

APPEAL NO. 000706

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 March 6, 2000. The hearing officer concluded that the respondent (claimant) sustained a compensable injury on or about _____, and that she had disability from the _____, injury from February 9, 1999, through the date of the CCH. The appellant (self-insured) requests our review, contending that there is insufficient evidence to support the injury determination and that, because claimant did not prove that she sustained a compensable injury, she could not have disability. Claimant=s response urges the sufficiency of the evidence to support the challenged findings and conclusions.

DECISION

Affirmed.

In that the hearing officer=s Decision and Order contains a detailed recitation of the evidence, with which neither party takes issue, we will only briefly state such evidence as is necessary to support our decision.

Claimant testified that in March and August 1997, she underwent lumbar spine surgery at the L4-5 level; that following the second surgery, she began to experience pain from scar tissue, which formed and pressed against a nerve, and had pain management treatment for this pain; and that on _____, while employed by the self-insured as a bus driver, she slipped while descending her bus steps; fell onto her buttocks on a step, with her back hitting the step above; and bounced down the remaining two steps. As claimant put it, it was "a hard hit"; she had immediate tingling down the middle of her spine and bad pain down the left leg; and her "pain was a lot different." She described it as a stabbing pain and also said she had numbness and tingling down her left leg. Claimant further stated that after reporting the accident to her supervisor, he took her to the clinic used by the self-insured where she was seen by Dr. H, who diagnosed lumbar trauma; that Dr. H referred her to Dr. B, who referred her to Dr. Y; that Dr. Y recommended spinal surgery at the L4-5 level; that on April 22, 1999, before the date of her scheduled appointment with a second opinion doctor, she went to a hospital emergency room with excruciating pain from low back and left leg muscle spasms; that she was seen there by Dr. P, who felt she needed surgery; and that Dr. P performed surgery (May 12, 1999) at the L4-5 level which was paid for by Medicaid. Claimant also testified that she has been off work since the accident but that she expects to be released for light duty, not including bus driving, at her next visit to the doctor.

Dr. B reported on February 23, 1999, that claimant had undergone a prior laminectomy and discectomy at the L4-5 level on March 31, 1997, and apparently underwent the same procedure again on August 19, 1997, for recurrent disc herniation; that claimant=s left lower extremity symptoms had resolved after the previous surgery but returned after the fall on _____; and that claimant "may have reinjured the same disk level." Dr. B, who ordered

an MRI, reported on April 6, 1999, that the MRI scan "showed a recurrent L4-5 left-sided disk herniation, impinging upon the L5 nerve root" and that claimant continues to have back pain with pain radiating down her left lower extremity.

The March 30, 1999, MRI report ordered by Dr. B states that there is an "8- to - 9 mm. left posterolateral extruded disc fragment" which causes "marked compression of the thecal sac and left L5 nerve root." Also in evidence (Claimant's Exhibit No. 10 and Self-Insured's Exhibit No. 2) is an August 14, 1997, MRI report stating that, at L4-5, there is evidence of prior surgery on the left and a fairly large recurrent disc herniation at L4-5 on the left with a disc fragment compressing the emerging left L5 nerve root sleeve and adjacent thecal sac. Also in evidence (Self-Insured's Exhibit No. 2) is a November 14, 1997, MRI report which states that, in comparison with the August 14, 1997, MRI, the latter MRI showed a recurrent left posterolateral disc herniation at L4-5 with a surrounding epidural scar whereas the November 11th study showed a nonenhancing left posterolateral epidural structure protruding beyond the confines of the L4-5 disc which is smaller than on the prior study and that the changes do not necessarily implicate the presence of a recurrent disc herniation. A November 14, 1997, note of Dr. W, who was apparently the treating physician at that time, states that the MRI findings of that date are "not clearly recurrent disc herniation" but may represent postoperative swelling of the disc and that the majority of the mass against the thecal sac and nerve root is composed of enhancing material consistent with scar. As noted above, Dr. B reported that claimant underwent another operation at the L4-5 level on August 19, 1997, five days after the August 14, 1997, MRI was reported. The hearing officer's discussion of the evidence indicates some confusion as to whether there was an MRI report dated August 14, 1997, or whether the MRI report was actually dated November 14, 1997.

Dr. Y's record of April 9, 1999, stated that claimant has a "probable recurrent disc herniation left L4-5"; that there is "a significant mass on the left L5 nerve root"; that her symptoms are secondary to a fall on _____; and that she requires nerve root decompression at the left L4-5 level.

Dr. P's operative report of May 11, 1999, reflects the diagnosis as "recurrent disc L4-5 degenerative disc disease and instability of L4 and L5 with severe radiculopathy in both lower extremities" and the procedure as a total discectomy of L4 and L5 with a lumbar interbody fusion with cages. Dr. P's report of August 9, 1999, states that it is clear in his history and that of Dr. Y that claimant was able to return to work following her spinal operations and was apparently doing very well; that on _____, claimant slipped and fell on her buttocks; and from that day on, claimant began having difficulty with the lower extremities. Dr. P concluded that the _____, injury "is a new injury aggravating a previous problem that this patient has at the level of L4-L5."

The September 29, 1999, report to the self-insured from Dr. A states his opinion that claimant's present condition/findings do not represent "a substantial change" from her

preexisting condition/findings, noting that the March 30, 1999, MRI findings and the August 14, 1997, MRI findings are identical. However, Dr. A does not mention the November 14, 1997, MRI report with findings not necessarily implicating a recurrent disc herniation at L4-5. Dr. A further stated that claimant's original problem was "not solved" by the first or second operations; that he does not think her fall of _____, "made any structural changes to qualify her as a physical aggravation"; and that "[a]ll we have is an exacerbation of symptoms, but that is not in itself a structural change."

Also in evidence is the undated report of Dr. M, who reviewed the medical records for the self-insured. He commented that the November 14, 1997, MRI report was not conclusive evidence that there was not then a recurrent disc problem. He states that a comparison of the November 14, 1997, MRI study with the March 30, 1999, study does not appear to show any substantial changes and that claimant "once again had a large extradural defect at L4-L5." Dr. M opined that claimant's current problems are clearly related to her previous history of back pain and subsequent surgeries and appear to be a natural progression of her preexisting disease process. Noting the absence of evidence of bruising or swelling following the _____, fall, Dr. M stated that there was no evidence to suggest that claimant sustained any trauma on that date.

The self-insured challenges factual findings that claimant's fall on _____, caused an aggravation, enhancement, and acceleration of her previous condition and that due to the _____, injury, claimant has been unable to obtain and retain employment at her preinjury wage from February 9, 1999, through the date of the CCH.

Claimant had the burden to prove that she sustained the claimed injury and that she had disability as that term is defined in Section 401.011(16). Texas Workers= Compensation Commission Appeal No. 94248, decided April 12, 1994. The Appeals Panel has stated that in workers=compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers= Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence (St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244

S.W.2d 660 (1951). The hearing officer could weigh the opinions of Dr. Y and Dr. P, as well as the opinions of Dr. A and Dr. M; claimant's testimony; the other medical evidence, including the differences in the MRI reports of November 14, 1997, and March 30, 1999, as well as claimant's continued treatment for low back and radicular pain; and conclude that claimant did indeed aggravate her preexisting condition at the L4-5 level when she slipped and fell on the bus steps on _____.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge