APPEAL NO. 000744

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 10, 2000. With regard to the only issue before him, the hearing officer determined that the "alleged injury" of _____, was not a producing cause of appellant's (claimant) bulging disc or aggravation of her degenerative disc disease. (Respondent (carrier) had accepted liability for a back strain.) The claimant appealed, contending that she had had no prior back complaints; that she had tried to self-medicate herself; and that her degenerative disc disease and bulging disc was asymptomatic until the compensable injury. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The carrier responded, urging affirmance.

DECISION

Affirmed, as reformed.

Claimant was employed as a registered nurse (RN) case manager for (employer). Claimant testified that she had "a pretty good knowledge of back injury symptoms." The employer was moving offices and claimant was assisting in the move when, on _____, she "was lifting a box down and . . . felt like a swelling in the back of my back and it just really hurt." Claimant testified that she "couldn't get up" and "couldn't move." Nonetheless, claimant continued to work, after reporting the injury, and did not seek medical attention for her back at the time. Claimant explained that since she was an RN, and believed that she could treat herself. Claimant testified "within the same time frame" she was pulling on some hanging "file rods" when one hit her foot, causing her to begin limping. Claimant sought treatment with Dr. T, her family doctor, on December 4, 1998, for her right "little toe & 4th toe." Although claimant testified that she told Dr. T about her back, no mention of back complaints are in the progress note. Claimant testified that Dr. T gave her "pain medication and it resolved the pain in the back, and it resolved the pain in the foot."

Claimant saw Dr. T again on December 9, 1998, apparently about the toes, and there was a problem with claimant's aversion to needles. Claimant saw Dr. T on December 14, 1998, for pink eye and had x-rays of the "right 5th toe" which were negative. Claimant saw Dr. T again on January 5 and February 24, 1999, regarding her right foot. No mention is made of back complaints in any of these office progress notes. Claimant continued to work full time for the employer until January 4, 1999, when she began working for another employer. It is undisputed that claimant has not lost any time from work.

In an office progress note dated March 23, 1999, Dr. T, for the first time mentions right knee and leg complaints. Claimant was referred to an orthopedic specialist and claimant chose Dr. B. In a report dated April 21, 1999, Dr. B recites the box-lifting incident of _____; that claimant "last worked 1-4-99" (for the employer); Dr. T=s treatment; and complaints of urinary incontinence. Dr. B ordered an MRI which was performed on April 30,

1999, and which showed "[d]egenerative disc disease at L3-L4, L4-L5 and most severe at L5-S1" and a "2 mm circumferential disc bulge . . . at L5-S1." Dr. B certified claimant at maximum medical improvement (MMI) on May 12, 1999, with a seven percent impairment rating (IR). In a progress note dated June 21, 1999, Dr. B noted claimant=s increase in back pain and urinary tract incontinence, a dispute by carrier of Dr. B=s IR and commented:

> According to [claimant] she never had the problem with back or leg pain prior to her lifting incident at work, therefore I feel that this is an underlying condition that was basically asymptomatic prior to her injury and has been dramatically exacerbated by her injury at work.

Claimant was examined by Dr. M, carrier=s required medical examination doctor. Claimant testified that Dr. M did not actually examine her but was unable to explain how Dr. M arrived at some test findings. In a report dated September 20, 1999, Dr. M recited claimant=s history, that claimant "has continued to work up until the present time," review of the MRI, the results of his examination and concluded:

> From [claimant=s] history and her inconsistent findings with considerable symptom magnification, it is my opinion that she has not had any significant back injury. By now, I would feel that she should have fully recovered from whatever low back strain she may have had.
>
> * * * *
>
> [Claimant] has continued to work full time at a sitting job, which would be extremely difficult for an individual with severe back injury or pain.
>
> Therefore, I would feel that there has been no evidence of any significant permanent injury. She should have fully recovered from whatever mild strain she sustained on _____.
>
> Likewise, her symptoms at this time far exceed what one would expect from a back injury, and they are inconsistent. I would feel that this represents significant symptom magnification.

Dr. M certified claimant at MMI on September 13, 1999, with a zero percent IR. (MMI and IR are not at issue.)

> The hearing officer, in the Statement of the Evidence, commented:
>
> Claimant has not established by a preponderance of the creditable [sic, credible] evidence that she sustained a back injury at work on _____. Carrier has not disputed Claimant had a strain. Claimant did not mention a

> back injury to [Dr. T]. Claimant changed jobs and is working full time. There is no compelling medical evidence that establishes a casual [sic, causal] relationship between Claimant=s job on _____, and her current back condition.

On appeal, claimant reiterates her position from the CCH, that she had complained to Dr. T about her back, that she did not realize how serious her back injury was until she stopped taking pain medication for her foot, that she had never had back problems prior to _____, and that Dr. B had stated that her condition had been asymptomatic until her back injury had been "dramatically exacerbated by her injury at work."

The claimant in a workers= compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). 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 medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association 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. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). A fact finder is not bound by medical evidence when that evidence is manifestly dependent upon the credibility of the information given by the claimant. Rowland v. Standard Fire Insurance Company, 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). 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 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).

In this case, the hearing officer could consider the four months during which claimant saw Dr. T for a number of complaints without mention by Dr. T of any back complaints, that claimant said she had good knowledge of back symptoms and that her back symptoms had "resolved" after medication from Dr. T. We also note that Dr. B relies heavily on claimant=s (incorrect) history that she has not worked since January 4, 1999, and that Dr. T had treated claimant=s back, which is certainly not evident from the medical records. We might also mention that while sole cause was mentioned and the carrier did an extensive brief on sole cause as an inferential rebuttal, the hearing officer=s decision is premised on the fact that there was no causal connection between claimant=s job (injury) on _____, and her current degenerative disc disease which is an ordinary disease of life. Those findings are supported by the evidence.

The hearing officer, in Finding of Fact No. 4, found "Claimant did not injure her back at work on _____." Whether claimant sustained a compensable injury was not an issue before the hearing officer and, in fact, as previously noted, the carrier had accepted liability for a resolved back strain. (The issue before the hearing officer was the extent of injury.) By making a finding that claimant did not injure her back, the hearing officer exceeded the scope of the issue before him, and that finding was contrary to carrier's acceptance of liability for a back strain. Consequently, we reform the hearing officer's decision by striking Finding of Fact No. 4 in its entirety.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer=s determinations unless they are 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, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed, as reformed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge