APPEAL NO. 950101
FILED MARCH 3, 1995

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 15, 1994, with the record closing on January 2, 1995. The hearing officer determined that the appellant's (claimant) compensable head injury of _____, did not extend to an injury to the neck and low back, and that the claimant only had disability resulting from the injury of _____, from March 2, 1994, to March 3, 1994. She further found that the respondent (carrier) did not waive the right to contest the compensability of the neck and low back injury. Claimant appeals urging, in essence, that the hearing officer's decision is "arbitrary, and capricious and therefore, in error and that the hearing officer failed and refused to consider the evidence presented and thus entered a decision which is against a preponderance of the evidence." The carrier responds asserting the appeal is concerned only with the weight to given to the evidence and that the hearing officer's decision is not against the great weight and preponderance of the evidence.

DECISION

The decision is affirmed.

Clearly, there was considerable conflict in the evidence before the hearing officer and credibility of witness testimony was a significant factor in the ultimate determinations in this case. Section 410.165(a) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Resolving conflicts and inconsistencies in the evidence and testimony is a matter for the fact finding hearing officer. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991. As the fact finder, a hearing officer may believe all, part, or none of the testimony of a witness (McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986)) and need not accept a claimant's testimony at face value. Bullard v. Universal Underwriter's Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). The hearing officer also determines the weight to be given medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)) and can accept lay testimony over medical evidence. Texas Workers' Compensation Commission Appeal No. 92491, decided October 30, 1992. Only if a hearing officer's findings are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, a circumstance we do not find here, would there be a sound basis upon which to disturb the decision. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Employers Casualty Co. v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

The evidence is fairly and adequately set out in the Decision and Order of the hearing officer and is incorporated herein. Succinctly, there was evidence showing that the claimant sustained two back injuries prior to an incident occurring on _____, when a box fell off of a conveyor belt and hit her head. According to documents in evidence at the time, she was still being treated for a back injury of October 20, 1993. In any event, she apparently experienced a severe headache from the _____, incident and went to a doctor and did not work the two days following the incident. The record from the doctor she saw following the incident does not reflect any other injury other than a headache. She was released to work effective March 2, 1994. A subsequent medical report showing a visit date of "03/24/94" states that "Pt. states she is a lot better, she is doing fine, no pain." The claimant continued working until April 7, 1994, and according to her testimony, the injury of _____, which had aggravated her prior injury, became worse and she has not worked since. On May 20, 1994, the claimant filed a request to change treating doctor's stating her injury to be "head/neck" and indicated she was still having pain and that the current doctor's treatment was not helping. The change was approved and the claimant began seeing a Dr. B, who in a letter dated June 6, 1994, stated "[claimant] presented to the office on April 7, 1994 with the complaint of neck and low back pain associated with a work related injury in December, 1993." A subsequent initial medical report signed by Dr. B on June 6, 1994, indicates in the date of injury column "3-2-94" and reports back and neck complaints (Carrier's Exhibit No. 10). The original of this report was not in evidence; however on the copy in evidence the injury date of "3-2-94" appears to have been changed, altered or corrected. A subsequent letter from Dr. B, given to the carrier at one of the benefit review conferences in this case, indicates the opinion that the claimant injured her lumbar spine in October 1993 which was aggravated by the _____, injury and that the claimant injured her cervical spine in the March 1994 incident. Medical bills in evidence indicate that the carrier was continuing to pay for treatment to the claimant's back injury of October 1993 even after the _____, incident.

The claimant testified that she called her supervisor, Mr. R, on April 7, 1994, said she would not be in because of severe neck and back pain but that there was no discussion how she got hurt. This testimony was flatly contradicted by the supervisor who testified that the claimant initially called in and talked to a part-time supervisor. Mr. R stated he subsequently called the claimant who told him that she was running late and would be in shortly. When she did not come in, he called her again at which time she told him that her back was hurting and that she would not be coming in. Mr. R asked her how, when and where she hurt her back and the claimant stated that it was not job related, that she had not hurt it on the job.

A carrier's adjuster testified that when they got the change of doctor request it did not indicate to them that any new injury was being claimed, particularly since it referenced the October injury and they were also working the October back injury at the same time. He indicated the first the carrier knew an injury relating to the cervical spine and lumbar

area arising out of the March 1st incident was being claimed was at the benefit review conference when they were given a copy of Dr. B's initial medical report showing cervical and lumbar injuries and listing the injury date in March, 1994 (Carrier's Exhibit No. 10). The carrier subsequently filed a dispute of claim within 60 days. The adjuster also stated that after the carrier received the change of treating doctor request, he contacted Dr. B's office to get a clarification of what they were treating the claimant for and was advised by fax (Dr. B's letter of June 6, 1994) that it was for the 1993 injury. The adjuster also testified that a earlier request for records was denied by Dr. B's office because "they could not release any information to me because it was a private patient claim."

After reviewing the evidence presented and permitting the parties to further comment no later than January 2, 1995, the hearing officer determined that the claimant had not met her burden of proof to establish by a preponderance of the evidence that her compensable injury of _____, extended to her neck and back, that the carrier failed to timely file a dispute of compensability, and that the claimant had disability from the _____, injury other than from March 2 to March 3, 1994. We have reviewed the complete record in this case and, while we observe there was considerable conflict and some inconsistency in the evidence, we cannot conclude that the hearing officer's findings and conclusions were so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Hutchinson, *supra*. To the contrary, there was sufficient evidence to support the hearing officer and we do not substitute our judgment for that of the fact finder under such conditions. Texas Workers' Compensation Commission Appeal No. 931148, decided February 1, 1994.

While we have stated that a carrier can be held to waive compensability after being notified of an additional injury, the evidence must show that there was, in fact, notice. Texas Workers' Compensation Commission Appeal No. 92437, decided September 28, 1992; *See also* Texas Workers' Compensation Commission Appeal No. 93491, decided August 2, 1993. Rule 124.1 defines written notice of injury as:

(a)Written notice of injury . . . consists of the insurance carrier's earliest receipt of:

(1)the employer's first report of injury;

(2)the notification provided by the commission under subsection (c) of this section; or

(3)any other written document, regardless of source, which fairly informs the insurance carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and facts showing compensability.

This is a factual matter for determination by the hearing officer from the evidence presented. There is sufficient evidence in the record from which the hearing officer could conclude that the carrier was not provided notice that fairly informed it of the claimed cervical and lumbar back injuries arising out of the _____, incident until the benefit review conference, and that a timely dispute was filed thereafter. And regarding the issue of whether the compensable injury to the head on _____, extended to the neck and lower back, we have held that an aggravation of a prior injury can constitute an injury in its own right. Texas Workers' Compensation Commission Appeal No. 92317, decided August 25, 1992. This too is a factual determination for the hearing officer and the evidence must show the existence of a later event which caused or resulted in damage or harm to the physical structure of the body. Here, the hearing officer could believe the testimony of Mr. R that the claimant herself denied on or about April 7, 1994, that her back condition causing her to miss work was related to her job. This testimony, coupled with the lack of any indication in the earlier medical records of other than a head injury, together with the fact that the claimant had sustained prior back injuries and was still under treatment for back problems and the inconsistence and conflict in other documents before the hearing officer, formed a sufficient evidentiary basis to support the hearing officer's determination. Although other inferences could possibly have been drawn from all the evidence than those found most reasonable by the hearing officer, this is not a sufficient basis to disturb the decision. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

For the foregoing reasons, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley

Appeals Judge