

APPEAL NO. 991542

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 24, 1999. The appellant (carrier 1) and respondent 2 (claimant) stipulated that the claimant sustained a compensable injury on Injury 1, and that on that day carrier 1 provided workers' compensation insurance for the employer. The claimant and respondent 1 (carrier 2) stipulated that the claimant sustained an injury to the lumbar spine at L3-4 on Injury 2, and that on that day carrier 2 provided workers' compensation insurance for the employer. Two benefit review conferences were held concerning the claimant's back condition after the Injury 2, injury. The issues reported as unresolved were:

Is the claimant's compensable injury 1 injury a producing cause of the claimant's L4-5 and L5-S1 disc herniations after injury 2?

Does the claimant's compensable injury 2 injury extend to include the L4-5, L5-S1 disc herniations?

With the consent of the parties, the hearing officer announced that one CCH would be held to resolve those two issues. The hearing officer denied a motion by carrier 1 to add an issue and made the following findings of fact and conclusions of law:

FINDINGS OF FACT

2. Claimant's current complaints are a result of his injury 1 compensable injury; thus Claimant's compensable injury of injury 1 is a producing cause of Claimant's L4-5 and L5-S1 disc herniations after injury 2.
3. Claimant's compensable injury of injury 2, does not extend to include the L4-5, L5-S1 disc herniations.

CONCLUSIONS OF LAW

3. Claimant's compensable injury of injury 1 is a producing cause of Claimant's L4-5 and L5-S1 disc herniations after injury 2.
4. Claimant's compensable injury of injury 2 does not extend to include the L4-5, and L5-S1 disc herniations.

Carrier 1 appealed, contended that the hearing officer erred in placing the burden of proof on it and failing to place the burden on carrier 2 to prove that the sole cause of the claimant's current complaints was the Injury 1 injury, that the findings of fact and conclusions of law set forth in this decision are against the great weight and preponderance of the evidence, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor. Carrier 2 responded, argued that the hearing

officer properly placed the burden of proof on the issues, urged that the evidence is sufficient to support the determinations of the hearing officer, and requested that her decision be affirmed. A response from the claimant has not been received.

DECISION

We affirm.

The claimant sustained a low back injury on Injury 1. A report of an MRI dated January 9, 1995, revealed small disc herniations at L4-5 and L5-S1. In a report dated January 11, 1995, Dr. T, the claimant's treating doctor, stated that the claimant's symptoms were consistent with left L5-S1 radiculopathy; that radiographic findings correlated with his symptomology; and that he was prescribed medication and physical therapy. In March 1995 the claimant reached maximum medical improvement with a zero percent impairment rating and was released to return to work. The claimant testified that generally he was able to control his pain with home exercises and took medication only on a few occasions until December 1997 when the pain did not go away after about three or four days and he saw a doctor. He stated that on Injury 2, he was taking inventory; that he twisted under a piece of furniture to see an inventory label; that he felt pain in his back, left leg, and bottom of his left foot; that the pain was similar to the pain he experienced after the Injury 1 injury; that he still has the pain in his back and leg and numbness in his foot; and that he is not receiving treatment because the dispute has not been resolved.

Dr. RS testified that an MRI performed on April 17, 1998, revealed that the herniations at L4-5 and L5-S1 look a little bigger than they did in Injury 1; that the osteophyte at L4 appears to be a little bigger; and that the claimant has a new herniation at L3-4 that did not appear on the 1995 MRI. In June 1998, Dr. T stated that the claimant's pattern of pain was directly related to the location of the disc herniations at L4-5 and L5-S1 and not at the disc herniation at L3-4 and that in his opinion the claimant's symptoms are related to the disc herniations at L4-5 and L5-S1. In an undated letter to carrier 1 that was stamped as received in July 1998, Dr. B said that there did not appear to be a specific causal relationship between the claimant's recent back problems and the Injury 1, injury based on the fact that the claimant went three years without any significant problems and the recent MRI that showed a herniation at L3-4. The Texas Workers' Compensation Commission (Commission) selected Dr. HS to render an opinion on the cause of the claimant's back problems at the time. In a report dated November 11, 1998, Dr. HS stated what the claimant's current problems were; that it was evident that the claimant's symptoms are due to left L5 and S1 nerve root involvement; that the L3-4 disc did not appear to be symptomatic on clinical evaluation; that the claimant's current symptoms were due to the left L4-5 and L5-S1 herniations that occurred as a result of the Injury 1 injury; and that those symptoms are a continuation of the Injury 1, injury. Dr. GS testified that he reviewed the claimant's medical records; that there was nothing in the records to indicate that the claimant's symptoms were related to the Injury 1 injury; that he did not agree with the opinions of Dr. T and Dr. HS; and that the claimant's nonspecific complaints of pain in the back of the calf and thigh could be due to several things wrong in the back.

After the hearing officer announced that the issues from two claims would be considered at one CCH, carrier 1 made a motion that the hearing officer add the issue of whether carrier 2 can establish that the sole cause of the claimant's complaints after Injury 2, was the Injury 1, injury. The hearing officer denied the motion. The attorney representing carrier 1 stated that carrier 2 had the burden of proving that the Injury 1, injury is the sole cause of the claimant's current condition and that carrier 1 had the burden of proving that the Injury 2, injury is the sole cause of the claimant's current condition. The hearing officer stated that the claimant had the burden of proof on each of the issues. In her statement of the evidence, the hearing officer stated "[t]he key determination that must be made is whether Claimant's current complaints relate to the injury 1 compensable injury or to the injury 2 compensable injury," summarized the evidence, and said "[b]ased on the totality of the evidence, the determination has to be made that Claimant's current complaints are a continuation of the injury 1 compensable injury." Carrier 1 contends that this placement of the burden of proof relieved carrier 2 of the burden of proving that the Injury 1 injury was the sole cause of the claimant's current back condition and resulted in reversible error. We do not agree that there was reversible error. The claimant agreed that he sustained a compensable injury on Injury 2, but contended that his current back problems resulted from the Injury 1 injury. Carrier 1 cited several Appeals Panel decisions including Texas Workers' Compensation Commission Appeal No. 980004, decided February 20, 1998 (Unpublished), and Texas Workers' Compensation Commission Appeal No. 990618, decided May 7, 1999. In Appeal No. 980004, *supra*, the Appeals Panel wrote:

In this case there was a jogging incident which carrier characterizes as an intervening cause. A carrier may indeed be relieved of liability for an aggravation and/or complications of the original compensable injury due to a subsequent noncompensable event provided that the carrier can prove that the subsequent noncompensable incident is the sole cause of claimant's current condition. Carrier cites a number of Appeals Panel decisions for the proposition that the claimant must establish that the compensable injury was "a producing cause of the disability" (or in this case the need for medical treatment). Again, we do not disagree with that proposition, as stated, but point out that the claimant has met that burden in this case through Dr. L's reports establishing such causation. The hearing officer obviously chose to give little weight to the peer review reports and the evidence strongly supports the position that the original compensable injury was at least a producing cause.

In Appeal No. 990618, *supra*, the Appeals Panel wrote:

The claimant has the burden of proving a compensable injury and disability. [Citation omitted.] However, if a carrier asserts a sole-cause defense, the carrier has the burden of proving the defense. [Citation omitted.] Although a carrier asserts a sole-cause defense, the claimant must still first prove the producing cause of an injury, that is, that the injury arose out of the course

and scope of employment. Where the claimant fails to meet this burden of proof on this threshold issue of producing cause, it is immaterial whether the carrier fails to prove sole cause. [Citations omitted.] In addition, simply because a carrier presents evidence of a preexisting or subsequent injury, this does not mean that the carrier is asserting a sole-cause defense. [Citation omitted.] A hearing officer should not consider a sole-cause defense unless it is expressly raised. [Citation omitted.]

The claimant agreed that he sustained a compensable injury on Injury 2, but contended that his current back condition resulted from the Injury 1 injury and presented evidence to support that contention. Carrier 2 did likewise. Carrier 1 contended that the claimant had not met his burden of proving that the claimant's current condition resulted from the Injury 1 injury, that carrier 2 had not put on evidence to show that the Injury 1 injury is the sole cause of the claimant's current conditions, and that the April 1998 injury is the sole cause of the claimant's current condition and presented evidence to support the first and last contentions. The hearing officer made limited findings of fact, but her statement of the evidence indicates that she determined that the claimant met his burden of proving that his current condition resulted from the Injury 1 injury. That placed the burden on carrier 1 to prove that something other than the Injury 1 injury¹ is the sole cause of the claimant's condition. The hearing officer did not err in not adding an issue on sole cause or not placing the burden of proof on sole cause prior to determining whether the claimant had met his burden of proof that his current condition resulted from either the Injury 1 injury or the April 1998 injury. Among other things, carrier 1 contended that claimant's current condition was the result of a natural disease of life.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The medical reports from doctors who treated the claimant and those that were obtained by

¹It contended either the April 1998 injury or a natural disease of life.

carrier 1 are in conflict. The Commission obtained an opinion from a neutral doctor who agreed with the doctor who treated the claimant. The hearing officer found the reports from those doctors to be persuasive. Only were we to conclude, which we do not in this case, that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Dorian E. Ramirez
Appeals Judge