APPEAL NO. 94185

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On December 2, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issue considered was whether the appellant, DH, who is the claimant herein, sustained an aggravation, worsening, or precipitation of a pre-existing condition, schwannoma (spinal tumor), in his back as a result of an injury that occurred (date of injury), while employed by (employer).

The hearing officer determined that claimant's pre-existing condition was not aggravated or made worse by his work activities of (date of injury), and that his condition, a tumor, was not a compensable injury.

The claimant has appealed. The claimant does not actually assert error by the hearing officer, but asks that the Appeals Panel consider an affidavit from one (Dr. S) which was not submitted as evidence during the hearing of this matter. The claimant also argues generally that an aggravation of a pre-existing condition is compensable, and that a work-related injury need only be a producing cause (not the sole cause) of disability in order for claimant to receive compensation. The carrier responds by noting that the newly produced evidence cannot be considered, and further asks that the hearing officer's decision be affirmed as sufficiently supported by the evidence in the case.

DECISION

We affirm the hearing officer's decision and order.

In brief summary, the facts are these. Claimant said that on (date of injury), he was drilling in a ceiling area over his head. The drill bit hit a piece of rebar in the ceiling, and the drill "kicked around," causing claimant to twist to avoid falling. At the time, claimant thought he was alright, but began to tighten up around lunchtime.

Claimant stated several times that the area of pain and muscle spasm was in his lower back, around the hip area. Claimant worked a week of light duty following the incident. The pain gradually worsened and went into his left leg. Claimant received epidural injections and was eventually hospitalized at Hospital for testing nearly two months later. On a second hospitalization, an MRI showed a schwannoma in his back at around the L-1 level. He had surgery July 13, 1993.

Claimant stated he had no previous back pains or injury before the May incident. He said that he did, however, have "normal" achiness, for example when he got up in the morning. The claimant stated that he was aware that his diagnosis for which he received epidural injections was back strain at the L5-S1 level.

Medical evidence included articles about the condition. Both articles note that the course of local and radicular pain associated with spinal tumors is progressive. Along with

pain, another common feature is described as progressive weakness. Neither article describes if, or how, a back strain could aggravate, accelerate, or precipitate the condition.

A medical report of (Dr. H), dated May 19, 1993, diagnoses lumbar back strain, with pain in the lower lumbar area. Claimant received epidural injections from (Dr. T) at the L5-S1 level. Dr. T's letter of June 4, 1993, indicates that an MRI indicated possible herniation at the L5-S1 level.

(Dr. B), on June 29, 1993, documented that he suspected a herniation and progressively worsening pain. Hospital testing performed July 1st through the 7th resulted in a discharge diagnosis of left leg pain, etiology unclear. Claimant was hospitalized again less than a week after discharge, due to severe pain. Hospital records of July 12, 1993, by (Dr. R), state that the MRI was reviewed and for the first time a possible spinal cord tumor is observed at the L-1 level.

Dr. R performed a laminectomy at L-1 and T-12 to remove the tumor. An MRI taken July 16, 1993, noted a degenerative disc at L5-S1.

Dr. R responded to questions from the carrier by indicating that claimant's tumor was the reason for his inability to work, and that the tumor was pre-existing to his (date of injury) injury, as opposed to "caused by or related to" that injury. Dr. T wrote a long letter dated September 24, 1993, in which he summarized the course of claimant's treatment and testing and concluded that the schwannoma would not be classified as an on-the-job injury, and that the leg and back pain he had been treating were "obviously" a result of the schwannoma. Dr. T indicates that claimant has no private insurance, and that Dr. T does not expect payment. He observes that this was a rare coincidence where a movement at work "coincided with" the initial symptoms of the tumor that was not work-related. A Report of Medical Evaluation (TWCC-69) completed by Dr. T certifies that claimant reached MMI in October 1993 with zero percent impairment rating.

The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). Proof should establish that an injury is causally connected with employment activities. Garcia v. Texas Indemnity Insurance Co., 209 S.W.2d 333 (Tex. 1948). Predisposing bodily infirmity will not preclude compensation so long as a work-related injury contributes to disability. *See* U.S. Fidelity & Guaranty Co. v. Herzik, 359 S.W.2d 914 (Tex. Civ. App.-Houston 1962, writ ref'd n.r.e.). A carrier that wishes to assert that a pre-existing condition is the sole cause of an incapacity has the burden of proving this. Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992.

The facts here parallel those in INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st Dist.] 1988, no writ); the Court of Appeals noted that notwithstanding claimant's pre-existing spinal tumors, her incapacity would be compensable if her work-related injury

was "a" cause, even if there were other causes. That case further notes that aggravation of a pre-existing condition constitutes an injury in its own right. However, the appeals court affirmed the decision of the trier of fact that Ms. Howeth had sustained an aggravation, noting that the case presented issues of fact.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). 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, N.J., 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers' Insurance Ass'n v. Campos, 666 S.W.2d 286, 290 (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.). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Co. of Pittsburgh, Pa. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). That is not the case here. The hearing officer evidently determined that the medical evidence in the record did not indicate that the course of the tumor, identified as the condition causing disability, was accelerated or aggravated by the twisting incident at work. While there is evidence from which the hearing officer could have concluded that claimant sustained a back strain, there is also evidence that he evidently weighed more heavily that there was no strain but simply a manifestation, coincident with (date of injury), of pain related to the natural progression of the tumor.

As to the affidavit of Dr. S that claimant now presents on appeal, there is no indication that it is of the nature that it could not have been prepared and produced for timely presentation at the hearing. We have stated many times that evidence presented for the first time on appeal will not be considered, and our review is limited to the record in the case. Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992 (and cases cited therein); Section 410.203. Even if such medical opinion had been timely presented, it is not conclusive, but would simply have been another piece of evidence for weighing by the trier of fact.

For the reasons stated above, the hearing officer's decision and order are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge