APPEAL NO. 040701
FILED MAY 19, 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 January 8, 2004. The record of the CCH was reopened at the request of the hearing officer in order to obtain additional medical records and to permit the parties the opportunity to comment on the content of such records. The record was closed on March 5, 2004. The hearing officer resolved the disputed issues by deciding that "[a]lthough the [appellant's (claimant)] compensable injury of _____ initially caused Claimant to sustain a bulging/protruding L5-S1 disc and radiculopathy, Claimant's subsequent serious [motor vehicle accident (MVA)] has broken any cause and effect relationship between the compensable injury made the basis of this case and claimant's current physical condition, and it therefore appears that Claimant's current injury and inability to work are no longer properly traceable to the compensable injury in question. Moreover, the doctrines of *res judicata* and *collateral estoppel* preclude litigating or relitigating questions regarding the extent of Claimant's injury at this time." The claimant appealed, disputing the decision of the hearing officer. The claimant contends that the decision is against the great weight and preponderance of the evidence and is clearly wrong and manifestly unjust and should be reversed and rendered in the claimant's favor. In its response, the respondent (carrier) contended that the hearing officer erred in overruling his objections to the issues to be heard at the CCH. The carrier contended that all issues should have been stricken as being improper issues under the law, and/or as having been precluded by waiver, res judicata, and/or collateral estoppel. The carrier additionally argues that Finding of Fact No. 13 is incorrect because the issue of whether the claimant's compensable injury included degenerative disc disease was determined at a prior CCH. The carrier urges affirmance of all other disputed findings of fact and conclusions of law.

DECISION

Affirmed as reformed in part and reversed and rendered in part.

The evidence reflects that in a CCH conducted on January 9, 2003, it was determined that the claimant's compensable injury of _____, extends to and includes a disc bulge at the L5-S1 spinal level, but does not extend to or include degenerative disc disease, and resulted in no disability, as of that date. In Texas Workers' Compensation Commission Appeal No. 030461, decided April 2, 2003, the disputed determinations of disability and extent of injury regarding degenerative disc disease were affirmed. Appeal No. 030461, *supra*, stated that the determination that the compensable injury extends to and includes a disc bulge at the L5-S1 level was not appealed. At the current CCH, the claimant testified that he did not further appeal these determinations in district court.

The following four issues were in dispute at the CCH held on January 8, 2004:

1. Whether Claimant's compensable injury of _____ extends to and includes a bulging, protruding, or herniated L5-S1 disc and/or radiculopathy, or degenerative disc disease at the L4-5 and/or L5-S1 spinal levels,

2. Whether a non-compensable injury constitutes the sole cause of Claimant's current degenerative disc disease at the L4-5 and/or L5-S1 spinal levels, L5-S1 disc injury, and/or radiculopathy,

3. Whether Claimant has sustained disability since the time of the previous [CCH] conducted in this matter, which was conducted on January 9, 2003, and

4. Whether the proposed litigation of any or all of the forgoing extent of injury issue is precluded pursuant to the legal concepts of waiver, *res judicata* and/or *collateral estoppel*.

We reform Finding of Fact No. 13 to read as follows to correct typographical errors and conform to additional findings: The issues presented for resolution in the CCH conducted on January 9, 2003 [rather than January 29, 2003], did not address the alleged causation of claimant's alleged herniated nucleus pulposus at the L5-S1 spinal level, or radiculopathy, or degenerative disc disease at the L4-5 spinal level [rather than the L5-S1 spinal level]. The hearing officer specifically found in Finding of Fact No. 16 that the causation of claimant's bulging/protruding L5-S1 disc and L5-S1 degenerative disc disease was resolved as the result of previous Texas Workers' Compensation Commission dispute resolution proceedings which have become final. The hearing officer found in part in Finding of Fact No. 18 that the claimant failed to pursue a determination of his allegedly compensable herniated nucleus pulposus (HNP) at the L5-S1 disc level, radiculopathy, and/or degenerative disc disease at the L4-5 spinal level in the CCH conducted on January 9, 2003.

EXTENT OF INJURY

There was sufficient evidence to support the hearing officer's finding that the prior CCH held on January 9, 2003, addressed the causation of claimant's bulging/protruding L5-S1 disc and L5-S1 degenerative disc disease. The hearing officer was not persuaded by the evidence presented that the claimant established that the compensable injury extended to include a herniated L5-S1 disc or degenerative disc disease at the L4-5 level. Extent of injury is a question of fact. Texas Workers' Compensation Commission Appeal No. 93613, decided August 24, 1993. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, 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 regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). The claimant essentially makes the same factual arguments on appeal that it made at the hearing. Applying the standard of review outlined above, we find no reversible error.

SOLE CAUSE

There is sufficient evidence to support the hearing officer's findings that on (subsequent date of injury), the claimant sustained an injury as a result of being involved in a MVA. The hearing officer was persuaded by the evidence presented that the claimant's current low back condition is no longer traceable to the claimant's _____, compensable injury. The hearing officer concluded that the claimant's compensable injury no longer constituted a producing cause of claimant's L5-S1 disc injury and/or radiculopathy. The mere existence of an intervening injury does not establish that the intervening injury is the sole cause of the claimant's condition. There may be more than one producing cause of the claimant's current condition, namely the original compensable injury and the subsequent noncompensable MVA of (subsequent date of injury). Whether a claimant's medical problems reflect the continuing effects of a compensable injury or are solely caused by an intervening or subsequent event is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 010965, decided June 7, 2001.

DISABILITY

The claimant argues that the hearing officer erred by finding that the claimant had no disability. Disability is defined as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Whether disability existed for any period was a question of fact for the hearing officer to resolve. The hearing officer was not persuaded that the claimant sustained his burden of proof on the disability issue. The hearing officer was acting within his province as the fact finder in so finding. Nothing in our review of the record demonstrates that the challenged determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse the disability determination on appeal. Pool, *supra*; Cain, *supra*.

RES JUDICATA AND COLLATERAL ESTOPPEL

The hearing officer erred in determining that the doctrine of res judicata barred litigation of the extent of injury at this time. The doctrine of res judicata, generally speaking, "prevents the re-litigation of a claim or cause of action that has been finally adjudicated as well as related matters that, with the use of due diligence, should have been litigated in the prior suit." Barr v. Resolution Trust Corporation, ex rel. Sunbelt Federal Savings, 837 S.W.2d 627, 628 (Tex. 1992). Res judicata has been found applicable to administrative proceedings. *See* Bryant v. L.H. Moore Canning Company, 509 S.W.2d 432 (Tex. Civ. App.-Corpus Christi, 1974), cert. denied 419 U.S. 845; Texas Workers' Compensation Commission Appeal No. 960022, decided February 15, 1996. The extent-of-injury issue certified for resolution at the prior CCH concerned a disc bulge at the L5-S1 level and degenerative disc disease. The hearing officer concluded that since the cause and effect relationship between the claimant's _____, compensable injury and his L4-5 and L5-S1 injuries and radiculopathy either were or could have been fully litigated at a CCH conducted on January 9, 2003, litigation of this matter at the current time is precluded pursuant to the legal concepts of res judicata and collateral estoppel. However, the hearing officer specifically found that the CCH conducted on January 9, 2003, did not address the alleged causation of claimant's alleged HNP at the L5-S1 spinal level and radiculopathy and/or degenerative disc disease at the L4-5 spinal level. Under these circumstances, we cannot agree that the issue of extent of injury as to the alleged conditions of HNP at the L5-S1 spinal level, radiculopathy, and/or degenerative disc disease at the L4-5 spinal level is barred under the doctrine of res judicata.

For the above stated reasons, we reverse the hearing officer's determination that the doctrines of res judicata and collateral estoppel preclude litigating or relitigating questions regarding the extent of claimant's injury at this time, in part, and render a decision that the doctrine of res judicata does not bar litigation of this issue with regard to the claimant's alleged conditions of HNP at the L5-S1 disc level, radiculopathy, and/or degenerative disc disease at the L4-5 spinal level. However, we affirm the hearing officer's extent-of-injury determination based upon the evidence. Likewise, we affirm the hearing officer's decision and order with regard to disability and the producing cause of the claimant's current condition.

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

LARRIET THOMAS
3636 EXECUTIVE CENTER DRIVE, SUITE 210
AUSTIN, TEXAS 78731-1643.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge