

APPEAL NO. 033309
FILED FEBRUARY 10, 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 was held on December 3, 2003. The hearing officer decided: (1) that the compensable injury of _____, extends to include the lumbar spine but does not include degenerative disc disease; and (2) the respondent (claimant) had disability from May 22, 2002, through November 12, 2003. The appellant (carrier) appeals the extent-of-injury determination with regard to the lumbar spine and the disability determination, on sufficiency of the evidence grounds. The claimant urges affirmance. The hearing officer's extent-of-injury determination with regard to degenerative disc disease was not appealed and has become final. Section 410.169.

DECISION

Affirmed in part, reversed and rendered in part.

EXTENT OF INJURY

The hearing officer did not err in determining that the compensable injury extends to include the lumbar spine. This determination involved a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the 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, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). In view of the evidence presented, we cannot conclude that the hearing officer's determination is 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).

DISABILITY

Disability means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Section 401.011(16). In Texas Workers' Compensation Commission Appeal No. 002599, decided December 13, 2000, we noted that disability is an economic concept and that if an injured employee becomes incarcerated the actual loss of wages is attributable to such incarceration, which is the reason for the inability to obtain and retain employment rather than the compensable injury. See *also* Texas Workers' Compensation Commission Appeal No. 92428, decided October 2, 1992; Texas Workers' Compensation Commission Appeal No. 92674, decided January 29, 1993. Whether the

claimant had disability, and if so for what period, was a question of fact for the hearing officer to resolve. The evidence supports the hearing officer's determination that the claimant had disability for most of the period beginning May 22, 2002, and continuing through November 12, 2003. However, the claimant testified that he was incarcerated for 10 days on and around September 16, 2003, and conceded that he did not have disability for that period. In view of the evidence and the applicable law, we reverse the hearing officer's disability determination relative to the period of incarceration and render a decision that the claimant had disability from May 22, 2002, through September 15, 2003, and from September 26, 2003, through November 12, 2003.

The hearing officer's decision and order is affirmed in part and reversed and rendered in part, consistent with our decision above.

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

**DONALD GENE SOUTHWELL
TRINITY UNIVERSAL INSURANCE COMPANY
1000 NORTH CENTRAL EXPRESSWAY, SUITE 100
DALLAS, TEXAS 75265.**

Edward Vilano
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Michael B. McShane
Appeals Panel
Manager/Judge