

## APPEAL NO. 990105

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 14, 1998. He (hearing officer) determined that the appellant's (claimant) compensable injury of \_\_\_\_\_, did not include a low back injury and that the respondent (carrier) timely disputed the compensability of the claimed low back injury. The claimant appeals the extent-of-injury determination, contending that it is against the great weight and preponderance of the evidence. The carrier replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The timely dispute determination has not been appealed and has become final. Section 410.169.

### DECISION

Affirmed.

The claimant worked as a housekeeping supervisor at a mall. She testified that on \_\_\_\_\_, she slipped and fell while putting trash into a dumpster. The carrier accepted liability for a left leg, left knee and left buttock injury, but denied liability for a low back injury.

The claimant went to an emergency room (ER) on the date of the accident. She admits that she did not use the words "low back" in her reporting her injury to Dr. S, the ER doctor, but reported "buttocks" and believed that this included the low back. She described her pain as essentially a radiating, tingling pain into the lower extremities. She is also an insulin-dependent diabetic and conceded that she has not taken her prescribed medication for this condition for some period of time.

The ER report for the \_\_\_\_\_, visit provides a history of a fall on the shin and knee and then a second fall on the left buttocks as the claimant tried to get up. Dr. S stated that "[e]xamination of the back shows no spinal tenderness." His diagnoses included contusion to the left lower leg and buttocks. The claimant was off work for a few days, returned to work two or three times, and stopped working the first week of April 1998. She said during this period of time she continued to have shooting pain into her legs, but the carrier denied any treatment for her back as unrelated to the compensable injury.

The claimant next sought medical care from Dr. L on June 22, 1998. A nerve conduction study was done on this date which, he said, suggested bilateral L5 radiculopathy. The results of a sonogram of the lumbar region were suggestive of muscle edema and/or swelling. An MRI of the lumbar spine taken on July 23, 1998, showed mild narrowing of the neural foramina. Dr. L's diagnosis was cervical and lumbar sprain/strain. Dr. J examined the claimant on August 17, 1998, on referral from Dr. L. His impression, based on the claimant's history of back symptoms and radiating pain, was nerve root irritation with an etiology of lumbar disc bulging.

Dr. C reviewed the claimant's records at the request of the carrier and discussed the claimant's condition with Dr. L. In a report of August 23, 1998, Dr. C wrote that he called Dr. L on August 21, 1998, and was told by Dr. L that "a different doctor had actually seen this lady, so he was learning about her case as he talked to me." He also wrote that Dr. L believed the condition of the claimant's lower extremities was consistent with diabetic neuropathy. It was Dr. C's opinion that had there been trauma to the low back, the symptoms would have been evidenced at the ER examination and that her low back, leg and foot pains "are almost certainly due primarily to complications of her uncontrolled diabetes." In a letter of October 18, 1998, Dr. C wrote that the MRI results mention hypertrophy, but not bulging, this suggests "chronic irritation of the back of much longer duration than the 6 months that had elapsed between [claimant's] fall at work and the date of her MRI examination."

In a letter of September 23, 1998, Dr. L addressed "the etiology of the bilateral leg pain and numbness." He recommended that an MRI be performed to rule out a disc bulge, but otherwise gave no indication that he was aware that a MRI had been done two months before. He concluded that "the most likely cause of [claimant's] current leg pain would be a low back injury associated with the fall reported on \_\_\_\_\_."

The claimant had the burden of proving that her fall on \_\_\_\_\_, caused a low back injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether she did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer was obviously concerned by the lack of any mention of back pain in medical reports until the claimant began treating with Dr. L some four months later and with the lack of low back symptomatology as reported by Dr. S in his initial examination of the claimant. In his discussion of the evidence, the hearing officer wrote at length about why he considered Dr. L unpersuasive on the question of causation. The reasons included the competing considerations of whether the fall caused the symptoms, or condition, or whether the claimant was suffering from diabetic neuropathy; Dr. L's lack of involvement in the claimant's treatment as reflected in Dr. C's report; and his seeming unawareness that an MRI had been performed on the claimant. Rather, the hearing officer found Dr. C's opinion more credible insofar as it attributed the radiating pain experienced by the claimant to her uncontrolled diabetes. The claimant, in her appeal, asserts that Dr. L and Dr. J were more credible because they actually examined the claimant and there was no objective data to support a finding of diabetic neuropathy. The claimant also asserted that she did complain of back pain, which she said she considered the same as buttocks pain, from the beginning and was denied treatment for a long period of time until she finally saw Dr. L. The hearing officer was the sole judge of the weight and credibility of the evidence. Section 410.165(a). In his role as fact finder, he could accept or reject in whole or in part any of the evidence. Texas Workers' Compensation Commission Appeal No. 93818, decided October 28, 1993. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the

record of this case, we decline to substitute our opinion of the credibility and persuasiveness of the medical evidence and claimant, but find the evidence, including particularly the opinion of Dr. C, deemed credible by the hearing officer sufficient to support his determination that the compensable injury of \_\_\_\_\_, did not include a low back injury.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge