APPEAL NO. 991787

On July 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). The issues at the CCH were: (1) the date of injury; (2) whether respondent (claimant) sustained a compensable injury; (3) whether the compensable injury is a producing cause of the claimant's L5-S1 herniated nucleus pulposus (HNP); (4) whether claimant gave timely notice of injury to her employer; and (5) whether claimant has had disability. Appellant (carrier) appeals the hearing officer's decision that claimant sustained a compensable injury on _____, which is a producing cause of claimant's L5-S1 HNP, and that, due to her injury of _____, claimant had disability from February 8, 1999, to February 21, 1999, on March 3, 1999, and from June 1, 1999, continuing through the date of the CCH. Carrier also contends that the hearing officer erred in not granting a hearing subpoena. Claimant requests affirmance. There is no appeal of the hearing officer's decision that claimant timely and properly notified her employer of her injury of _____, and that carrier is not relieved of liability under Section 409.002.

DECISION

Affirmed.

Section 401.011(26) defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease." Section 401.011(10) defines "compensable injury" as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage."

On _____, claimant was working for (employer) and was told by employer to clean out a storage room. Claimant testified that she injured her back lifting 40- to 50-pound boxes and carrying them out of the storage room on _____. Employer sent claimant to Dr. LA on July 13, 1998, who diagnosed a low back strain and returned claimant to work. Dr. LA noted complaints of left leg pain. Claimant went to Dr. LA again in August. Claimant quit her job with employer on January 8, 1999, and went to work for another employer on February 1, 1999. An MRI done on February 8, 1999, revealed a central and right disc herniation at L5-S1 with an extruded fragment on the right. On February 10, 1999, Dr. DA performed surgery on claimant's lumbar spine for an HNP at L5-S1. Dr. DA noted complaints of right leg symptoms. Claimant said she has had symptoms in both legs.

Dr. DA opined in a letter that it is very likely possible that the back injury that occurred in June 1998 subsequently led to the need for surgery in February 1999. Dr. LA testified that he does not believe that the February 1999 surgery is related to the claimant's work injury in June 1998. Claimant testified that she continued to have back pain after her

injury of _____. There is evidence that she also had back pain when she fell on ice on employer's walkway on December 23, 1998, and when she got into her truck on February 8, 1999. Claimant described the December 23, 1998, fall as affecting her knee and as an aggravation of her preexisting injury. She said she fell on her right knee and left hip that day. She denied that she injured her back on February 8, 1999. Dr. DA's February 8, 1999, report notes a sudden onset of back pain when claimant got into her truck that day.

Claimant testified that due to excruciating back pain, she has been unable to work since June 1, 1999, and that Dr. DA wants to do more testing to see if additional surgery is needed. Dr. DA took claimant off work on June 1, 1999. Claimant also testified that because of her _____, injury, she was unable to work from February 8 to February 21, 1999 (surgery was on February 10), and on March 3, 1999. SJ, who works for employer, testified that claimant was able to work from July 1998 to January 8, 1999, when she quit, without observed difficulties, and that claimant told him she injured her knee on December 23, 1998. MC, who works for employer, testified that claimant notified him of an injury on July 13, 1998, that he sent claimant to Dr. LA, and that claimant was able to do her job without back complaints until she quit.

Claimant had the burden to prove that she sustained a compensable injury and that she had disability. Claimant also had the burden to prove the extent of her compensable injury. The hearing officer found that on _____, claimant sustained a back injury that included an HNP at L5-S1 due to lifting boxes while moving the contents of a storage room as part of her job duties for employer, and that due to her _____, injury, claimant has been unable to obtain and retain employment at her preinjury wage from February 8, 1999, to February 21, 1999, on March 3, 1999, and beginning on June 1, 1999, continuing through the date of the CCH. The hearing officer concluded that claimant sustained a compensable injury on _____, which is a producing cause of claimant's L5-S1 HNP, and that due to her injury of _____, claimant has had disability from February 8, 1999, to February 21, 1999, on March 3, 1999, and from June 1, 1999, continuing through the date of the CCH. Carrier contends that the evidence shows that claimant sustained her HNP on February 8, 1999, when she got into her truck, and that claimant has not proven disability from the _____, injury.

In workers' compensation cases the issues of injury and disability may generally be established by the testimony of claimant alone, if found credible by the trier of fact. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). If, as carrier contends, expert medical evidence was necessary regarding the HNP issue, the hearing officer could weigh and consider the conflicting opinions of Drs. LA and DA on that issue. It has been held that a medical expert need not use exact magic words in providing an opinion on causation. Stodghill v. Texas Employers Insurance Association, 582 S.W.2d 102 (Tex. 1979). Although there is conflicting evidence on the disputed issues, the hearing officer's findings and conclusions are sufficiently supported by claimant's testimony and Dr. DA's opinion.

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 trier 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. 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).

On April 27, 1999,_____(hearing officer 2) granted carrier's request to take Dr. DA's deposition on written questions. While Dr. DA's answers to the deposition on written questions are not in evidence, carrier stated in a subsequent request for the issuance of a subpoena for Dr. DA to appear as a witness at the CCH originally scheduled on June 1, 1999, that Dr. DA had been deposed on written questions and carrier expressed its dissatisfaction with Dr. DA's answers. On May 28, 1999, (hearing officer 3) granted carrier's request for a subpoena for Dr. DA to appear at the CCH. Hearing officer 3 had previously granted carrier's request for a subpoena duces tecum for Dr. DA's medical records, and there is no indication that those records were not delivered to carrier. Medical records from Dr. DA are in evidence. On May 28, 1999, carrier requested a continuance in order to have time to serve the subpoena for Dr. DA's presence at the CCH, which request was apparently granted by hearing officer 3. Since the original subpoena referenced the June 1, 1999, CCH, carrier requested another subpoena for Dr. DA with the date of the rescheduled CCH. By the time the second subpoena request was made, the hearing officer who presided at the July 26, 1999, CCH had apparently been assigned as the hearing officer to hear this case. The hearing officer found that carrier had not shown good cause for the subpoena for Dr. DA to appear at the CCH, because carrier had had the opportunity to depose Dr. DA on written questions and because his testimony could be adequately obtained by deposition or written affidavit. Carrier filed a motion to reconsider its subpoena request, which the hearing officer denied for the same reasons he had originally denied the subpoena request.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.12(b) (Rule 142.12(b)) provides that the Texas Workers' Compensation Commission may issue a subpoena (1) on its own motion; or (2) at the request of a party, if the hearing officer determines the party has good cause, and Rule 142.12(d) provides in part that the hearing officer may deny a request for a hearing subpoena upon a determination that the testimony may be adequately obtained by deposition or written affidavit. We cannot conclude that the carrier has shown that the hearing officer abused his discretion in denying the hearing subpoena for Dr. DA.

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Tommy W. Lueders
Appeals Judge