decision and order that determined that claimant had disability from September 4, 2002, through September 9, 2003.

According to information provided by carrier, the true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

**TH
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Robert W. Potts
Appeals Judge