APPEAL NO. 000561

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 22, 2000. The hearing officer made the following findings of fact:

> 2. There is no causal connection between the compensable injury at C4-5 and the degenerative disk disease and herniations from C3-4 through C7-T1 except at C4-5.
>
> 3. On April 29, 1999, Claimant [sic carrier, respondent] received written notice of claimant=s [appellant] assertion that the injury extended to degenerative disk disease and herniations from C3-4 through C7-T1 in addition to the compensable injury at C4-5 for which Carrier contested compensability on June 10, 1999, which was within 60 days.

The claimant appealed those determinations; commented on evidence that he contended was favorable to his position; attached copies of an operative report dated March 6, 2000, and a letter from Dr. M dated March 13, 2000; and requested that the Appeals Panel reverse the decision of the hearing officer. The carrier responded, stated that the documents attached to the claimant=s appeal should not be considered, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm in part and reverse and remand in part.

We first address the determination of the hearing officer concerning the extent of the injury sustained by the claimant on _____. The claimant testified that on _____, he tripped; fell forward; landed on his hands; hit his head on the leg of a coworker, jarring it back; and had burning and tingling in his hands and stiffness in his neck. The claimant denied having these problems before the fall. He went to his family doctor; was referred to (Dr. H) who performed an MRI and an EMG; was referred to Dr. M, a neurosurgeon; and had an emergency three-level cervical fusion by Dr. M on April 5, 1999. In an initial report dated April 2, 1999, Dr. M said that an MRI of the cervical spine done on March 31, 1999, showed evidence of

severe spinal cord compression at the C3-4, C4-5, and C5-6 levels with evidence of hyperintensity in the spinal cord suggestive of a spinal cord injury or myelomalacia; that his impression was cervical myelopathy secondary to cervical stenosis and cervical disc herniation, worse at the C4-5 and C5-6 levels, but also significant at the C3-5 level; that the claimant would require a two-level corpectomy and fusion from C3 to C6 followed by spinal instrumentation; and that this was a work-related injury, but needed to be addressed promptly due to the severe nature of the claimant=s condition. In an operative report dated April 5, 1999, Dr. M stated that the claimant suffered a hyperextension injury to his neck when he fell at work on _____; recorded that the preoperative and postoperative diagnoses were A[c]ervical myelopathy secondary to cervical stenosis and disc herniation at C3-C4, C4-C5, and C5-C6 with severe cord compression@; and described the surgery, including fusion from C3 to C6. In a letter to Dr. H dated April 21, 1999, Dr. M stated that the claimant=s status was post a two-level cervical corpectomy and three-level fusion for a cervical myelopathy secondary to acute spinal cord compression related to an on-the-job injury. The claimant attempted to call Dr. M as a witness. Dr. M was not available, apparently because he was performing surgery. The claimant did not request a continuance to have Dr. M testify.

In a letter to the carrier dated May 10, 1999, Dr. G stated that he had been provided documents to review that included an MRI, EMG, and a report from Dr. M dated April 2, 1999; that surgery was planned for April 5, 1999, but he did not have the operative report; that, in his opinion, the claimant had extensive chronic multilevel degenerative changes involving the cervical spine as well as underlying cervical spinal stenosis, probably both on a congenital and acquired basis; that the claimant=s spinal canal is probably on the small side which allowed his longstanding acquired degenerative changes to significantly decrease the diameter of the spinal canal; that he sustained a seemingly minor injury, at least from what can be determined from the initial injury report, and developed major symptoms requiring decompression and fusion; that the injury may have caused an acute disc herniation at C4-5 or exacerbated an already herniated disc at that level; that A[t]his injury would have not likely caused any problems in a normal person or someone with average degenerative changes for age, but probably was >the final straw= which led to significant cord compression and myelopathy in this patient@; and that he would not be surprised if the claimant had preexisting neck pain or

radiculopathy. Dr. G provided similar testimony at the hearing. He testified that most likely the herniations and bulges were there before the fall, but he could not tell to what degree; that the initial report of the injury indicated that the claimant may have just slightly jarred his neck and that may have been enough to make the disc protrude at C4-5; that he did not examine the claimant; and that he based his opinion on the test results and reported symptoms the claimant had.

The claimant attached medical reports from Dr. M dated after the date of the CCH. The claimant did not request a continuance to obtain additional evidence. We will not consider those documents in rendering this decision.

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 because the finder of fact judges the credibility of each and every witness and the weight to assign to each witness=s testimony and resolves conflicts and inconsistencies in the 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). 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 would 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). Aggravation of a preexisting condition, including arthritis and degenerative joint disease, may result in an injury sustained in the course and scope of employment. Texas Workers= Compensation Commission Appeal No. 92241, decided July 24, 1992; and Texas Workers= Compensation Commission Appeal No. 952184, decided February 7, 1996. That a different factual determination could have been made based upon the same evidence is not a sufficient basis to overturn a factual determination of a hearing officer. Texas Workers= Compensation Commission Appeal No. 94466, decided May 25, 1994. Apparently, the hearing officer believed part of the testimony of Dr. G concerning injury to C4-5. Only were we to conclude, which we do not in this case, that the hearing officer=s determination concerning the extent of the claimant=s injury is

so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb that determination. In re King=s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determination of the hearing officer concerning extent of injury, we will not substitute our judgment for his. Texas Workers= Compensation Commission Appeal No. 94044, decided February 17, 1994. We affirm that determination.

We next address the determination that on April 29, 1999, the carrier received written notice of the claimant=s assertion that his injury extended to degenerative disc disease and herniations from C3-4 through C7-T1 and that the carrier timely contested compensability on June 10, 1999. An Employer=s First Report of Injury or Illness (TWCC-1) dated March 23, 1999, states that the claimant sustained a contusion of the left thumb. The top of the TWCC-1 in the record indicates that it was transmitted by facsimile on March 23, 1999. The record contains two copies of an amended TWCC-1 dated April 5, 1999, that states that the nature of the injury is Aherniated disks@ and that the part of the body injured is the Aneck.@ The copies of the TWCC-1 dated April 5, 1999, in the record do not contain an indication that the TWCC-1 was transmitted by facsimile. There is less unused space at the top of the TWCC-1s dated April 5, 1999, than at the top of the TWCC-1 dated March 23, 1999, and if a date of transmission by facsimile had been placed on the TWCC-1 dated April 5, 1999, in the same place as it appears on the TWCC-1 dated March 23, 1999, it seems that it would not appear on the copies in the record because of the way the copies are reproduced on the sheets of paper in the record. During closing argument, the attorney representing the carrier stated that the operative report was not sent to the carrier until April 29, 1999, and that the denial was filed within 60 days of that date. The hearing officer asked the attorney representing the carrier if the carrier agreed that the first written notice was no earlier than April 29, 1999, and the attorney responded Aright.@ The record does not indicate that the same or a similar question was directed to the claimant or the ombudsman who assisted the claimant. The statement of the attorney representing the carrier and his response to the question of the hearing officer are not evidence. The record does not contain evidence as to when the operative report of Dr. M or the TWCC-1 dated April 5, 1999, stating herniated discs in the neck was received by the carrier. The Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) is dated June 10, 1999. The

parts of Finding of Fact No. 3 that on April 29, 1999, the carrier received written notice of the claimant=s assertion that the injury extended to degenerative disk disease and herniations from C3-4 through C7-T1 and that the carrier contested compensability within 60 days of receiving notice of the claimed injury and the conclusion of law and decision that the carrier timely contested compensability of the claimed degenerative disc disease and herniations from C3-4 through C7-T1 are not supported by the evidence and are reversed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Receipt of written notice of the claimed injury, not oral notice, is required to start the 60-day period. Texas Workers= Compensation Commission Appeal No. 971340, decided August 28, 1997. We remand for the hearing officer to make findings of fact and a conclusion or conclusions of law necessary to resolve the issue of whether the carrier timely contested compensability of the claimed injury.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers= Compensation Commission=s Division of Hearings, pursuant to Section 410.202. *See* Texas Workers= Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens

Appeals Judge