

## APPEAL NO. 001133

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 19, 2000. With respect to the single issue before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury to his cervical spine in addition to his lumbar spine on \_\_\_\_\_. In his appeal, the claimant argues that that determination is against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

### DECISION

Affirmed.

The claimant testified that on \_\_\_\_\_, he was working in a temporary position with (employer) remodeling the store. He stated that he was standing on a two-step stool, moving shelves and putting the stock back on the shelves. He testified that as he was getting down from the stool, he tripped over a coworker who had squatted down next to the stool, causing him to fall backwards and hit his neck and back on the floor. The claimant stated that he reported his injury to Mr. B, his supervisor, who took him to the clinic for treatment with Dr. B.

Dr. B's records reflect a history of the claimant's having "tripped at work & hurt back & tail bone." Dr. B diagnosed a lumbar strain. Dr. B's records do not reflect complaints of cervical pain or contain a cervical diagnosis. On March 17, 1999, Dr. B certified that the claimant reached maximum medical improvement (MMI) on March 4, 1999, with an impairment rating of zero percent. In an April 19, 1999, "To Whom it May Concern" letter, Dr. B stated that the claimant had a "minimal lumbar strain" and expressed concerns of "malingering" and "secondary gain" on the part of the claimant.

The claimant changed treating doctors from Dr. B to Dr. P because he moved. In a March 26, 1999, Initial Medical Report (TWCC-61), Dr. P diagnosed lumbar and cervical herniated discs and requested a lumbar and cervical MRI. Dr. P noted that his examination of the claimant's cervical spine revealed pain, limitation of motion, and "spastic muscles around the C4 area." The cervical MRI was denied and thereafter, Dr. P changed his cervical diagnosis from herniation to cervicalgia. The lumbar MRI demonstrated herniation at L4-5 and Dr. P recommended surgery. Dr. T concurred in the proposed surgery and on July 21, 1999, Dr. P performed a laminectomy and fusion with instrumentation at L4-5. In a June 4, 1999, "To Whom it May Concern" letter, Dr. P stated that the claimant presented with cervical and lumbar symptoms and that he had not been able to treat the cervical spine because the carrier had denied compensability. In addition, Dr. P stated "[i]n my opinion, it is a medical probability that the patient did sustain a cervical injury on \_\_\_\_\_." In an April 12, 2000, letter, Dr. P stated that his diagnosis of the claimant's cervical condition is "cervical spine syndrome" and opined that "the cervical spine injury is a direct result of the work related injury that the patient sustained on \_\_\_\_\_."

On May 19, 1999, the claimant was examined by Dr. K, who was selected by the Texas Workers' Compensation Commission (Commission) to serve as the designated doctor. In a Report of Medical Evaluation (TWCC-69) of the same date, Dr. K certified that the claimant had not yet reached MMI. The narrative report accompanying Dr. K's TWCC-69 only reflects complaints of low back pain. In addition, Dr. K stated that he was "very concerned about the patient's malingering with extremely poor effort on today's exam being appreciated."

The claimant has the burden to prove by a preponderance of the evidence that he sustained a compensable injury and the nature and extent of his injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App. -Texarkana 1961, no writ). The question of whether the claimant's compensable injury extends to his cervical spine presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. Generally, the existence of an injury can be established by the claimant's testimony alone, if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the testimony of the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos, supra; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant's compensable injury did not extend to and include a cervical spine injury. A review of the hearing officer's decision demonstrates that he was not persuaded that the evidence presented by the claimant was sufficient to carry his burden of proving that he injured his cervical spine in addition to his lumbar spine in the incident at work on \_\_\_\_\_. The hearing officer could properly consider the delayed manifestation of neck pain and the expressed concerns of Dr. B and Dr. K about malingering and secondary gain in resolving the conflicts and inconsistencies in the evidence and determining that the compensable injury does not extend to a cervical injury. The hearing officer was acting within his province as the fact finder in so finding. Our review of the record does not reveal that the hearing officer's extent-of-injury determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge