

APPEAL NO. 111360
FILED DECEMBER 2, 2011

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 July 7, 2011, with the record closing on August 26, 2011, in (City), Texas, with [hearing officer] presiding as hearing officer. With regard to the five issues before her, the hearing officer determined that: (1) the compensable injury of [date of injury], does not extend to disc bulges at L4-5 and L5-S1; (2) the appellant/cross-respondent (claimant) had disability resulting from the injury sustained on [date of injury], from March 9, 2009, through December 6, 2010; (3) the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. L on January 30, 2009, did not become final under Section 408.123; (4) the claimant reached MMI on December 6, 2010; and (5) the claimant's IR is 5%. The determination that the claimant reached MMI on December 6, 2010, has not been appealed and has become final pursuant to Section 410.169.

The claimant appealed the extent of injury and IR determinations, contending that the compensable injury extends to the claimed conditions and that the IR should be 10%. The respondent/cross-appellant (carrier) cross-appealed the finality issue and disability determinations. The carrier responded to the claimant's appeal. The appeal file does not contain a response from the claimant to the carrier's cross-appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on [date of injury], and that Dr. G was the designated doctor appointed by the Texas Department of Insurance, Division of Workers' Compensation to determine the claimant's MMI date, IR, the extent of the claimant's compensable injury, ability to return to work and "disability/direct result."

**EXTENT OF INJURY, FINALITY, IR, AND PERIOD OF DISABILITY
FROM MARCH 9, 2009, TO MARCH 7, 2010, AND MARCH 25
THROUGH DECEMBER 6, 2010**

The hearing officer's determinations that the compensable injury does not extend to disc bulges at L4-5 and L5-S1; the first certification of MMI and IR assigned by Dr. L did not become final; and the claimant's IR is 5% are supported by sufficient evidence and are affirmed. We also affirm the hearing officer's determination that the claimant

had disability from March 9, 2009, to March 7, 2010, and March 25 through December 6, 2010, as being supported by sufficient evidence, namely the claimant's testimony.

DISABILITY FROM MARCH 8 THROUGH MARCH 24, 2010

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage." The claimant was employed as an elevator mechanic. In evidence is a New Hire or Personnel Change Notice dated November 14, 2008, reflecting the claimant's current salary as \$32.73 per hour. The claimant testified that before his injury he was working 40 to 50 hours per week. Using the new hire form and the claimant's testimony there is evidence that the claimant was earning \$1,309.20 to \$1,636.50 per week before his injury. As the hearing officer notes in her Background Information, the claimant returned to work for the employer after his injury. The claimant testified that he returned to work at his pre-injury hourly wage but was unable to work as many hours as before his injury because of the compensable injury. The testimony establishes that the claimant continued to work until sometime in September 2009 (no specific date is established) when his position was eliminated.

The claimant testified that he worked about two weeks in March 2010 for another elevator company but that he was laid off from that job because he was unable to get a nuclear security certification. In evidence are W-2 wage and tax statements from the elevator company showing gross wages of \$3,782.00. A handwritten notation at the bottom of the page states: "employed from 3/8/2010 to 3/24/2010."

The claimant returned to work with the employer on or about May 3, 2010. The new hire form indicates the claimant's salary was \$34.95 an hour (\$1,398.00 a week for a 40 hour week). The employer representative testified that the claimant continued to work his regular job until the claimant was laid off in June 2010 because of lack of available work.

The carrier, in its cross-appeal, asserts that the claimant had been released to return to work without restrictions and had in fact returned to work. The hearing officer's determination that the claimant had disability is based on the claimant's testimony that he had returned to work at his pre-injury hourly wage but that he was working fewer hours than before his compensable injury. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). The Appeals Panel has held that disability may be established by the claimant's testimony alone if believed by the finder of fact. Gee v. Liberty Mutual Fire Ins. Co. 765 S.W.2d 394 (Tex. 1989). The hearing officer can find disability based on the claimant's testimony alone, if believed, even though contradicted by medical reports. Houston General Insurance

Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). In this case, the hearing officer found that the claimant had been working fewer hours after his injury because of the compensable injury. However, the claimant also testified that he had worked for a second elevator company in March 2010. As noted, in evidence are W-2 wage and tax statements from the second elevator company showing two weeks gross wages of \$3,782.00. The \$1,891.00 per week wages from the second elevator company exceeds any wages based on the claimant's hourly wage and claimant's testimony of hours worked, that was paid by the employer.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We reverse the hearing officer's determination that the claimant had disability from March 8 through March 24, 2010, the period of time the claimant was working for the second elevator company earning more than his pre-injury wage, as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We render a new decision that the claimant did not have disability for the period of March 8 through March 24, 2010.

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

**CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge