APPEAL 041899
FILED SEPTEMBER 27, 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 June 23, 2004. The hearing officer decided that the appellant (claimant herein) sustained a compensable injury on _____, and had disability from March 17 through May 11, 2004. The claimant appeals the hearing officer's disability determination, contending that the evidence showed that he had disability continuing through the date of the CCH. The claimant also argues that the hearing officer erred in making findings regarding the extent of his injury when there was no issue regarding the extent of his injury before her. The claimant attaches a medical report to his appeal that indicates that he has a herniated lumbar disc. The respondent (carrier herein) replies that the evidence supported the hearing officer's determination as to disability and the extent of the claimant's injury. The carrier also argues that we should not consider the medical report attached to the claimant's appeal. Neither party appeals the hearing officer's finding of injury and this determination has become final pursuant to Section 410.169.

DECISION

We regard the factual findings of the hearing officer regarding the extent of the claimant's injury to be surplusage. Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

First, we note that we will not generally consider evidence not submitted into the record and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). Applying this standard, we will not consider the medical report attached to the claimant's appeal.

We note that the issues reported out of the benefit review conference were injury and disability. There was no issue on extent of injury. We have encouraged hearing officers to indicate the nature of the injury when determining whether an injury existed. However, we have also stated that it is not appropriate for a hearing officer to make a final determination on the issue of extent of injury when the issue of extent of injury is not before the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 001239, decided July 13, 2000, and Texas Workers' Compensation Commission

Appeal No. 002898, decided January 29, 2001. As we have done in earlier cases, we consider all findings by the hearing officer concerning the extent of the claimant's injury to be beyond the scope of the issue before her, and we consider them surplusage. The parties are free to litigate the extent of the claimant's injury and the findings of the hearing officer in this case regarding the extent of the claimant's injury will not preclude the hearing officer at a later hearing from determining that the claimant's injury extends beyond a lumbar sprain/strain.

Disability is a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 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, 702 (Tex. Civ. App.-Amarillo 1974, no writ). 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 Co., 715 S.W.2d 629, 635 (Tex. 1986). There was clearly conflicting evidence in this case concerning disability and based upon the above standard of review, we find no basis to reverse the hearing officer's decision concerning disability.

The decision and order of the hearing officer are affirmed as reformed.

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

JOSEPH A. YURKOVICH
1431 GREENWAY DRIVE, SUITE 450
IRVING, TEXAS 75038.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

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Daniel R. Barry
Appeals Judge

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Robert E. Lang
Appeals Panel
Manager/Judge