

APPEAL NO. 000311

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 8, 1999. The record closed on January 20, 2000. With respect to the issues before him, the hearing officer determined that the respondent's (claimant) compensable injury includes her neck and her lower back; that claimant's injury does not include her upper back; that the appellant (carrier) waived the right to contest compensability of the "claimed injury" by not contesting compensability within 60 days of receiving notice thereof; and that the claimant had disability as a result of her compensable injury from July 7, 1998, through the date of the hearing. The carrier appeals, contending that the hearing officer's determinations that the claimant's injury extends to her neck and low back, that it waived its right to contest compensability of the "claimed injury," and that the claimant had disability for the period found, are against the great weight of the evidence. In her response to the carrier's appeal, the claimant urges affirmance. The claimant did not appeal the hearing officer's determination that her compensable injury did not extend to her thoracic spine; thus, that determination has become final pursuant to Section 410.169 and will not be discussed further on appeal.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury to her right shoulder on _____, in the course and scope of her employment as a child care worker. The claimant stated that she worked 40 hours per week at that job and that she worked an additional 12 to 14 hours per week babysitting at her church. The claimant testified that on November 19th, she had taken some children outside and was walking back inside, when a boy on a tricycle rode in front of her, causing her to fall and injure her right shoulder. The claimant contends that she also injured her cervical and lumbar spine in the fall. The claimant initially treated at the emergency room and then she sought treatment with Dr. A. In an Initial Medical Report (TWCC-61) for a December 5, 1997, appointment, Dr. A states that the claimant "fell at work on _____ and injured her neck, right shoulder and back." That report is date-stamped as having been received by the carrier on December 15, 1997. The carrier does not dispute that that document provided notice of the cervical and lumbar injuries. On January 27, 1998, the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) with the Texas Workers' Compensation Commission (Commission), which states "[c]arrier denies extent of injury for bone spurs and osteoporosis of cervical spine and degenerative changes of AC joint of right shoulder. Carrier denies treatment or disability of same."

The claimant testified that she continued to complain about burning pain in her neck and low back to Dr. A but that he told her nothing was wrong with them. She stated that in

the summer of 1998, she returned to her native country of (Country), in part because she believed she would receive better medical treatment there because she would not have the language barrier that she had with Dr. A. A lumbar MRI was performed in (Country), which revealed "subtle bulging" at L2-3, L3-4, L4-5, and L5-S1 and compression fractures of the vertebral body at T9, T10, and T11. The claimant testified that her doctor in (Country) recommended surgery but she did not want to undergo surgery, so she returned to the United States. The claimant again sought treatment with Dr. A on February 9, 1999. In his report of that date, Dr. A noted that the claimant had a "[h]istory of back injury secondary to fall, but without neurological involvement and no radicular pain." In addition, Dr. A noted that he had reviewed the claimant's lumbar MRI and that it revealed "evidence of multiple level degenerative disc disorder rather than evidence of an acute injury." In his responses to Deposition on Written Questions, Dr. A stated that the disc disorders in the claimant's lumbar spine were not related to her _____, compensable injury; that she had chronic back pain secondary to multiple level degenerative disc disease and spinal stenosis; that the multiple level degenerative disc disease and spinal stenosis is not related to her compensable injury; and that her compensable injury was limited to a dislocation of her right shoulder, torn rotator cuff in the right shoulder, and cervical and lumbar strains. In response to cross-questions from the claimant, Dr. A stated that "it is my opinion that her injury of _____ made a preexisting condition of her lumbar spine symptomatic" and that he "would not attribute her symptoms of 2/09/99 to be related to the injury of _____."

The claimant stated that she changed treating doctors to Dr. L, a chiropractor, because Dr. A told her that there was nothing wrong with her neck and low back. At an April 22, 1999, appointment, Dr. L took the claimant off work and referred her to Dr. D for consultation. Dr. D testified by telephone at the hearing. He stated that he had been treating the claimant since April 22, 1999. He opined that she had three "clear and distinct injuries relative to the work-related injury," a rotator cuff injury in her right shoulder, cervical radiculitis, or cervical disc syndrome with myelopathy, and disc bulging from L2-3 to L5-S1. Dr. D opined that the claimant's shoulder, cervical and lumbar injuries were "clearly not preexisting," noting that the herniated or bulging lumbar discs were "very clearly in response to injuries." Dr. D further stated that he could not say that the thoracic compression fractures are "beyond doubt" due to the fall at work in _____; however, he opined that it is "clearly so that the neck, low back, and right shoulder were injured in the fall at work on _____." Finally, Dr. D opined that the claimant is "in far too great a pain to work even in a sedentary capacity" and that she has "clearly" been disabled since the date of her injury. On cross-examination, Dr. D testified that he had no reason to believe that the claimant's cervical and low back injuries were preexisting because he has documentation that she was working full time without complaints, then she had her injury and began to have pain in those areas immediately thereafter. Dr. D noted that the claimant worked additional hours babysitting at her church in addition to the 40 hours per week she worked for the employer and explained that in his clinical experience people with extensive lumbar and cervical disc bulges do not work 16 hours per day without complaints of pain or the requirement of pain medication.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury and the nature and extent of the injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. Generally, injury may be proven by the testimony of the claimant alone, if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The carrier contends that the hearing officer's determination that the claimant's compensable injury extends to and includes her cervical and lumbar spine is against the great weight and preponderance of the evidence. The hearing officer was acting within his province as the fact finder in deciding to credit the evidence from the claimant and from Dr. D that the claimant injured her neck and low back in addition to her right shoulder in the fall at work on _____, over the evidence from Dr. A that she only sustained a cervical and lumbar strain in the fall, which had resolved, and that the current problems with her cervical and lumbar spine are not related to the work-related injury. The factors that the carrier emphasizes on appeal, it also emphasized at the hearing; however, the significance, or lack thereof, of those factors was a matter left to the discretion of the hearing officer as the fact finder. Our review of the record does not reveal that the hearing officer's determination that the compensable injury extends to the cervical and lumbar spine is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse that determination on appeal. Pool; Cain.

The carrier also contends that the hearing officer erred in finding that it waived its right to contest compensability of the claimed injury because it failed to do so within 60 days of the date it received its first written notice of the alleged cervical and lumbar injuries. The hearing officer found that the carrier received its first written notice of the cervical and lumbar injuries on December 15, 1997, when it received Dr. D's December 5, 1997, report stating that the claimant "fell at work on _____ and injured her neck, right shoulder and back." The carrier does not dispute that that report provided its first written notice of the injury. Thus, the question becomes whether the carrier filed a compensability contest that

was sufficiently specific to dispute those injuries within 60 days of December 15, 1997. The carrier contends that the TWCC-21, which was filed with the Commission on January 27, 1998, timely and sufficiently disputed the claimed injuries. Without question, that document was filed within 60 days of December 15, 1997, and would be a timely contest if it is sufficiently specific to serve as a valid contest of compensability. In determining that the carrier waived its right to contest the cervical and lumbar injuries, the hearing officer noted that "when the [TWCC-21] is read as a whole, it fails to deny that the neck and back were injured. Instead, it identifies particular conditions, namely bone spurs and osteoporosis of the cervical spine and degenerative changes of the AC joint of the right shoulder which the carrier contested." Our review of the record does not demonstrate that the hearing officer's determination in that regard is so contrary to the great weight and preponderance of the evidence as to compel its reversal on appeal in that the TWCC-21 filed by the carrier did not dispute the existence of a cervical injury, it merely contested two conditions, and it failed to mention the lumbar spine. Accordingly, we will not disturb the hearing officer's determination that the carrier waived its right to contest compensability of the cervical and lumbar injuries. Pool, *supra*; Cain, *supra*.

The success of the carrier's disability argument is premised upon the success of its argument that the compensable injury does not extend to the cervical and lumbar injuries. Given our affirmance of the hearing officer's extent-of-injury and waiver determinations, we likewise affirm his determination that the claimant had disability from July 7, 1998, through the date of the hearing, December 8, 1999.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge