

APPEAL NO. 992944

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 was held on October 21, 1999. He (hearing officer) kept the record open to provide the appellant (claimant) the opportunity to obtain additional medical evidence. She presented additional evidence. The claimant and the respondent (carrier) stipulated that the claimant sustained a compensable neck injury on _____. The parties agreed that the issues were as reported in the benefit review conference report and that one of them was:

Is the compensable injury a producing cause of the spondylosis and stenosis at the L3-4 and L2-3 levels of the lumbar spine, as well as the bulging revealed by the June 25, 1999, MRI of the lumbar spine at the L4-5 and L5-1 spinal level.

The hearing officer found that the claimant did not injure her lower back and did not aggravate a previous lower back condition on _____, when she slipped and fell, hitting her head on a wall locker and concluded that the compensable injury of _____, is not a producing cause of the spondylosis and stenosis at the L3-4 and L2-3 levels of the lumbar spine, as well as the bulging revealed by the June 25, 1999, MRI of the lumbar spine at the L4-5 and L5-1 spinal levels. The claimant appealed. She stated that injury is defined as damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm; quoted from and commented on a Supreme Court of Texas decision in which "damage" and "harm" are discussed; contended that the Decision and Order of the hearing officer indicates he considered damage to the physical structure of the body but not harm to the physical structure of the body; urged that the evidence established she sustained harm to the physical structure of her body on _____; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that she suffered harm to her lower back in her compensable injury. In the alternative, the claimant requested that the case be remanded to the hearing officer. The carrier responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

The claimant testified that on _____, she slipped; did not fall all the way down; hit the back of her neck on some lockers; and became stiff and sore. She said that she asked about going to a doctor; that she was told to wait until legal forms and papers were received; that she continued to work; that she saw Dr. H on June 23, 1999; that Dr. H referred her to Dr. D; that Dr. D asked her to see Dr. R; that Dr. R is a neurosurgeon who performed surgery on her lumbar spine in 1995 for a _____ injury; that the 1995 surgery was successful; that she did not have serious problems with her low back after she recovered from the surgery and before the _____ incident; that before the

_____ incident, she had some low back and leg pain and intermittent numbness in both legs and that those conditions would go away quickly; and that after the _____ incident, the pain is worse and she has constant numbness and pain in the left leg and foot. The claimant also testified that she has a herniated disc in her cervical spine and that surgery on her neck had been recommended.

In a letter dated May 10, 1995, Dr. R stated that an MRI documented a ruptured disc at the L5-S1 level and a ruptured disc with severe stenosis at the L4-5 level and recommended lumbar spinal surgery. A report of a lumbar myelogram dated June 16, 1995, indicates a defect at L4-5 that is consistent with a herniated nucleus pulposus and smaller extradural defects at L3-4 and L5-S1 consistent with central bulging discs. On August 25, 1995, "laminectomy, facetectomy, and foraminotomy with decompression of the cauda equina L4 and 5" were performed. A report of an MRI dated November 25, 1996, states:

L5-S1 and L4-5: There is bilateral L5 laminectomies. There is no recurrent L5-S1 disc herniation. There is mild epidural fibrosis at this level. A small posterior extension of disc-like signal that subsequently enhances is seen at L4-5 and this may represent epidural fibrosis. Bilateral L4 laminectomies have been performed.

L3-4: There is no evidence of disc herniation or significant spondylosis. The neural foramina are patent and paravertebral soft tissues are normal.

L2-3 and L1-2: There is no evidence of disc herniation or significant spondylosis. The neural foramina are patent and the paravertebral soft tissues are unrevealing.

IMPRESSION:

1. Bilateral L4 and L5 laminectomies.
2. No evidence of recurrent disc herniation.
3. Mild L4-5 spondylosis.

In a letter dated December 5, 1996, Dr. R stated that he concurred with the radiologist's interpretation in that no evidence of discrete pressure is seen on the dural sac or on the nerve roots of significance and that she does have a degenerative disc at L4-5. In a diagnostic report dated the same day Dr. R said that the "5-1 disk space is slightly narrowed" and that no other disc pathology was observed. In a letter dated March 20, 1997, Dr. R stated that it was his opinion that probably arthritis and a scar type phenomenon were producing the claimant's current symptoms. In a letter dated August 28, 1997, Dr. R said that the claimant slipped and fell on _____; that she had lumbar surgery in August 1995; that she had back and leg pain in 1996; that she had an MRI done in November 1996; that the pain is now more severe; that he concurs that August 1997 x-rays show evidence of some degenerative changes; and that clinically she has a picture of a ruptured disc at L4-5 on the left side with sciatica and with nerve root tenderness as well

as motor weakness. A report of an MRI of the lumbar spine dated November 18, 1997 states:

L5-S1: There is disc narrowing with desiccation. There is a bilateral laminectomy defect.

L4-5: There is intervertebral disc desiccation and a bilateral laminectomy defect. There is dorsal disc protrusion, as well as anterior epidural material, greater to the right of midline which exhibits enhancement.

L3-4: There is mild intervertebral disc desiccation and associated degenerative change.

IMPRESSIONS:

1. Lower lumbar degenerative and post surgical changes.
2. Anterior epidural, partially enhancing material. L4-5, greater toward the right midline. The appearance may only represent post surgical changes and scar formation. Residual and/or recurrent disc fragment herniation can not totally be ruled out.

In a report of an MRI dated June 25, 1999, Dr. JG wrote:

FINDINGS: Peripheral vascular structures and soft tissues appear intact. The signal within the vertebrae themselves appears to be within normal limits. The T2-weighted images demonstrate diminished signal within L3-4, L4-5, and L5-S1 discs, and there is decreased height of the L5-S1 disc. The axial images confirm laminectomy of L5. Previous MRI in August of 1995 at [Hospital], had demonstrated a disc herniation and stenosis at L4-5. A central disc bulge at L5-S1 was also present. The canal has been decompressed at both of those levels. A milder bulge is suspected at L5-S1, and no disc herniations are identified at L4-5. Facet hypertrophic spurring and a mildly bulging annulus result in moderate stenosis of the canal at L3-4. Hypertrophic spurring from the facet joints results in mild stenosis at L2-3. L1-2 appears grossly intact. The findings at L2-3 and L3-4 are basically unchanged from the study in 1995. No recurrent disc herniation is defined. Other abnormalities are not seen.

In a report dated August 12, 1999, Dr. R said that an MRI suggests that there might be a ruptured disc at L4-5, stated that in cases of persons with decompressive laminectomies an MRI may be unreliable, and requested a myelogram with post myelogram CT. On September 23, 1999, Dr. R reported that the carrier had not approved the myelogram and post myelogram CT and stated that they were needed.

Dr. MG reviewed medical records at the request of the carrier. In a letter dated October 7, 1999, Dr. MG said that the claimant had lumbar surgery after an _____ injury; that she had some improvement, but developed chronic lower back pain which persisted; that it is likely that her continued low back pain and radicular symptoms affecting her legs are the result of post-laminectomy and degenerative disc instability; that he may be able to provide more information if he had a recent MRI, myelogram, and CT scan; that there is no indication in the record for a need for lumbar or cervical surgery; and that in his opinion there was not any new harm or damage as a result of the new injury.

In a letter dated October 21, 1999, Dr. R said that he thought that an MRI requested by Dr. D showed evidence of pathology at L4-5, that he had requested a myelogram and post myelogram CT of the lumbar spine, that the request was denied, that Dr. MG did not examine the claimant, that he disagrees with the report of Dr. MG that lumbar and cervical surgery are not needed, that he continues to await approval of the myelogram and post myelogram CT, and that the claimant said that her condition dramatically worsened since the _____ fall.

At the hearing the claimant made the same arguments that she made on appeal concerning the definition of injury and the Supreme Court of Texas case interpreting that definition. There is no indication that the hearing officer did not consider that argument. In addition, neither party objected to the way the issue was stated at the hearing. The hearing officer made several findings of fact to resolve the appealed issue. Finding of Fact No. 5 states:

A MRI of the lumbar spine on June 25, 1999, showed degenerative disc disease at L4-5 and L5-S1, laminectomy at L5, no evidence of recurrent disc herniation at L4-5 and mild spondylosis and stenosis at L3-4 and L2-3 which is basically unchanged from the study of 1995.

He also found that the claimant did not injure her lower back or aggravate a previous lower back condition on _____, when she slipped and fell hitting her head on a wall locker. After the 1995 MRI, the claimant had surgery at L4-5. The record does not indicate that she had surgery at L3-4 or L2-3. While Finding of Fact No. 5 could have been more carefully drafted to indicate the condition at L3-4 and L2-3 was basically unchanged from the study in 1995, a review of the report of Dr. LG and Finding of Fact No. 5 reveals that the evidence is sufficient to support that finding of fact. Also it may have been appropriate to make a comparison of MRIs that were performed after the 1995 surgery.

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 issue, 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 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 judgement 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). That different determinations could have been made based on the same evidence is not a sufficient basis to overturn factual determinations. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. The hearing officer's determinations on the issue of extent of injury are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. 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).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge