APPEAL NO. 93985

On September 22, 1993, a contested case hearing was held in (city), Texas, and the hearing officer, (hearing officer), determined that the respondent (claimant) was injured in the course and scope of her employment on (date of injury), and that since (date), she has had disability under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.011(16) (1989 Act) (formerly V.A.C.S., Article 8308-1.03(16)). In its request for review, the appellant (City) asserts that the claimant failed to prove she had an injury under the 1989 Act, that the hearing officer failed to make any finding of causation for claimant's disability, that the hearing officer erred in failing to find that claimant's disability was solely caused by her pre-existing back problems, and that the hearing officer erred in failing to allow the City to offer probative evidence. In her response the claimant, in essence, urges the sufficiency of the evidence to support the challenged determinations and the absence of reversible error.

DECISION

Finding no reversible error and the evidence sufficient to support the challenged findings, we affirm.

Claimant, a 15 year public works dispatcher for the City, injured her left shoulder and back in a fall down some steps at work in February 1990 after which she had four operations including three lumbar spine operations, the last in January 1992. She was off work from August 1990 to January 1993 after which time she said she was having no particular problems with her back unless she attempted heavy yard work. She said that as of January 1993 she was able to work, keep house, wear high heels and so forth although she conceded she was still taking various medications. On (date of injury), at about 3:30 p.m., claimant was about to enter her work area from a hallway and to do so had to push open a wooden door which she described as solid, heavy and difficult to open. Unbeknownst to her, her supervisor, (Mr. D), was about to open the door from the other side. When she pushed against the door with her left shoulder Mr. D pulled it open from the other side and claimant lurched forward in a stumble and off balance but did not fall. She said she felt immediate pain in her low back predominately on the right side and a knot appeared shortly later.

Coworker (Ms. D), who was in the office sitting near the door, witnessed the event and described it essentially as claimant had testified. Ms. D testified that claimant said to her, "(Ms. M), I think I've messed up my back," and she knew that claimant was in pain because she remained quiet and standing for the rest of the shift. Ms. D said she was able to feel the knot on claimant's back. Mr. D testified that he did not notice claimant stumble as she came through the doorway when he pulled the door open. However, in the City's accident report, Mr. D wrote that "when I opened the door, it pulled her forward." He also said he was unable to feel the knot in her back but that she did complain of pain in her right lower back.

Claimant said she attempted to work the next day thinking she just had a muscle

spasm but had to leave after a few hours and has not since been able to work because of her back condition. She said she knew she reinjured her back because the pain after this accident was entirely different and was predominately on her right side, radiating into her right buttock and leg, whereas the pain from her prior injury was predominately left-sided. She described her condition as one of severe pain and being on medications and bedridden about 99% of the time. She also stated that no doctor has returned her to work, not even on a light duty basis.

Claimant further testified that she was able to get an appointment with (Dr. K), a doctor who had previously treated her, for April 28th. Claimant said Dr. K took x-rays, told her "it was a new injury," put her in therapy, and took her off work. In his report of claimant's April 28th visit, Dr. K diagnosed a lumbar sprain/strain, and his clinical assessment found "marked spasm L/S tender coccyx" and "lumbar strain with radiculopathy." This report also stated that he felt claimant had a "new injury" and also that she had extensive underlying degenerative lowback disease which complicated her situation. In a July 22, 1993, report, Dr. K stated that claimant's (date of injury) injury increased a spondylolisthesis at L5-S1 and apparently destabilized a previous fusion.

Claimant was seen by (Dr. R), a neurologist, on June 9th upon referral and she said he also told her she had a new back injury by way of aggravating the prior injury. After further diagnostic testing, Dr. R stated in his June 23rd report that her tests showed a grade I to early grade II L5/S1 spondylolisthesis which has increased from the January 1993 films, no new disc herniation, that the L4 to S1 fusion "has not taken." In his July 21st report, Dr. R stated that claimant "re-injured her back on (date) at her employment while opening a door," that her lumbar fusion had not joined, and that she would need an L4 to S1 instrumentation and fusion with right L5/S1 nerve root decompression. Claimant was also seen by (Dr. JH) who had previously performed fusion surgery on her back. In his (date) report, Dr JH stated that claimant "has an aggravation of her old lumbar spinal injury."

Claimant also testified that the City had her examined by (Dr. RH) and that although he did not include such in his report he told her she had aggravated her back on (date of injury). Dr. RH testified that he examined claimant on August 30th and reviewed her extensive medical records. He stated that claimant and her records indicated that in April 1993 she "had some reoccurrence of her back discomfort" with pain in her right lower spine and down her right leg, and that she has had continued significant problems and has been unable to return to work. Dr. RH's impression was that of lumbar spondylolisthesis which he described as claimant's lower lumbar spine vertebrae slipping on top of her sacrum. Dr. RH felt that claimant's current problems were the progression of her prior injury due to the failed spinal fusion and said he found no objective medical indication of the (date of injury) accident's having caused new damage or harm to the physical structure of claimant's body. *See* Section 401.01(26) which defines "injury" in those terms. However, Dr. RH did agree that with the surgery induced unstable spine, trauma could cause a dramatic slippage to occur.

Carrier's position at the hearing was that claimant's prior injury was the sole cause of

her disability and acknowledged it had the burden of proof of that defense. The hearing officer made the following pertinent findings and conclusions:

FINDINGS OF FACT

4.Claimant hurt her back when she stumbled through a door at work on (date of injury).

5.The injury of (date of injury), aggravated Claimant's unstable low back condition.

6.The Claimant has been unable to work since (date).

CONCLUSIONS OF LAW

2.The Claimant was injured in the course and scope of her employment on (date of injury).

3.The Claimant has been disabled since (date).

The City's appeal, in essence, challenges the sufficiency of the evidence to support the determinations that claimant sustained a compensable injury on (date of injury) and has since had disability as a result of such injury. These issues presented fact questions for the hearing officer to resolve and it is the hearing officer who is the sole judge not only of the relevance and materiality of the evidence but also of its weight and credibility. *See* Section 410.065(a). The Appeals Panel has recognized that the aggravation of a pre-existing condition can constitute an injury under the 1989 Act. *See e.g.* Texas Workers' Compensation Commission Appeal No. 93577, decided August 18, 1993; Texas Workers' Compensation Commission Appeal No. 92654, decided January 22, 1993; and we have observed that it can be a close question as to whether a subsequent manifestation of a symptom is a new, distinct injury in its own right or is merely a continuation of an original specific injury. Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. Though not obligated to accept the testimony of a claimant, an interested witness, at face value, issues of injury and disability may be established by the testimony of a claimant alone. *See e.g.* Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992.

Claimant's version of the events on (date of injury) was basically unrefuted and also unrefuted was her testimony that she has since been unable to work because of her back condition and that none of her doctors have released her to return to even light duty work. There was conflicting medical evidence respecting whether claimant's accident aggravated her prior back condition or whether claimant experienced only a continuation of symptoms and the progression of spinal deterioration due to the failed fusions and resultant fibrosis. It was for the hearing officer to resolve the conflicts and discrepancies in the evidence including the medical evidence. The hearing officer resolves conflicts and inconsistencies

in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer also judges the weight to be given expert medical testimony and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Atkinson v. United States Fidelity Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.); Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336, 339 (Tex. Civ. App.-Corpus Christi 1973, no writ). We will not disturb the hearing officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986). We are satisfied the evidence is sufficient to support the hearing officer's determination of the disputed issues.

We also find no merit in the City's contention that the hearing officer failed to find "causation for disability." Section 401.011(16) defines "disability" and provides that the inability to obtain or retain employment at the pre-injury wage equivalent must be "because of a compensable injury." While the hearing officer's findings do not specifically state that it is because of the injury that claimant has been unable to work since (date), we are satisfied that the findings when read together, as well as the evidence, fairly permit us to imply such additional finding. *See* Texas Workers' Compensation Commission Appeal No. 92064, decided April 3, 1992. Indeed, the City seems to recognize an implied finding of disability on page 10 of its request for review.

We have carefully reviewed the record and are satisfied the hearing officer did not prevent the City from offering probative evidence. In the first instance, the hearing officer allowed the City to develop that Ms. D herself had two workers' compensation claims against the City and she denied having listed the claimant as a witness. In the second instance complained of, the hearing officer instructed the City to desist from efforts to have Dr. RH speculate on what other doctors might have meant by verbiage in their reports. The hearing officer's efforts were obviously directed toward keeping the hearing focused on relevant evidence and we find no abuse of discretion in the instances cited by the City.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge