

APPEAL NO. 033042
FILED JANUARY 8, 2004

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 October 21, 2003. The hearing officer resolved the disputed issues by deciding that the _____, compensable injury does extend to include the diagnoses of lumbar disc herniation left at L5-S1 and degenerative disc disease at L3-4, but does not extend to include the congenital fusion at L4-5 and T12-L1, and that the claimant has not had disability from February 12, 2003, continuing to the date of the CCH. Both parties have appealed. The appellant/cross-respondent (claimant) appealed, disputing the disability determination. The respondent/cross-appellant (carrier) responded, urging affirmance of the challenged disability determination. The carrier also filed an appeal, disputing the determination that the compensable injury extended to include the diagnoses of lumbar disc herniation left at L5-S1 and degenerative disc disease at L3-4. The carrier argues that the medical evidence presented at the CCH did not establish to the level of a reasonable medical probability, a causal link between either the herniated disc or the degenerative disc disease and the compensable injury of _____. The carrier additionally argued that the claimant failed to meet his burden of proof to show a compensable aggravation injury. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on _____. The claimant testified that he worked for the employer as a forklift driver and injured his back on _____, when a dock door he was attempting to close got stuck. He testified that he sought medical treatment and continued to work and that the only time he missed work between _____, and February 12, 2003, was when he received injections for his back. The evidence reflects that the claimant was initially diagnosed with a lumbar sprain/strain. An MRI of the lumbosacral spine dated October 2, 2002, indicated a congenital fusion, a disc herniation at L5-S1, and degenerative disc disease. The claimant testified that he was working with an electric pallet jack on February 12, 2003, when he again injured his back and has not worked since.

Extent of injury and disability are factual questions for the fact finder to resolve. Conflicting evidence was presented on these issues. The hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given to the evidence. Section 410.165(a). It is for the hearing officer to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true of medical evidence. Texas

Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness, including that of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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. 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).

In this instance, the hearing officer was persuaded that the _____, compensable injury does extend to include the diagnoses of lumbar disc herniation left at L5-S1 and degenerative disc disease at L3-4, but did not extend to include the congenital fusion at L4-5 and T12-L1. In view of the evidence presented, we cannot conclude that the hearing officer's extent-of-injury determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." We have often held that a restricted release to work, as opposed to an unrestricted release to work, is evidence that the effects of the injury remain. Texas Workers' Compensation Commission Appeal No. 92432, decided October 2, 1992. Disability is fluid in nature, and a claimant can move in and out of disability over time. Given the hearing officer's extent-of-injury determination, we hold that the following factors constitute the great weight of the evidence against the hearing officer's determination that the claimant did not have disability as a result of his compensable injury: the medical evidence from the claimant's current treating doctor, who immediately took the claimant off work when he began treating the claimant, due to the claimant's lumbar structural compromise; the medical evidence from Dr. B, the orthopedic surgeon appointed by the Texas Workers' Compensation Commission (Commission), who performed a required medical examination of the claimant and opined that disc herniation is the cause of the claimant's ongoing disability; and the medical evidence from the Commission-selected designated doctor, Dr. A, who recommended the claimant see a neurosurgeon for consideration of spinal surgery, physical therapy, and pain management; as well as the claimant's own testimony. Cain, supra. Accordingly, we reverse the disability determination and render a new decision that the claimant had disability from February 12, 2003, through the date of the hearing.

We affirm the determination that the _____, compensable injury does extend to include the diagnoses of lumbar disc herniation left at L5-S1 and degenerative disc disease at L3-4, but does not extend to include the congenital fusion at L4-5 and T12-L1 and reverse the determination that the claimant has not had disability and render a determination that the claimant had disability from February 12, 2003, through the date of the CCH.

The true corporate name of the insurance carrier is **TRANSCONTINENTAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

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

Margaret L. Turner
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Edward Vilano
Appeals Judge