APPEAL NO. 010435

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 February 9, 2001. The hearing officer found that the appellant (claimant) sustained a lumbar and cervical sprain on _____, and had disability from the injury from June 6, 2000, to the date of the CCH.

The claimant has appealed. She argues that extent of injury was not in issue, and the hearing officer therefore erred by finding that her injury was limited to sprains. The claimant argues that her injury also includes a herniation and annular tear. There is no response from the respondent (carrier).

DECISION

We affirm the hearing officer's decision.

Given the record and the grounds for defense of the claim, we cannot agree that the hearing officer erred by making a finding as to the nature of the injury that he believed occurred. The claimant, who was in her early 50s, contended that she was injured when she pushed back her chair on _____, and it fell over, tipping her back. While no one directly witnessed the fall, she was observed by coworkers sitting on the floor next to the upended chair. Although she initially said she was alright, she sought medical treatment later that day and began missing work the following day. She eventually had an MRI in late July 2000 which reported a large encroaching herniation at T12-L1, degenerative changes lower down, and an old compression fracture at the site of the herniation. The claimant remained in an off-work status and said that she was still in pain.

What would appear to be a straightforward case, however, was complicated by undisputed evidence that in the six weeks (or less) prior to the incident in question, the claimant had two other instances where she slipped and fell. Two to five weeks before her injury (the involved witnesses could not recall), she was with Ms. T at a fitness club when the claimant slipped and fell by the pool. Although Ms. T testified that the claimant was alright, several witnesses testified that the claimant later showed coworkers a bruise that spanned the area from her knee to her hip, although the claimant disputed this estimate of the size of the contusion.

The claimant also recalled that she slipped and fell in some water at home in her bedroom around the first of May 2000, and struck her lower leg on the rail of her television set. She walked around in a brace due to that. She was treated in late May by Dr. M; Dr. M had ben treating her since 1996, when the claimant agreed she missed two or three weeks from work because of back pain, but she asserted it could have been a kidney problem. Dr. M was an orthopedic specialist. The claimant also agreed that Dr. M told her she had age-related back conditions. There was evidence that she had missed these weeks a year before her accident on _____.

The carrier disputed the claim, contending that there was no incident on _____, or that all injuries resulted from preexisting conditions or falls. The carrier also asserted that this was a spite claim due to personnel action. With respect to the latter, it was agreed that the claimant was counseled on June 1 that she was not performing to requirements but the result would have been transfer to another division of the employer, not termination.

There was no express issue over the "extent" of injury reported from the benefit review conference. However, the evidence presented by both parties indicated that at least some conditions in the claimant's back preceded her fall on _____. The July 2000 MRI opines that the claimant's wedged vertebrae at the lower thoracic and upper lumbar spines may be due to old compression fractures. These same discs were observed to be markedly desiccated. The carrier presented a records review report from Dr. C, who analyzed the reports and tests before him and opined that, at most, she sustained a lumbar sprain on _____. Dr. C specifically noted that there was no evidence of aggravation or a new injury, and that the current structural problems shown on the MRI related to preexisting conditions. The claimant's second treating doctor, Dr. G, stated that the claimant's neck, shoulder, and lower back problems related to her mechanism of injury; however, Dr. G's long report makes no mention of any knowledge of the claimant's preexisting back problems or earlier falls.

While the carrier asserted that there was no sole cause issue, we disagree. At least as to the unappealed disability issue, it was the obligation of the carrier to show the sole cause of the claimant's inability to work after _____. The hearing officer evidently found this burden not met. However, the claimant had the initial burden of proving a compensable injury. This includes the burden to prove (not merely assert) aggravation to a preexisting injury or condition. It is axiomatic, in case law having to do with aggravation, that the employer accepts the employee as he is when he enters employment. Gill v. Transamerica Insurance Company, 417 S.W.2d 720, 723 (Tex. Civ. App.-Dallas 1967, no writ). An incident may indeed cause injury where there is preexisting infirmity and where no injury might result in a sound employee, and a predisposing bodily infirmity will not preclude compensation. Sowell v. Travelers Insurance Company, 374 S.W.2d 412 (Tex. 1963). However, the compensable injury includes these enhanced effects, and, unless a first condition is one for which compensation is payable under the 1989 Act, a subsequent carrier's liability is not reduced by reason of the prior condition. St. Paul Fire & Marine Insurance Company v. Murphree, 357 S.W.2d 744 (Tex. 1962). Had this been a case of an arthritic back and then the _____, fall from the chair, coupled with subsequent off-work status, the case for an aggravated or primary injury would have been clearer.

The hearing officer had to consider, however, that "preexisting" conditions included two falls, one dramatic, within a short time frame preceding the injury. The hearing officer's decision, finding a cervical and lumbar sprain, shows that he weighed all the evidence and rejected both parties' "all or nothing" approach to the _____, incident. Under these circumstances, he could believe that the tear and herniation resulted from an earlier incident, but that the claimant nevertheless sustained some injury on _____. The

scope of the injury that occurred on _____, was therefore necessarily before the hearing officer and actually litigated.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza, *supra*. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

With respect to the issues actually litigated, the hearing officer did not err, and is supported by the record, in his decision that the claimant sustained lumbar and cervical sprain, and we affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge