

APPEAL NO. 001274

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 May 3, 2000. With regard to the issues before him, the hearing officer determined that the appellant (claimant) had not sustained a new injury to his right hip on _____, and that the claimant did not have disability.

The claimant appealed, contending that he had aggravated a preexisting condition, that he has had disability due to the aggravated condition, and that the hearing officer's decision is contrary to the great weight of the evidence. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

It is not disputed that the claimant sustained a right hip injury in either December 1997 or January 1998. The claimant's doctor for that injury was Dr. B. The claimant at that time was diagnosed as having "Grade 4 aseptic necrosis, right hip" by Dr. B in a report dated January 22, 1998, and told he would eventually need surgery. The claimant was eventually returned to light duty. The claimant filed a workers' compensation claim for that injury where a hearing officer found against him and the matter was appealed resulting in Texas Workers' Compensation Commission Appeal No. 981363, decided July 27, 1998 (Unpublished).

The claimant testified that he was employed as a "plumber/estimator" apparently working for (employer) which assigned him to (company). The claimant testified that on _____, he had gone out to a site to assist in the laying of some PVC pipe. The claimant testified that while two coworkers were at lunch he was working in an 18- to 20-inch deep trench connecting the PVC pipe and as he stepped into the trench with one leg he heard and/or felt a snap in his right hip which caused him to fall to his knees. The claimant was questioned in detail about the mechanics of the incident; one of the coworkers testified and both coworkers gave written statements which had been given and written in Spanish and then translated into English. How much work who did is in dispute and one of the statements refers to the claimant as "faking a limp." There were other inconsistencies between recorded statements and the testimony.

The claimant testified that he had discontinued seeing Dr. B because his 1997/1998 claim had been denied and apparently Dr. B was not getting paid and that Dr. B refused to see him anymore. The claimant sought treatment with Dr. H for the _____, injury and in an Initial Medical Report (TWCC-61) of a December 6, 1999, visit, Dr. H diagnosed "aggrav. Severe DJD [degenerative joint disease], right hip; . . . aggrav. stage - IV, avascular NE [necrosis]." Dr. H recommended a right hip replacement "because of severe

changes and he has had severe aggravation." Dr. H took the claimant off work. That diagnosis and recommended treatment is repeated in a Specific and Subsequent Medical Report (TWCC-64) of a March 20, 2000, visit. In a narrative report dated March 22, 2000, Dr. H referenced that Dr. B had diagnosed the claimant as having "avascular necrosis" in January 1998, that the claimant had returned to work using only occasional over-the-counter medication, and the history of the _____, incident. Dr. H commented:

As a result of his exacerbation of his condition from his work-related injury, the patient has had an acceleration or worsening of his underlying condition. He is having to take narcotic medication to control his pain. He is having to use a cane for support and he is not able to return to work.

I do feel that as a result of his work-related accident that he accelerated and worsened his preexisting condition, and this enhancement is the reason that he is now in need of a total hip replacement, which we are trying to get approved as soon as possible.

The hearing officer found:

FINDINGS OF FACT:

4. Claimant had a preexisting grade 4 aseptic necrosis of the hip due to ideopathic avascular necrosis.
5. Claimant did not prove by a preponderance of the evidence that he performed any duties on _____, which could have aggravated his preexisting condition.
6. Claimant did not prove by a preponderance of the evidence that he suffered a new injury.
7. Claimant has been unable to obtain or [sic] retain employment at wages equivalent to his preinjury average weekly wage as a result of his hip problems.
8. Claimant's hip problems are not a compensable injury.

The claimant contends that he did aggravate his hip condition "while stepping into a ditch to connect PVC pipes" and that he had "continued to work without any problems" (a statement that is disputed) after his 1998 injury and that now "he has had to use a cane in order to ambulate."

In Appeal No. 981363, *supra*, the claimant was also claiming an aggravation of a preexisting condition in lifting a water heater. In that case, we wrote:

We stated in Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, that "an aggravation of a pre-existing [sic] condition is an injury in its own right." We also stated in that decision that merely asserting an aggravation does not carry the claimant's burden of proof and that what must be proven is some enhancement, acceleration, or worsening of the underlying condition from the injury. The fact that symptoms occur during a period of employment does not mandate a conclusion that the employment was the cause of a claimant's ailments [sic]. Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989 no writ). In Texas Workers' Compensation Commission Appeal No. 970349, decided April 14, 1997 (unpublished), we affirmed a hearing officer's decision that the employee's injury included a compensable aggravation of his bilateral avascular necrosis; however, in that case the medical evidence showed that the employee had avascular necrosis of the femoral heads and that the heavy lifting he did at work caused the femoral heads to collapse, thus accelerating or worsening the claimant's preexisting condition.

In the present case, although Dr. H references Dr. B's diagnosis, there are no specific reports which show what, if any, change of condition occurred between January 1998 and December 1999 and there is only Dr. H's comments, based on the history the claimant gave him, that the claimant's present condition is a "work related injury."

The circumstances of stepping in the trench and the status of the claimant's hip at that time were in dispute. Further, the Appeals Panel has held that whether there has been an aggravation of a preexisting condition is generally a question of fact. Appeal No. 981363, *supra*. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact the hearing officer resolves conflicts in the evidence. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

In that we are affirming the hearing officer's decision that the claimant had not sustained a compensable injury, the claimant cannot, by definition in Section 401.011(16), have disability.

Upon review of the record submitted, we find no reversible error. 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:

Philip F. O'Neill
Appeals Judge

Dorian E. Ramirez
Appeals Judge