

APPEAL NO. 000994

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 4, 2000. With regard to the only issue before her, the hearing officer determined that the compensable right ankle injury sustained by the appellant (claimant) on _____, does not extend to include an injury to the lumbar spine. Claimant appealed, contending that her testimony and the medical records showed how her back injury was related to her ankle injury and that her research showed that "there 'can be' a delayed reaction to pain when a disc is damaged." Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

Claimant was apparently employed by a department store (employer) and she testified how on _____, she caught her toe on the edge of a carpet, causing her to trip and "twist" before catching herself on the edge of a counter. Claimant did not fall to the floor and had immediate pain in her right leg and ankle. Whether claimant complained of back pain to the doctors at the time is in dispute. The parties stipulated that claimant sustained a compensable right ankle injury on _____.

Claimant was initially seen at (clinic) on August 3, 1998, and an Initial Medical Report (TWCC-61) of that date noted a "twisted ankle at work," ankle strain, and soft tissue trauma. Claimant was apparently taken off work for two days. A Specific and Subsequent Medical Report (TWCC-64), dated August 6, 1998, noted the sprained ankle and numbness in claimant's toes. Claimant was referred to Dr. S, who has become claimant's treating doctor. In a report dated August 7, 1998, Dr. S references only a right foot and ankle injury. An EMG of the right lower extremity was discussed. Claimant was prescribed Ibuprofen and then "Arthrotec." A follow-up report of August 20, 1998, continued to reference only the right ankle and right foot numbness. Claimant testified that when she was working in a fitting room on _____, she "collapsed." In a report dated August 31, 1998, Dr. S notes that "[y]esterday, she noted some discomfort in the sciatic region" and that claimant's right foot and ankle are "somewhat unstable." Claimant contends that the Ibuprofen and pain medication she was taking for her ankle injury masked her back pain. Claimant was referred for therapy for her right ankle and in a report dated September 8, 1998, only claimant's ankle injury is referenced. A therapy note dated October 8, 1998, said that carrier suggested that claimant see Dr. M "for a second opinion" and that claimant "also has a history of some back pain" but that claimant was "focused mostly on the foot." A report dated October 23, 1998, from Dr. M commented that "she has had a history of some back pain" but the report was almost entirely focused on the right ankle and foot. A report dated November 12, 1998, from Dr. S notes claimant "also has back pain" and recommended an "MRI of the back and then follow-up with an EMG as recommended by [Dr. M]." In a chart note dated November 20, 1998, Dr. S commented:

They [carrier] stated that they would approve the follow up EMG, however, the back was not injured at the time of the work related injury and it started hurting subsequent to that and they do not feel that is a work related injury and at the time she did present, she did not tell me about back pain. She explained that she only had ankle pain. I will explain this to the patient, but they will go ahead and follow up with the EMG.

In a report dated December 7, 1998, Dr. S stated:

I asked her about the back again today. It turns out it did start hurting after she was already off work. She did not hurt her back at the time of the accident.

Dr. M saw claimant again in January 1999 and in a report dated May 18, 1999, commented that "additionally she is having some pain in the back" and continued to focus on the foot. The therapist, in a note dated May 19, 1999, commented that claimant was making no progress and "[h]er low back pain does not seem to be related to her feet."

Claimant had a lumbar MRI on October 22, 1999 (over a year after her compensable injury), which had an impression of a "right-sided disc protrusion at L5/S1 impinging upon the right S1 nerve root" and "mild disc dessication diffusely in the lumbar spine." Therapy notes of November 5, 1999, reference "relatively constant pain" in the lower right back and that claimant relates her symptoms to the _____, "fall." Other therapy notes show no progress. Dr. T did a record review for carrier and in a report dated December 15, 1999, summarized the records which first showed a brief mention of back pain by Dr. S "on 10/23/98" and concluded:

It would be my medical professional opinion that the patient's complaint of low back condition and very likely her disk problem at L5-S1 is not related to any compensable event which occurred on or about _____.

Dr. S, in a "To Whom It May Concern" report dated December 14, 1999, commented that he had first seen claimant on August 7, 1998, and:

At that time, she was complaining of pain radiating down the right lower extremity. She has continued to have pain in the back and radiating down the right lower extremity. An MRI scan has been obtained which shows a disc protrusion at the L5-S1 level, impinging upon the right S1 nerve.

It does appear that the mechanism of injury is consistent with the disc protrusion at the L5-S1 level. Tripping and twisting the lower back without actually sustaining a fall, could produce forces great enough to produce a disc protrusion at the L5-S1 level.

In another "To Whom It May Concern" note dated December 27, 1999, Dr. S again stated:

It is felt that she twisted her lower back and produced the disc herniation that is causing her right lower extremity radiculopathy.

The most common mechanism of injuring a disc in the lumbar spine is a twisting injury, such as the one [claimant] describes occurring when she injured her right foot. It is a common misconception that disc herniations in the lumbar spine occur most commonly with heavy lifting.

Dr. M, in a report dated January 27, 2000, stated:

I do, though, show documentation each time I saw her, in October of 1998, January of 1999 and even in May of 1999, that she was having back pain at each of those times, so therefore I feel that her problem did probably start at the time of the original accident, i.e., I think she may have herniated her disk at the time of the original injury.

The hearing officer, in her Statement of the Evidence, after reviewing the medical evidence, commented:

Although there is intermittent documentation of low back pain throughout the medical records, the letters provided by [Dr. M] and [Dr. S] 16-18 months post-injury which relate the back condition to the twisting incident of _____ appear to be inconsistent with the records made between August 7, 1998 and December 1999. In fact, several of [Dr. S's] notations indicate the back was not related to the _____ compensable injury. Based on the credible evidence and testimony presented, the Claimant failed to meet her burden of proving, by a preponderance of the evidence, that her lumbar spine condition is causally related or a naturally flowing effect of her compensable ankle injury of _____.

Claimant, in her appeal, explains in her testimony that she did not just trip on _____, but also twisted; that pain medications masked her back injury; and that her research shows that "there 'can be' a delayed reaction to pain when a disc is damaged." She also explained why there is "confusion" in Dr. S's reports. We note that because something "can be" possible does not constitute evidence that it, in fact, did occur. More importantly, all of the evidence was presented to the hearing officer, including the fact that the pain medication masked the back injury, and the hearing officer obviously did not find it persuasive. We have frequently noted that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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).

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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge