APPEAL NO. 990955

On March 26, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). With regard to the issues at the CCH, the hearing officer decided that respondent's (claimant) (date of injury of 1992), compensable injury is a producing cause of his herniated nucleus pulposus (HNP) at L5 and L6 and his lumbar facet syndrome (LFS); that claimant's (date of injury of 1992), compensable injury is the sole cause of claimant's HNP at L5 and L6 and his LFS; that claimant's (date of injury of 1995), compensable injury is not a producing cause of his HNP at L5 and L6 and his LFS; that claimant's (date of injury of 1995), compensable injury is not the sole cause of claimant's HNP at L5 and L6 and his LFS; and that the respondent, (carrier 2), did not waive the right to contest compensability of the HNP at L5 and L6 and the LFS by not contesting compensability within 60 days of being notified of the diagnoses. The only part of the hearing officer's decision appealed by appellant, (carrier 1), is the decision that carrier 2 did not waive the right to contest compensability of the HNP at L5 and L6 and the LFS. Carrier 2 requests affirmance. No response was received from claimant.

DECISION

Affirmed.

Section 409.021(c) provides that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c) (Rule 124.6(c)) provides that if a carrier disputes compensability after payment of benefits has begun, the carrier shall file a notice of refused or disputed claim, on or before the 60th day after the carrier received written notice of the injury or death. A notification, 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 will constitute written notice of injury, as will an employer's first report of injury and a notification provided by the Texas Workers' Compensation Commission. Rule 124.1.

Claimant testified that on (date of injury of 1992), he was working as a maintenance worker for employer, (employer 1), when he fell off a roof he was repairing and onto a concrete drive. The parties stipulated that on (date of injury of 1992), claimant sustained a compensable injury to his low back and that carrier 1 was employer's workers' compensation carrier on that date. Claimant was taken by ambulance to a hospital and was then treated by Dr. M, who wrote on May 11, 1992, that x-rays showed a fracture of the transverse processes of the second and third lumbar vertebrae. Claimant said that following his injury, he was off work for about one and one-half weeks. Dr. M wrote that claimant could return to light duty and then to regular duty in two to four weeks. Claimant said that his back continued to hurt and that he took pain medications. A report indicates

that sometime in 1993 claimant felt back pain when moving furniture for the employer. Claimant changed treating doctors to Dr. K in October 1994. A radiologist reported that a lumbar MRI done in November 1994 showed a protrusion or herniation at L4-5 and at L5-S1. Dr. K noted in November 1994 that he gave claimant injections and referred claimant to Dr. C, an orthopedic surgeon. Claimant said that Dr. K took him off work for awhile and then released him to light-duty work.

In a report dated December 8, 1994, Dr. C noted the history of the (date of injury of 1992), injury. Dr. C wrote that Dr. K had prescribed physical therapy and had placed claimant on light-duty work, that following a period of light-duty work claimant returned to full-duty work, that claimant complained of pain in his back and left leg, and that x-rays showed that claimant has six lumbar vertebrae. Dr. C reviewed the MRI, diagnosed claimant as having an HNP at L5 and L6, and wrote that "what we are seeing is the direct result of his injury . . . ." Dr. C wrote in May 1995 that claimant had had Phenol blocks and that he anticipated six to eight weeks of therapy. Dr. C diagnosed claimant as having an HNP at L5 and L6, degenerative disc disease at those levels, left L5 radiculopathy (per an EMG done in January 1994), and LFS. On June 5, 1995, Dr. C reported that, with regard to claimant's injury of (date of injury of 1992), claimant reached statutory maximum medical improvement (MMI) on May 13, 1994, with a nine percent impairment rating (IR), and that claimant was having recurrent episodes of back and left leg pain. Dr. C noted that claimant would return in a few weeks to determine how much more therapy would be required and that, if he worsened, a discogram would be recommended.

Claimant said that on (date of injury of 1995), while working for employer, he strained his back when turning and lifting a lawnmower in a truck at work; that he was off work for about two weeks following that injury; that he went to Dr. K; and that Dr. K provided therapy and released him to light-duty work. The parties stipulated that on (date of injury of 1995), claimant sustained a compensable injury to his low back and that carrier 2 was employer's workers' compensation carrier on that date. On June 26, 1995, Dr. K gave a date of injury of (date of injury of 1995), and wrote that claimant was reinjured loading a lawnmower and diagnosed claimant as having a lumbar strain. Carrier 2 represents that it accepted a soft tissue injury in 1995. In an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated June 29, 1995, claimant claimed a lower back injury from loading the lawnmower on (date of injury of 1995). On June 29, 1995, Dr. C wrote that claimant had reinjured himself on (date of injury of 1995), and stated that he hoped it was just a "muscular and ligamentous exacerbation of his problem." Dr. C's diagnoses regarding HNP at L5 and L6, degenerative disc disease, L5 radiculopathy, and LFS remained the same as they had been prior to the (date of injury of 1995), injury and his report references a date of injury of (date of injury of 1992).

In a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated July 13, 1995, carrier 1 wrote that it was disputing any claim for lost time or medical (benefits) related to claimant's on-the-job injury of (date of injury of 1995); that that was a new injury; and that it was no longer the carrier for the employer. On December 22, 1995,

Dr. C reported that, with regard to claimant's injury of (date of injury of 1995), claimant reached MMI on December 18, 1995, with a zero percent IR, and Dr. K noted his agreement with that report. Dr. C wrote in an attachment to that report that claimant had reached MMI from his recent aggravation of (date of injury of 1995), and that he feels that this is an aggravation of his original injury and is not a new injury, although it had been declared a new injury. Dr. C's diagnoses of HNP at L5 and L6, degenerative disc disease, L5 radiculopathy, and LFS remained the same as they had been prior to the (date of injury of 1995), injury and Dr. C gave a (date of injury of 1992), date of injury at the top of the attachment.

Dr. K referred claimant to Dr. B for a consultation about claimant's depression and in a report dated October 15, 1996, Dr. B reviewed the extensive history of claimant's back injury, including an incident in June 1996 when a coworker accidentally struck claimant in the back with a chair, and Dr. B diagnosed claimant as having a major depressive episode and a back injury from a fall with recurrent exacerbations. In a TWCC-21 dated October 23, 1996, carrier 2 wrote that it disputed that claimant's current back treatment is related to the (date of injury of 1995), incident when he strained his lower back and noted that Dr. B had reported that claimant had had a new injury in June 1996. On December 2, 1996, Dr. K wrote to carrier 2, noting that claimant's original injury was (date of injury of 1992); that claimant was reinjured on (date of injury of 1995); and stating the conditions of HNP, radiculopathy, and LFS that Dr. C had diagnosed prior to the injury of (date of injury of 1995). Dr. K also noted that the manipulative therapy he had given claimant beginning on August 27, 1996, was for the injury of (date of injury of 1992). In a Benefit Dispute Agreement (TWCC-24) dated March 4, 1997, the issue was the extent of claimant's (date of injury of 1995), injury, and claimant and carrier 2 agreed that claimant is entitled to reasonable and necessary medical treatment for the (date of injury of 1995), back injury, but that carrier 2 reserved the right to dispute that the (date of injury of 1995), injury extends to a herniated disc.

In a May 1998 report Dr. C gave dates of injury of (date of injury of 1992), and (date of injury of 1995); stated the same diagnosis as he had prior to the (date of injury of 1995), injury; and noted that no new imaging studies had been done since the MRI of November 1994, which had shown the HNP at L5 and L6. In November 1998, carrier 1 wrote to claimant stating that it and carrier 2 were involved in a dispute as to which of them is liable for his medical treatment, but that it would pay for his lumbar facet injections pending resolution of the dispute. On November 2, 1998, carrier 1 requested a benefit review conference asserting that claimant had a new injury on (date of injury of 1995), and that all current medical treatment is related to the (date of injury of 1995) injury. In a letter dated November 18, 1998, which stated a date of injury of (date of injury of 1995), Dr. K asked carrier 2 to pay him for ligament injections and a nerve block. In response to questions from the benefit review officer, Dr. C wrote that claimant's facet blocks are related to his injury of (date of injury of 1992), and are a continuation of his original problem, and Dr. K wrote that the facet blocks are to treat claimant's (date of injury of 1995), injury, and that the diagnosis of HNP at L5 and L6 is related to claimant's (date of injury of 1992), injury.

On January 14, 1999, Dr. C wrote that he had talked with Dr. K, that the lumbar facet injections are related to the LFS secondary to claimant's injury of (date of injury of 1992), and that Dr. K is in agreement with that. Dr. C noted that prior to the injury of (date of injury of 1995), which he called an aggravation of the 1992 injury, his diagnoses had already included HNP and LFS.

With regard to the waiver issue, which is the only issue on appeal, the hearing officer found that carrier 2 did not receive written notice of facts showing compensability of the HNP and LFS conditions as they related to the (date of injury of 1995), injury, and concluded that carrier 2 did not waive the right to contest compensability of the HNP at L5 and L6 and the LFS. Carrier 1 contends that the hearing officer's decision on the waiver issue is against the great weight and preponderance of the evidence. Carrier cites several Appeals Panel decisions in support of its contention. However, the instant case is complicated by the fact that shortly before the (date of injury of 1995), injury, claimant was apparently still being considered for further treatment or diagnostic testing for his (date of injury of 1992), injury, for which diagnoses of HNP and LRS had already been made. In addition, while the HNP and LRS diagnoses were carried forward in reports subsequent to the (date of injury of 1995), injury, the diagnosis of the treating doctor for the (date of injury of 1995), injury was a lumbar strain, which, according to carrier 2, it accepted as the (date of injury of 1995), injury. The waiver issue presented a factual question for the hearing officer to determine from the evidence presented. There is evidence that carrier 2 received reports containing diagnoses of HNP and LFS, but whether those reports linked those diagnoses to the 1992 injury or to the 1995 injury was a factual matter for the hearing officer to resolve. The hearing officer notes in her decision that the medical records related those diagnoses to the 1992 injury. The 1989 Act makes the hearing officer the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact the hearing officer resolves conflicts in the evidence. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied). We conclude that the hearing officer's decision is not against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). The hearing officer's decision that claimant's (date of injury of 1992), injury is the sole cause of claimant's HNP at L5 and L6 and his LFS is not appealed. Section 408.021(a) provides in part that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge