APPEAL NO. 001490
FILED JULY 25, 2000

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 9, 2000, in _____, Texas, with _____ presiding as hearing officer. The issues were:

1. Did the Claimant's [respondent] compensable injury on _____, include an injury to the thoracic spine?

2. Did the Carrier [appellant] contest the compensability of the injury to the thoracic spine within sixty (60) days of receiving notice of the claim?

With regard to those issues, the hearing officer determined that the claimant's compensable injury of _____, included an injury to the thoracic spine; and applied Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3) in determining that while the carrier may not have timely contested compensability of the thoracic condition, it was not required to do so pursuant to Rule 124.3(c).

The carrier appeals the hearing officer's decision on the extent of injury, citing medical evidence that supported its position and contends that the hearing officer "made several errors in her Statement of Evidence," attacking the claimant's doctors' credibility. Inexplicably, the carrier also appears to appeal the hearing officer's decision on timely contest of compensability, urging that we should apply Rule 124.3(c), which is what the hearing officer did. Consequently, because the carrier was not aggrieved by the determinations, we will disregard that portion of the carrier's request for review that urges application of Rule 124.3(c). The carrier urges that we reverse the hearing officer's decision on extent of injury.

The claimant filed a timely response, urging affirmance on the extent-of-injury issue, citing evidence from her doctors. The claimant also urges that Rule 124.3(c) not be applied because the effective date of the rule was after the CCH was initially set. The claimant's response is timely as a response but is not timely as an appeal of the Rule 124.3(c) issue as the response was mailed after Wednesday, June 21, 2000, the last day for the timely filing of an appeal.

Consequently, we hold that the hearing officer's decision regarding the contest-of-compensability issues applying Rule 124.3(c) has not been timely appealed and has become final pursuant to Section 410.169. We will only address the extent-of-injury issue.

DECISION

Affirmed.

The claimant testified and it appears relatively undisputed that she was involved in nonwork-related motor vehicle accidents (MVA) in _____ and _____ and sustained injuries to her thoracic spine in those accidents. The claimant had a laminectomy/diskectomy at T8 and T9 in August 1996 and left brachial plexus surgery in April 1997. A thoracic MRI performed on April 7, 1998, showed:

> Postoperative changes are seen at the T8-9 and T9-10 levels on the right with bony changes seen within the T8 and T9 vertebral bodies and probable resection of eighth and ninth ribs. There is a mild amount of soft tissue within the right neural foramina which house the right T8 and T9 nerve roots. This is thought to represent mild postoperative scarring and may contact or surround the exiting nerve roots.
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> * * * *
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> . . . . there is no evidence of a recurrent disk herniation.

The injury at issue in this case occurred on _____. The claimant was employed by (employer) as a nursing supervisor and testified how she tripped over a box, fell hitting her right side on a desk and twisting her back. The carrier accepted liability for the injury which includes a low back injury not at issue. The crux of the case is an extent-of-injury question of whether the _____, fall caused a new injury or an aggravation of the preexisting thoracic injury. (Dr. F) was the claimant's initial treating doctor and there is extensive medical evidence in the record. Initial treatment was for the lumbar injury not in dispute. (Dr. M), the claimant's family doctor, in handwritten progress notes of July 17, 1998, notes "lots of problems w/thoracic spine." A note of July 28, 1998, requests "eval poss re-injury T-spine." The claimant was seen by (Dr. S) who, in a report dated September 15, 1998, recited thoracic complaints and had an impression of "Status post T8-T9 lami discectomy with new injury." Another MRI of the thoracic spine was performed on October 9, 1998, with a summary of postoperative changes on the right at T8-9 and no cord compression or focal disc protrusion. (Dr. B) reviewed the October 1998 MRI and commented that aside from postoperative changes, "it showed no new findings." In a longhand progress note of January 29, 1999, Dr. M again comments on the claimant's complaints of pain since her _____ fall and states "[t]his is likely a re-injury of previous thoracic spine injury."

The claimant was examined by (Dr. K), the carrier's required medical examination doctor who, in a report dated March 2, 1999, commented that Dr. F thought that the claimant's "intercostal neuropathy may have been aggravated by this slip and fall injury," and that Dr. B had noted thoracic radicular complaints since October 1998. Dr. K goes on to comment, without contemporaneous thoracic complaints on the date of

injury, "it is not reasonable to assume that any ongoing problem in relation to [the] dorsal spine at this time are causally related to the event of _____."

(Dr. H), apparently a subsequent treating doctor, in a May 19, 1999, report states that Dr. S and Dr. B had diagnosed the claimant with "reinjury of the thoracic spine." Dr. H has the impression that the October 1998 MRI "revealed compression fractures in the thoracic areas." A follow-up report dated May 27, 1999, has an impression "Rule out possible thoracic compression fracture." A subsequent report says that he cannot rule out thoracic compression fracture.

(Dr. WM), a carrier peer review doctor, is of the opinion in a August 4, 1999, report that there is no objective evidence of a new thoracic injury, and that the thoracic complaints are due to the preexisting MVAs. Additional record reviews by other doctors also were of the opinion that the claimant's thoracic complaints are not related to the compensable _____, fall. (Dr. FS), a radiologist who had reviewed the pre and post injury MRIs, testified at the CCH that there was no change in the MRIs which would indicate a new injury. The hearing officer points out that Dr. FS did admit on cross-examination that the "Claimant did have scarring at T8-9 which could have come from the Claimant falling." The carrier argues that "the scarring from the prior unrelated surgery does not prove the necessary link . . . to establish the existence of a new distinct injury." Of interest is the fact that Dr. FS testified that there could be some difference of opinion on the numbering of thoracic levels of the spine and perhaps all the reports were not referencing the same levels. The hearing officer commented that although Dr. FS "was a credible witness I did not find his explanation of the MRI films persuasive." The claimant contends that there are at least four doctors who have stated that the claimant sustained a new injury, apparently referring to Dr. F, Dr. M, Dr. S, and Dr. H. The carrier also has at least four doctors of a contrary opinion, Dr. K, Dr. WM, Dr. FS, and some of the other peer review doctors.

As should be obvious, there is a plethora of medical evidence and opinions regarding this matter. 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). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

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:

Kathleen C. Decker
Appeals Judge

Judy L. Stephens
Appeals Judge