APPEAL NO. 000903

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 27, 2000. The issues reported as unresolved at the benefit review conference (BRC) are: does the compensable injury sustained on _____, extend to disc herniations at L4-5 and L5-S1 and did the respondent (claimant) have disability. The appellant (carrier) requested that three issues be added. The hearing officer stated the requested issues concerning sole cause were subsumed in the issue of whether the compensable injury sustained on _____, extends to disc herniations at L4-5 and L5-S1 and need not be added. He did not find good cause for adding the issue of whether the carrier is relieved of liability because the claimant failed to file a claim not later than one year after the date of injury. The hearing officer determined that the compensable injury sustained on _____, extends to disc herniations at L4-5 and L5-S1; that the carrier failed to meet its burden of proof and did not establish that the intervening incidents which occurred on _____, and _____, are the sole cause of claimant's current condition; and that the claimant had disability from November 3 until December 30, 1998, and from September 3, 1999, and continuing to the date of the CCH. The carrier appealed, urged that the hearing officer erred in not adding the issue of whether the claimant timely filed a claim, contended that the determinations of the hearing officer are not supported by sufficient evidence, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor. In the alternative, the carrier requested that the Appeals Panel reverse the decision of the hearing officer and remand for a new CCH. A response from the claimant has not been received.

DECISION

We affirm.

We first address the hearing officer's not adding the issue of whether the carrier is relieved of liability because the claimant failed to file a claim not later than one year after the date of the injury. The BRC was held on November 10, 1999; the BRC report is dated November 10, 1999; and was distributed with a letter dated November 18, 1999, stating that a CCH was scheduled for January 18, 2000. On November 22, 1999, the carrier filed a response to the BRC report. The response requested that issues concerning injuries in May and August 1999 be specifically stated. In addition, the response contains:

> Pursuant to TWCC [Texas Workers' Compensation Commission (Commission)] Rule 142.7(b)(2) [Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(b)(2)] the Carrier raises the issue of the Employee's failure to timely file a claim for compensation within one year as required by Section 409.003 of the Texas Labor Code. The Carrier asserts that the Employee does not have good cause for failing to file a claim within one year from the date of injury and, therefore, the Carrier is relieved of liability pursuant to Texas Labor Code Section 409.004.

The carrier was granted a continuance to take the deposition of Dr. M, who had become the claimant's treating doctor. The CCH was rescheduled for Monday, March 27, 1999. On Thursday, March 23, 1999, the carrier filed an objection to the Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated September 19, 1999, and stamped as received by the Commission on September 23, 1999. At the CCH, the carrier made a motion that an issue of whether it is relieved of liability because the claimant failed timely to file a claim be added. The attorney representing the carrier stated that at the BRC the carrier asked the benefit review officer to see if the claimant had timely filed a claim and asked that the issue be added. The record does not contain other information about what occurred at the BRC. At the CCH, both attorneys stated information that they considered favorable to their positions on whether the carrier is relieved of liability. The hearing officer stated that he did not find good cause to add the issue and denied the motion. The hearing officer did not abuse his discretion in not finding good cause to add the issue.

Even if it was to be decided that the hearing officer erred in not adding the issue and the carrier's position that changing the handwritten entries of the date of injury in the TWCC-41 resulted in it not being a TWCC-41 filed for the _____, injury was to be accepted; it would not necessarily follow that the error was reversible error. Section 409.003 provides that a claimant shall file a claim for compensation for an injury with the Commission not later than one year after the date of the injury. Section 409.004 provides:

> Failure to file a claim for compensation with the commission as required under Section 409.003 relieves the employer and the employer's insurance carrier of liability under this subtitle unless:
>
> (1) good cause exists for failure to file a claim in a timely manner; or
>
> (2) the employer or the employer's insurance carrier does not contest the claim.

The record does not indicate that the carrier contested the claim, and the attorney representing the carrier said that the carrier accepted a sprain/strain of the claimant's low back. In the absence of a finding of evidence that could not reasonably have been discovered earlier, a carrier that does not contest compensability of a claim on or before the 60th day after receiving written notice of a claim waives the right to contest compensability. Section 409.021(c), (d).

We next address the factual determinations of the hearing officer concerning the issues before him. The claimant contended that on _____, he sustained a low back injury that included disc injuries; that he continued to have low back pain in the same place and to receive treatment for that injury; that that injury has not been resolved; that he had lifting incidents on _____, and _____, after which he experienced more severe pain in the same location; that he did not sustain new injuries on those dates; and that the

herniated discs at L4-5 and L5-S1 revealed in a report of an MRI performed on June 17, 1999, resulted from the _____, injury. The carrier contended that the claimant's _____, injury was only a sprain or a strain of the low back; that the claimant's herniated discs are a result of the lifting incident of _____; and that any time lost from work after _____, was the result of that lifting incident or the lifting incident of _____.

The claimant testified that on _____, he requested help unloading a floor cleaning machine that weighed several hundred pounds; that he did not get help; that he lowered the machine from the vehicle it was in; that he felt pain in his lower back; that the pain got worse; that he reported the injury; that he was sent to Dr. W, a chiropractor, by the school district that employed him; that Dr. W at first treated him five days a week and later treated him three days a week; that Dr. W placed him on light duty; and that the employer told him that light duty was not available. The claimant said that he continued to have back pain, but wanted to return to work and asked Dr. W to release him to return to work; that at the end of December 1998, Dr. W released him to return to work effective January 4, 1999; that two days before that day, he was severely burned and was not able to return to work; that his back continued to hurt even though he was in bed for the burn; and that the school district terminated him in January 1999 because they could no longer do without a person in the position he had. He testified that he continued to have back pain; that he saw Dr. W until March 29, 1999; that on March 31, 1999, he accepted employment with another employer as a carpenter; that he changed treating doctors to Dr. M; and that on _____, he unloaded lumber and the next day had sharp pain in the same area of the low back that he has had pain in since the _____ injury. The claimant stated that Dr. W had an x-ray taken but did not have an MRI performed; that Dr. M had an MRI performed in June 1999; that the MRI showed ruptured discs; and that Dr. M related the ruptured discs to the _____ injury. He said that he also had pain after lifting cabinets on _____; that the current employer referred him to Dr. D; that Dr. D related his back pain to the _____ injury; and that his boss told him that he could no longer work because of the ruptured discs. The claimant testified that he has been referred to a surgeon for a consultation, that the carrier has not approved his seeing that doctor, and that he has not worked since September 3, 1999, because the current employer will not let him work for them and because of the back pain.

In an Initial Medical Report (TWCC-61) dated November 4, 1998, Dr. W stated that the claimant had decreased range of motion in all lumbar quadrants; palpable tenderness over L3, 4, and 5 spinus processes; decreased interosseous spacing at L5-S1 disc space; and disc wedging at L5. Another document from Dr. W dated the same day indicates that the claimant was being treated for a low back injury that involved the fifth lumbar disc and was causing pain in the sciatic nerve, going into the left leg. In a report dated June 25, 1999, Dr. M stated that an MRI suggests a right paramedian disc herniation at L4-5; disc material filling right lateral recess displacing the right L5 nerve root; and moderate-sized posterocentral bulge at L5-S1, contacting both S1 nerve roots and suggested that the claimant obtain a consultation with an orthopedic surgeon who specializes in spinal surgery. In a report dated July 23, 1999, Dr. M said that he saw the claimant on May 12,

1999, and opined that the claimant's symptoms he experienced while working for the current employer are referable to the _____ injury. On February 28, 2000, Dr. M provided sworn answers to written questions asked by the carrier and stated that in his report dated July 23, 1999, he stated that the claimant had received a letter of denial from the carrier; that the claimant had simply related that he was having pain while lifting; that the statement was not intended to indicate that the claimant had a new or different problem as a result of the new job, but simply that this represented another instance of pain which had been persistent since the time of his original injury; and that his, Dr. M's, intent in relating the fact that the claimant was having pain at work was to simply indicate that the claimant was having pain with activities of daily living including those with his current job and that these represented a common, continuing pattern of discomfort. A letter from Dr. D dated September 2, 1999, states that he saw no evidence of a new injury related to claimant's present employer; that he feels that there had been incomplete treatment for herniated discs at two levels; that the treating physician had been thwarted by the carrier in completing the treatment; and that complete treatment is needed. At the request of the carrier, Dr. H reviewed the records sent to him. He did not examine the claimant. In a letter dated December 2, 1999, he stated that it was his very strong opinion that the injury sustained on _____, was a sprain of the lower back and at most pseudoradiculopathy with left leg symptoms; that there is ample documentation that the claimant's current symptom complex is a result of a new and distinct injury and has nothing to do whatsoever with the probably-resolved injury sustained on _____; and that the new and distinct injury is the sole producer of the claimant's current symptom complex.

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, 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). The hearing officer properly placed the burden of proof. His determinations are supported by sufficient evidence and are not 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge