APPEAL NO. 991335

On May 4, 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). The issue at the CCH was whether the _____, compensable injury is a producing cause of the disc herniation at L3-4 and of the bulges at the L2-3 and L4-5 levels. The hearing officer decided that the _____, compensable injury is a producing cause of the disc herniation at L3-4 and of the bulges at the L2-3 and L4-5 levels. Appellant (self-insured) requests that we reverse the hearing officer's decision and render a decision that the hearing officer did not have jurisdiction to hear the matter, or in the alternative, reverse and render a decision that respondent's (claimant) disc injury is not a result of the _____, compensable injury. No response was received from claimant.

DECISION

Affirmed.

Claimant worked for employer for 18 years. She was a microfilm technician, mailroom supervisor, and information operator. She sustained a compensable back injury on _____, when the chair she was sitting on collapsed to the floor. She said that her neck, shoulders, lower back, and legs hurt as a result of that accident. She said that she had not had back problems prior to that accident. Following her injury, she has been treated by Dr. P, D.C., who diagnosed claimant as having lumbar intervertebral disc syndrome (displacement); sciatica, with disc involvement; and cervicocranial syndrome. Dr. P wrote in October 1991 that claimant had severe low back pain with numbness in her left leg, that she had recovered satisfactorily, and that he anticipated that claimant would have occasional problems from time to time from her injury.

Dr. P wrote in November 1991 that claimant was released from his care with no permanent disability, but that it was his experience that symptoms reoccur with injuries such as the claimant has. Dr. P wrote in January 1992 that claimant had had a complete resolution of her symptoms but that she was to return to him if an exacerbation occurred. Claimant said that from 1991 to 1998 she had intermittent back pain and went to Dr. P for chiropractic treatment whenever that occurred. Claimant was examined by Dr. T in June 1991 and he diagnosed claimant as having a gluteal sprain and a lumbosacral sprain. Dr. T noted that a lumbar x-ray showed a transitional vertabrae with what looked liked a lumbarization of the first sacral segment, but that no other bony abnormalities were noted.

Dr. P's records show that he treated claimant for lower back pain in October 1992; that he reported that claimant reached maximum medical improvement (MMI) with a zero percent impairment rating (IR) in November 1992; that he treated claimant for lower back and leg pain from June through August 1993; that he reported that claimant reached MMI with a zero percent IR in August 1993; that he treated claimant for lower back, hip, and leg pain in November and December 1993; that he reported that claimant reached MMI in January 1994 with a zero percent IR; that he treated claimant for lower back and hip pain in

June 1994; that he treated claimant for lower back, hip, and leg pain in June, July, and August 1995; that he reported that claimant had been released with no anticipated residuals in August 1995; that he reported that claimant reached MMI in August 1995 with a zero percent IR (but noted that he does not give IRs); and that he treated claimant for lower back pain in February 1997. Dr. P noted on his treatment records that he was treating claimant for either a re-aggravation or an exacerbation of her _____ work-related injury.

Claimant said that Dr. P told her that she had a protruding lumbar disc that would slip out and swell. Claimant said that when Dr. P told her that another doctor might want to perform back surgery on her, she told Dr. P that she did not want that and that she would get by with his chiropractic treatment. She said Dr. P told her that she would have recurring back problems that would continue to need chiropractic treatment. She said that Dr. P's treatments would alleviate her intermittent back pain. Claimant said that Dr. P told her that she had disc problems but did not use the word "herniation."

Claimant retired from her job with the self-insured in February 1998. She said that she and her husband went on a fishing trip in May 1998 and when she returned she went to Dr. P for back pain. Dr. P's records show that he saw claimant in May 1998. Claimant said that she was kind of inactive after her retirement but that in August 1998 a rent house she and her husband owned needed fixing up so she, her husband, and her two grandsons worked on that house for a week. She said that her grandsons, who were 23 and 19 years of age, did the heavy work and that she mostly helped her husband paint. She said she used a paint roller and a two-step kitchen stool and that her husband painted the ceilings and higher areas. Claimant said that the evening of the Friday that they finished their work on the rent house, which date appears to be August 7, 1998 (an Subsequent injury date, date is stated in some documents and in the hearing officer's decision), she laid down on the couch and when she woke up she had back pain and was unable to get up. She said that the pain she had was worse than the pain she had experienced when she previously had recurrences of back pain but that it was about the same amount of pain as she had when she first went to Dr. P in May 1991 for her work-related injury. When asked what she attributed the exacerbation of her back pain to, claimant said that she had been inactive and just overdid it.

Claimant went to Dr. P on Monday, August 10, 1998, and Dr. P noted that claimant had been working on a rent house and re-aggravated her injury. Claimant was treated by Dr. P over the next three days but his treatments did not alleviate her back pain. Written statements from a person who rented the house, and who helped with the fixing up of the house, and from claimant's grandsons, indicate that claimant did not do any heavy work at the rent house and that claimant did lighter work such as painting.

Claimant went to a hospital emergency room on August 13, 1998, and the hospital referred her to Dr. V. Dr. V saw claimant on August 14, 1998, and Dr. V noted claimant's work-related injury of _____, her treatments with Dr. P over the past seven years, and that her pain became severe after working on the rent house. He recommended an MRI.

Dr. V referred claimant to Dr. B, who examined claimant and wrote on August 27, 1998, that the lumbar MRI that was done after claimant saw Dr. V on August 14, 1998, showed a disc herniation at L3-4 and disc bulges at L4-5 and L2-3. Dr. B noted claimant's work-related injury of May 1991, her intermittent treatment with Dr. P over the last seven years, and the back pain claimant had after painting the rent house in August 1998. Dr. B wrote for his impression: "Herniated lumbar disc right at L3-4. Currently symptoms are resolving. She has had intermittent symptoms of back and leg pain over the past seven years in my opinion in relation to this problem." Dr. B recommended conservative treatment. Claimant said that she undertook physical therapy. Claimant had not had a lumbar MRI done prior to the one done after she saw Dr. V on August 14, 1998.

Dr. B examined claimant again on January 26, 1999, and wrote that "[i]t is my opinion that her back and leg pain as [sic] a direct result of the herniated disc that she sustained as a result of her on-the-job injury on _____. In my opinion her herniated lumbar disc at L3-4 is a result of this injury." Dr. P wrote in March 1999 that he had been claimant's treating doctor since her on-the-job injury of _____; that review of his files shows that his initial diagnosis of her condition is consistent with Dr. B's reports of August 27, 1998, and January 26, 1999; and that Dr. B agrees with him that her condition is a direct result of the _____, on-the-job injury. Claimant said that physical therapy has helped her and that she has not had surgery.

In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated November 11, 1998, the self-insured wrote that it disputes extent of injury to claimant's back as there was an intervening injury which occurred at the beginning of August 1998 and that it denies any further medical treatment for this claim and also any impairment or lost time after August 6, 1998. A benefit review conference (BRC) was held in March 1999 and the benefit review officer (BRO) wrote in the BRC report that, with regard to the issue of whether the _____, compensable injury is a producing cause of the disc herniation at L3-4 and the disc bulges at L2-3 and L4-5, self-insured's position was that claimant sustained a new injury in August 1998 while painting the wall of a rent house; that the description of the August events support a new injury and not a continuation of claimant's _____, symptoms; that no diagnostic testing had been done as a result of the _____, injury; that the MRI done after the August incident indicated a herniated disc at L3-4; that claimant had been released from treatment for the _____, injury; that the cause of the new injury occurred in August 1998; that it denies liability for compensation in this case because the August 1998 incident causing this injury was not in the course and scope of employment; and that it feels that it has no more liability for future medical benefits in the case due to the new injury in August 1998. The BRO recommended in claimant's favor on the disputed issue.

Self-insured filed a response to the BRC report, stating that its position was correctly noted in the BRC report, but that it contends that the issue is better suited for medical dispute resolution rather than a CCH, citing Texas Workers' Compensation Commission Appeal No. 981133, decided July 15, 1998, and that based on that decision it intends to raise a jurisdictional defense at the CCH in addition to its stated position in the BRC report.

Self-insured contended at the CCH that the disputed issue did not fall within the jurisdiction of the hearing officer and that the issue would be better dealt with by medical review dispute resolution. In the alternative, self-insured contended that, if the hearing officer decided to treat the disputed issue as an extent-of-injury issue, then the evidence showed that claimant's 1991 work-related injury was a sprain or strain that had resolved, that the herniated disc was not the result of the 1991 injury, that there was never any suggestion of a herniated disc prior to the claimant's activities working on the rent house in August 1998, that claimant's exacerbation or recurrence in August 1998 was due to those activities, and that any injury that resulted from those activities would not be compensable.

The hearing officer decided that the _____, compensable injury is a producing cause of the disc herniation at L3-4 and the disc bulges at L2-3 and L4-5. He found that the recently developed low back problem after painting the rent house in August 1998 is not the sole cause of claimant's current low back condition.

In addressing self-insured's contention regarding jurisdiction, the hearing officer found that "[t]his case concerns an alleged alternative causation in the form of a subsequent injury on Subsequent injury date and is not a case of reasonably required medical care. The Benefit [CCH] has jurisdiction to resolve the causation issue even though the resolution of that issue indirectly determines medical benefits as well." Self-insured contends that the determination of the disputed issue impacts only on claimant's right to receive medical benefits and, therefore, the hearing officer did not have jurisdiction to decide the issue and the issue is one for the Texas Workers' Compensation Commission's (Commission) Medical Review Division to decide. Self-insured contends that the present case is controlled by the decisions in Appeal No. 981133; Texas Workers' Compensation Commission Appeal No. 981212, decided July 22, 1998 (Unpublished); Texas Workers' Compensation Commission Appeal No. 981220, decided July 15, 1998; Texas Workers' Compensation Commission Appeal No. 990076, decided February 25, 1999; and Texas Workers' Compensation Commission Appeal No. 990211, decided March 10, 1999.

The instant case is distinguishable from the Appeals Panel decisions cited by the self-insured in its appeal because in this case the self-insured was asserting that claimant's disc herniation was the result of a subsequent injury and not the result of her work-related injury. In Appeal No. 990076, *supra*, the Appeals Panel stated that that case was not an extent-of-injury case, or a case involving alleged alternative causation and a subsequent injury, but was a case of reasonably required medical care over which the hearing officer had no jurisdiction. *See also* Chief Judge Sanders' dissent in Appeal No. 981220, *supra*, and Texas Workers' Compensation Commission Appeal No. 981110, decided July 10, 1998. In the instant case, we agree with the hearing officer's analysis of the case as one involving an alleged alternative causation and his finding that he had jurisdiction to resolve the causation issue. However, what health care is reasonably required by the nature of the compensable injury is a matter for the Commission's Medical Review Division to decide.

In a recent decision, Texas Workers' Compensation Commission Appeal No. 991263, decided July 29, 1999 (Unpublished), the Appeals Panel considered a hearing officer's decision where a hearing officer made findings in favor of a claimant on the issues of whether the compensable injury is a producing cause of claimant's lumbar radiculopathy and whether carrier timely contested compensability of the lumbar radiculopathy but the hearing officer decided that the Commission's Division of Hearings did not have jurisdiction to resolve the dispute and that jurisdiction was properly in the Division of Medical Review. In addressing the carrier's appeal that the hearing officer did not have jurisdiction to make findings of fact in favor of claimant because she did not have jurisdiction over the issues, the Appeals Panel stated:

> The Appeals Panel has stated that the issue of whether or not treatment is reasonable and necessary for the claimant's compensable injury in the past or in the future is not within the jurisdiction of the hearing officer. The determination of what "health care is reasonably required by the nature of the injury" is a matter for the Medical Review Division of the Commission. Section 413.031(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.305 (Rule 133.305). The determination of "benefit disputes" are adjudicated by the Commission's Hearings Division. Rule 140.1. A "benefit dispute" is one "regarding compensability or eligibility for, or the amount of, income or death benefits." *Id.* A carrier is liable for lifetime medical benefits reasonably required by the nature of a compensable injury. Section 408.021(a); Texas Workers' Compensation Commission Appeal No. 92649, decided January 6, 1993.

In Appeal No. 991263, the Appeals Panel went on to determine that the hearing officer did have jurisdiction to determine the issues before her, but that the hearing officer did not have jurisdiction over the issue of what treatment is reasonable and necessary. The Appeals Panel pointed out that the Division of Hearings had to determine what conditions are compensable before the Division of Medical Review could determine what treatment is reasonable and necessary.

Alternatively, self-insured asserts on appeal that claimant's compensable injury of _____ was limited to a soft tissue injury and did not involve any injury to her lumbar spine and that the hearing officer's decision in favor of claimant is against the great weight and preponderance of the evidence. It states that it did not assert a sole cause defense.

In Texas Workers' Compensation Commission Appeal No. 971727, decided October 17, 1997, the Appeals Panel stated that, once a claimant has made out a *prima facie* case that the current condition is a result of the original compensable injury, the burden to prove that a preexisting or unrelated injury was the sole cause of the current condition falls on the carrier. *See also* Texas Workers' Compensation Commission Appeal No. 971134, decided July 31, 1997. In American Surety Company of New York v. Rushing, 356 S.W.2d 817 (Tex. Civ. App.-Texarkana 1962, writ ref'd n.r.e.), the court stated that there are many cases that hold that where a subsequent injury is alleged, such must be proved, and that a

subsequent injury must be the sole producing cause of a claimant's disability. There can be no doubt from self-insured's TWCC-21 and its position stated in the BRC report, that it was alleging that the cause of claimant's disc herniation was a new injury sustained by claimant in August 1998 while working on the rent house.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. 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, even if the evidence would support a different result. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. Claimant's testimony and the opinions of Dr. B and Dr. P support the hearing officer's decision in favor of the claimant on the disputed issue. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge