APPEAL NO. 94122

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 22, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues presented for resolution were: 1) whether claimant's back injury is causally related to her compensable ankle injury of (date of injury); and 2) whether claimant's knee injury is causally related to her compensable ankle injury of (date of injury).[1] The hearing officer determined that the claimant's back and left knee injuries were causally related to a compensable ankle injury of (date of injury).

Appellant, carrier herein, contends that the evidence is legally and factually insufficient to support the hearing officer's decision and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

It is undisputed that claimant was employed as a part-time seasonal farm worker with (employer), employer herein, and that on the evening of (date of injury) (all dates are 1992 unless otherwise noted) claimant twisted her left ankle and fell. Claimant testified, through a translator, that she landed hard, in a sitting position, on her left leg and her ankle folded beneath her and her right leg extended to the front. Claimant stated that several coworkers saw her fall, that she supported herself on a bench until quitting time and a coworker took her home. Claimant testified that her whole left leg hurt and that she did not notice pain in her back at the time. Claimant stated she was in pain throughout the night but went to work the following morning and reported her fall and ankle injury to the foreman. (Ms. W), employer's part owner, was notified and took claimant to employer's doctor, (Dr. G). Dr. G examined claimant's leg and ankle, took x-rays of the leg, determined no fractures were present, provided claimant with a nylon anklet and gave claimant four pills for pain. Claimant testified that some time later (the testimony was not more specific) she noticed pain in her back and knee and tried twice to go back to Dr. G. On one occasion claimant testified she was told that Dr. G was not in and on the other occasion she was told that Dr. G would not see her because the bill from the earlier visit had not been paid. Claimant testified she tried to return to work in early May (the employer's wage and attendance record would indicate the date to be May 6th) but after trying to work for about two hours, it was apparent to everyone that she was in pain and the foreman told her to just go home. Ms. W testified that a coworker was given permission to take claimant home. Claimant testified she did not have money to see another doctor. Claimant testified she went to see an attorney in May[2] but was unable to schedule an appointment with the attorney until June

[1]The date of injury was subsequently determined to have been (date of injury).

[2]Claimant indicated the date she went to the attorney's home was variously May 1st or May 16th. Claimant's testimony on specific dates is very vague but is generally supported by ancillary documentation.

16th. Claimant testified that with the assistance of the attorney's secretary she completed and signed an Employer's Notice of Injury (TWCC-41) dated June 16, 1992, which listed the nature of injury as "left foot." The attorney signed the TWCC-41. At the June 16th meeting the attorney referred claimant to (Dr. S) who was not able to see claimant until June 22nd. Dr. S's records, discussed below, reported that claimant complained of pain in the left ankle and knee, and also of pain in her right lumbar spine. Subsequently, Dr. S referred claimant to (Dr. P), an orthopedic surgeon, for a consultation. An MRI performed on July 24th, showed a disc herniation at the L5-S1 with dural sac indentation.

The medical documentation of Dr. G's treatment is an Initial Medical Report (TWCC-61) showing a "Sprained left ankle," "X-rays were negative for fractures" and a treatment plan of "Oral medication, and return PRN (as needed)." The TWCC-61 shows an "anklet" was provided claimant and that claimant "may return to work, no disability."

Dr. S, in progress notes of June 22nd and June 25th, noted claimant complained of "pain to [left] ankle & knee, mostly when walking. Also c/o pain to [right] l/s [lumbar spine]." Dr. S, in the June 22nd progress notes and a July 22, 1992, TWCC-61, noted tenderness to the left knee and had as a treatment plan "[t]ake meds., physical therapy 4 modalities to the right lumbar spine, left ankle and left knee, daily for 6 weeks." Detailed range of motion (ROM) measurements of claimant's left ankle, left knee and lumbar spine indicate deficits from normal. Progress notes from "6/23" through "7/27" show continued complaints of pain. An "8-3-92" progress note records that claimant ". . . states she is in severe back pain." A Specific and Subsequent Medical Report (TWCC-64) dated October 7th for a September 15th visit gave a diagnosis of "chronic low back pain" and "[l]eft radiculopathy." In a report dated October 30th, Dr. S stated claimant ". . . has a herniated disc at L5-S1 with chronic low back pain and left radiculopathy."

An MRI performed on July 27th diagnosed claimant with a "[m]ild degeneration of the nucleus pulposus at L5-S1. Transitional S1 vertebral body. Left posterior disc herniation at L5-S1 level with associated dural sac indentation."

Dr. P in a TWCC-61 dated August 21st noted severe limitation of motion of the lumbar spine and prescribed as a treatment plan conservative treatment. Subsequent TWCC-64s dated October 20th, December 10th and December 23rd all document continued back problems. In the December 23rd TWCC-64, Dr. P requested a discogram and stated "[i]f the discogram reveals a complete rupture then I recommend a lumbar laminectomy with a possible interbody fixation." Additional TWCC-64s on February 2, 1993, and June 17, 1993, continue to document claimant's lumbar back problem. In a report dated October 13, 1993, addressed to the Texas Workers' Compensation Commission (Commission) Dr. P stated: "In my opinion, the patient's back injury is secondary to the foot injury sustained in the work injury."

Carrier, while accepting liability for the ankle injury, has denied liability for the knee and back injuries on the basis that the knee and back were not identified as being injured by Dr. G and that in claimant's TWCC-41, apparently completed in the attorney's office and

signed by the attorney, only the left ankle is identified as the injured portion of the body. Ms. W testified at the CCH and stated that claimant was in a great deal of pain on (date of injury), and apparently on May 6th, when Ms. W authorized a coworker to take claimant home after she had worked two hours.

The hearing officer determined that the claimant's back and knee injuries were related to and caused by her fall on (date) while at work for the employer. Carrier appeals on several grounds, the principal one being that claimant's initial complaints were an injury to her left foot, that claimant's TWCC-41 listed only a left ankle injury, that the evidence established that claimant's "back and knee did not begin to bother her until some time after June 16, 1992." This, of course, disregards claimant's testimony where she testified her back began to bother her shortly after she saw Dr. G on (date of injury) and that she tried to go back and see Dr. G but that he refused to see her. The hearing officer obviously found claimant's testimony credible as stated in the discussion of the evidence as follows:

> Claimant's explanation of why she did not earlier report her back and knee pain is plausible in view of her lack of transportation, influence and income. When she could not return to work during the first week of May because of continued debilitating pain, Employer should have taken more positive steps to investigate the seriousness of her injury rather than to just send her home. Claimant's economic position and apparently non-assertive nature can explain why she did not more assertively report and seek care for her injuries.

The hearing officer, as the trier 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 the evidence. Section 410.165(a). The hearing officer heard the claimant's testimony and observed her demeanor. If there were conflicts or inconsistencies in the testimony it was up to the hearing officer to resolve those conflicts or inconsistencies. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). And the hearing officer may believe all, part or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ); Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer obviously accepted the claimant's testimony as he was authorized to do.

Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992, is a factually similar case where the employee in that case undisputedly sustained an ankle injury and two months later asserted he sustained a back injury at the same time he sustained the ankle injury. Some of the factors the Appeals Panel considered in reversing in favor of the employee, which might be applicable in the instant case, are: 1) an undisputed serious ankle injury where the employee fell to the ground; 2) the absence of any inconsistency between the ankle and back injuries; 3) that the serious back injury, a disc herniation, was eventually diagnosed during the course of claimant's continued treatment of the original injury; 4) medical reports consistent with the causal relationship of the back injury and the work-related accident, and 5) common knowledge and experience would tend to

support the reasonableness of the employee's assertions.[3] As in Appeal No. 92503, in the instant case, an incident occurred (the fall), it could reasonably cause the type injury claimed, claimant shortly thereafter experienced back pain, claimant went to the doctor as soon as reasonably possible under the circumstances complaining of the back injury, she was subsequently diagnosed with a herniated disc, nothing indicated any other cause of the herniated disc and a doctor's statement indicated the possibility of the job relationship together with the claimant's testimony relating the injury to the job. The hearing officer's determinations on this point are sufficiently supported by the evidence.

Carrier next asserts that the decision "must be supported by the pleadings . . . [and] the claimant's pleadings are the notice of injury . . . and compensation can be awarded only as to the injury raised in the claim." In support of its contention carrier cites Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ); Treybig v. Home Indemnity Co., 632 S.W.2d 896 (Tex. App.-Dallas 1982, writ ref'd n.r.e.). We disagree. Initially, we note that conformity to the legal rules of evidence is not necessary (Section 410.165(a)) nor are the rules of civil procedure applicable to CCHs. Texas Workers' Compensation Commission Appeal No. 91088, decided January 15, 1992. Furthermore, the Appeals Panel has held "it is not incumbent upon a claimant to establish in precise detail how an injury occurred in order to persuade the finder of fact that he suffered a compensable injury." Texas Workers' Compensation Commission Appeal No. 92014, decided March 4, 1992, *citing* Scott v. Millers Mutual Fire Insurance Co., 524 S.W.2d 285 (Tex. 1975). In the instant case, the claimant was not held to precisely the date of injury that she claimed on the TWCC-41 ((date of injury)) and was allowed to prove the actual date of injury; similarly we will allow the claimant to prove the extent of her injuries and not limit her precisely to the exact injury she listed on the TWCC-41. In addition, we do not read Johnson, *supra*, and Treybig, *supra*, to limit claimant to the injury she listed on the TWCC-41. The question in both of the cited cases was whether "a fatal variance existed between the claim presented to the Industrial Accident Board and that urged before the district court." Treybig at 899. Treybig seems to indicate there would have been no fatal variance "where the employee was unaware of the extent of his injury at the time he filed his claim for compensation." Id at 898. We note in this case claimant completed the notice of injury, with the assistance of a secretary, before she had an opportunity to see Dr. S and before she knew she had a herniated disc. The Texas Supreme Court in Johnson, *supra*, in considering a chemical inhalation case, surveyed other cases of variances, reversed the court of civil appeals, and held ". . . if there is a fair and substantial identity of the claim . . . thereafter sued upon in court, then there is no fatal variance." Johnson at 87. More importantly, the Johnson case held:

> . . . the function of the claim filed by the workman is to give information as to what happened and to serve as a proper basis for investigation, hearing and the determination of the claim. It is not intended that the claim filed be governed

[3]This is not to suggest that the enumerated list is exclusive or contains the only factors to be considered in a case of this nature. Appeal No. 92503 has a more detailed list and we do not suggest it is inclusive of all the factors which might be considered.

> by any strict rules or formalities. It is not required of claimants that they know correct legal classification, the medical name of the disabling condition, or proper diagnosis of the injury or disease which causes their incapacity.

We believe that function has been attained in the instant case and find carrier's contention unmeritorious.

Finally, carrier contends, in the alternative, that it should not be liable for interest because its duties and standing are governed by TEX. INS. CODE ANN. art. 21.28-C, § 8(b) (Vernon Supp. 1994) which makes it liable only for "covered claims" which are defined in Article 21.28-C § 5(8) to exclude ". . . court costs, interest and penalties, and . . . prejudgment or postjudgment interest. . . ." Carrier contends that "as a matter of statutory definition, any interest to which [claimant] would otherwise be entitled under § 408.064, Tex. Labor Code, is not encompassed in the definition of a covered claim. . . ." We disagree, and would note that Article 21.28-C § 25 (controlling law) provides that the Texas Insurance Code shall control except "(b) This section does not apply to a conflict between this Act (the Insurance Code) and: (1) the Texas Workers' Compensation Act (Article 8308-1.01 *et seq*. . .)" since codified in the Texas Labor Code. In effect, the 1989 Act takes precedence over the Insurance Code and Section 408.064 of the 1989 Act (assessing interest) controls. Carrier's contention on this point does not have merit.

Having reviewed the record, we find no reversible error and sufficient evidence to support the hearing officer's factual determinations. An appeals level body will reverse the hearing officer's 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). We do not so find.

Finding there is sufficient evidence to support the determinations of the hearing officer and applying the cited standard of appellate review, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge