APPEAL NO. 000478

This appeal arises 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 February 2, 2000. The hearing officer determined that the respondent (carrier) did not waive its right to contest compensability of the appellant's (claimant) lumbar and cervical spine condition and that the compensable injury does not extend to the claimant's lumbar and cervical spine. The claimant appeals the extent-of-injury determination only, citing evidence in support of her position and requesting that we reverse and render a decision in her favor. The carrier replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The non-waiver of dispute determination has not been appealed and has become final. Section 410.165.

DECISION

Affirmed.

The claimant worked as a cashier at (employer). On _____, she slipped and fell in a twisting motion. She said that she initially felt pain in her back that for a period of time seemed to lessen somewhat. In any case, her initial attention was to a right leg and right knee injury, which the carrier accepted as compensable. She contended at the CCH that in this accident she also injured her cervical and lumbar spine. The claimant continued to work after her fall until her leg pain became more serious. She first sought medical treatment for her injuries from Dr. W on May 18, 1999. Claimant said she also told him about her back pain, but she concentrated on her knee. Dr. W's Initial Medical Report (TWCC-61) does not mention back pain, but refers only to the right leg and knee. Claimant also said that between the accident and this visit with Dr. W she gave a recorded statement to the employer and the carrier in which she mentioned her back pain. Neither statement was offered into evidence. On May 24, 1999, the claimant completed a workers' compensation statement for the employer in which she listed only her right leg and knee as injured and described the incident as a twisting of her right leg.

Dr. W eventually referred the claimant to Dr. I, whom she first saw on June 14, 1999. The history questionnaire completed by the claimant for Dr. I also references only leg and knee pain. The claimant said she told Dr. I about her back pain, but, according to the claimant, he told her he only treated knees and for this reason she did not mention her back in the questionnaire. Also on June 14, 1999, the claimant obtained a "worker's compensation request for medical care" form from the employer. The claimant testified that when she picked up this form the employer had already filled out a part of the form to reflect the lower back as part of the injury as well as the right leg and knee, but the claimant returned it for the employer to scratch out the reference to the lower back, which the employer did.

The claimant further testified that on June 22, 1999, as she was drying off in the shower she bent her leg and felt excruciating pain in her lower back. She insisted that she always had some back pain after her fall, but that it only became severe on June 22, 1999. After this date, references to back pain appear in her medical records. On July 19, 1999, Dr. I wrote that "I am not sure that her spine discomfort is due to her injury." An MRI on August 10, 1999, disclosed both cervical and lumbar herniation. In a letter of October 8, 1999, Dr. S, a neurologist, wrote that the claimant never had these back problems in the past and that the symptoms "occurred on _____ while at work."

The decision and order of the hearing officer contains an extensive recitation of the evidence and a statement of her reasons for finding that the claimant's compensable injury did not extend to the lumbar or cervical spine. With regard to the lumbar spine, the hearing officer commented about the absence of any reference to the claimant's lower back in the early incident reports and questionnaire filled out by the claimant and she found it questionable that Dr. I would fail to mention the complaint just because he only treated the knee. Regarding the cervical spine, the hearing officer commented that there was "even less evidence of how the neck was injured in the fall of _____" and that the claimant did not testify to neck pain after the fall. From this evidence, she concluded that the claimant did not establish a compensable cervical or lumbar spine injury and that the lumbar pain began on or about _____, not in _____. She made specific findings of fact consistent with this analysis. In her appeal of these determinations, the claimant relies primarily on her testimony that she had been experiencing back pain since the fall in _____ and on Dr. S's letter of October 8, 1999, quoted above. She also refers to other statements allegedly written by the claimant which were not introduced into evidence as proof of complaints of back pain since the fall and suggests that the failure of the carrier to produce them should work to the detriment of the carrier in this case.

The claimant had the burden of proving the extent of her compensable injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The carrier had no similar obligation. In meeting her burden of proof the claimant had some responsibility to attempt discovery of evidence she believed would support her position. Whether she injured her cervical and lumbar spine in the fall on _____, presented a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. The hearing officer evaluated the evidence and gave reasons for why she believed the claimant was not persuasive in meeting her burden of proof. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the compensability determinations of the hearing officer and all related findings of fact.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge