APPEAL NO. 991536

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case (CCH) hearing was held on June 21, 1999. She (hearing officer) determined that the (injury 1), compensable injury of the appellant (claimant) is not a producing cause of claimant's "current lumbar herniated disc." The hearing officer also determined that claimant did not have disability. Claimant challenges these determinations on sufficiency grounds. Claimant also contends that the hearing officer abused her discretion in excluding the curriculum vitae of his treating doctor. In his appeal, claimant raises a concern regarding his average weekly wage (AWW). There was no issue at the CCH regarding AWW and, further, the parties stipulated to claimant's AWW. Therefore, we will not address this assertion on appeal. Respondent (carrier) responds that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Claimant contends that the hearing officer erred in determining that his injury 1 compensable injury is not a producing cause of his current herniated disc. Claimant asserts that: (1) the medical evidence from Dr. K and Dr. M "unequivocally proves" that the injury 1 compensable back injury is the producing cause of his current lumbar herniated disc; (2) he did not sustain any type of injury working in his attic in Injury 2; (3) claimant has frequently carried flooring materials at work, so carrying materials to the attic could not have caused a herniation; (4) he had no prior back problems before his compensable injury; and (5) he had disability. Carrier asserted that the sole cause of claimant's herniated disc was a subsequent injury of Injury 2.

Claimant had the burden to prove by a preponderance of the evidence that the lumbar disc herniation was caused by the injury 1 compensable injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). This question of the cause of the herniation had to be proved by expert evidence to a reasonable medical probability. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 941583, decided January 9, 1995. Claimant was not required to prove that the injury 1 compensable injury was the sole cause of the current herniation, but only that it was a producing cause of the herniation. *See* Texas Workers' Compensation Commission Appeal No. 962391, decided January 8, 1997. The use of "magic words" by an expert does not in itself establish causation, and the substance of the expert evidence, including the reasons given for the opinions expressed, must be considered in resolving the issue of causation. *See* Texas Workers' Compensation Commission Appeal No. 950455, decided May 9, 1995; Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992.

Claimant testified that he sustained a compensable back injury in injury 1 when he tried to catch a heavy box that slipped and that he was off work for about 10 days. He said he was treated conservatively and that he tried to avoid surgery. Claimant said his therapy ended around April 1995 and that he did not see his doctor again regarding back pain until Injury 2. Claimant denied that he was injured working in his attic on Injury 2, and stated that severe back pain began around January 4th or 5th. He said he had had back pain all along after his injury 1 compensable injury and that he had been taking over-the-counter medications daily. Claimant said he underwent lumbar surgery in December 1998.

In a January 6, 1998, medical report, Dr. B stated under "history of illness," "4 years ago work comp injury. Told he has bulging disc. Has had essentially no problems since. After working in attic in home 1 [day] ago/developed severe 1 sided back pain, radiating into 1 leg." In a January 24, 1998, report, Dr. G wrote that claimant had increasing back pain since injury 1 "but has reinjured himself on Injury 2, while working at home." In an April 1, 1998, letter, Dr. K stated: (1) claimant returned to see him in Injury 2 because of lumbosacral pain that claimant related to a injury 1 injury; (2) claimant had seen Dr. K in August 1994 for "the same complaint"; (3) a CT scan at that time revealed a "broad bulging disc" at L3-4 and bulging discs at L4-5 and L5-S1; and (4) claimant was treated "conservatively successfully" at that time but "apparently has had back pain off and on since then." Dr. K then stated that claimant's problems do "seem to be related to that original injury in injury 1." A December 1998 operative report states that claimant underwent a laminectomy, microdiscectomy, and decompression, and that he had a herniated disc at L3-4 on the left. In a January 14, 1999, report, Dr. K stated that claimant had been injured in injury 1 and that his pain "gradually became intolerable." In a March 1999 report, Dr. K stated that claimant did not see him "from 1995 to 1998 because he was able to function with the amount of pain he experienced." He also said that claimant had indicated that he had been in his attic in Injury 2, but that "the severe pain at that time was not a direct result of his simply being in an attic." In a March 26, 1999, report, Dr. M stated that if claimant sought some medical treatment between injury 1 and the December 1998 surgery, "then the patient's surgery would reasonably be considered part of his initial work place injury." He indicated that he compared claimant's injury 1 and 1998 test reports and that he thought it "would still appear to reasonably be a case of gradual build up of problems complicating the initial protrusion associated with his work place injury." Dr. M did not mention any history about claimant's Injury 2 work in his attic.

In a February 1999 report, Dr. H stated that:

> It is quite clear that [claimant] on injury 1 had one episode of a lumbar sprain/strain event. . . . He completely recovered from this episode as is so well stated in the physician's note of 1/14/98, which states: 'Has had essentially no problems since.' It appears that the new episode of 'pain' leading to his surgery . . . came from [a] non-work related incident . . . after working in the attic in his home.

Dr. H stated that it was incomprehensible to relate claimant's current symptoms to a "remote" episode that "needed no medical attention for a period of four years."

The parties stipulated that claimant sustained "a compensable back injury" on injury 1. The hearing officer determined that: (1) claimant has degenerative disc disease, an ordinary disease of life; (2) claimant's degenerative disc disease caused annular bulges; (3) claimant sustained an injury to his lower back on Injury 2, while working in his attic putting in a plywood floor; (4) claimant's current back condition is not directly related to or the natural result of the injury 1 compensable back injury; (5) "an intervening injury is the sole cause of claimant's current back condition, in addition to claimant's degenerative disc disease . . ."; and (6) claimant did not have disability.

The hearing officer considered the evidence and concluded that claimant's injury 1 compensable injury was not a producing cause of his current lumbar herniated disc. In his appeal of this determination, claimant contends that the evidence did establish causation. Claimant points to evidence in the record that he contends supports his request for review. Whether the compensable injury was a producing cause of the current herniated disc was a question of fact for the hearing officer to decide. We will not reverse her determinations unless they are so against the great weight and preponderance of the evidence as to be clearly erroneous and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Section 410.165(a) provides that the hearing officer, as fact finder, is the sole judge of the weight and credibility to be given the evidence. In the discharge of this responsibility, the hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In this case, the evidence conflicted regarding causation. The hearing officer could have chosen to credit the medical evidence from Dr. H in concluding that the compensable injury was not a producing cause of the current herniation. The hearing officer could and did conclude that the intervening injury on Injury 2, was the sole cause of claimant's current herniated disc.

Claimant contends the hearing officer erred in determining that he did not have disability. The hearing officer determined that the injury 1 compensable injury was not a producing cause of the herniation, that claimant had surgery in December 1998 for the herniated disc, and that any inability to obtain and retain employment at wages equivalent to the preinjury wage was not due to claimant's injury 1 compensable injury. We have reviewed this determination and we conclude that it is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

Claimant complains that the hearing officer considered only the evidence from Dr. H, who did not examine claimant. There is nothing in the record to indicate that the hearing officer failed to consider all the evidence admitted in this case. We perceive no error.

Claimant asserts that the hearing officer abused her discretion in excluding the curriculum vitae of Dr. K. To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show

that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). We have reviewed claimant's assertions in this regard and we conclude that any possible error in the exclusion of this evidence was not reasonably calculated to cause nor did it probably cause the rendition of an improper decision in this case.

In affirming, we would note that Section 408.021 provides that an injured employee "is entitled to all health care reasonably required by the nature of the injury as and when needed." This provision is frequently referred to as the lifetime medical benefit provision.

We affirm the hearing officer's decision and order.

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Judy Stephens
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge