APPEAL NO. 011280
FILED JULY 25, 2001

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 May 17, 2001. The hearing officer determined that the respondent's (claimant) compensable injury does not extend to degenerative disc disease at L3-4 and L4-5, but that the compensable injury aggravated or worsened the claimant's preexisting spinal condition at L3-4 and L4-5 and constituted a new injury. The hearing officer also determined that the appellant (carrier) is liable for the cost of the spinal surgery performed on January 2, 2001. The carrier appeals these determinations, contending that they are against the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed.

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). Section 401.011(26) defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease." In Cooper v. St. Paul Fire & Marine Insurance Company, 985 S.W.2d 614 (Tex. App.-Amarillo 1999, no pet.), the court held that "to the extent that the aggravation of a prior injury caused damage or harm to the physical structure of the employee, it can reasonably be said that the resulting condition fell within the literal and plain meaning of 'injury' as defined by the 71st Legislature" and that "the legislature intended the meaning of 'injury' to include the aggravation of preexisting conditions or injuries." *See also* Peterson v. Continental Casualty Company, 997 S.W.2d 893 (Tex. App.-Houston [1st Dist.] 1999, no pet. h.), in which the court held that the aggravation of a preexisting condition is a compensable injury for purposes of the 1989 Act. In Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, the Appeals Panel noted that to prove an aggravation of a preexisting condition there must be some enhancement, acceleration, or worsening of the underlying condition from the injury and not just a mere recurrence of symptoms inherent in the etiology of the preexisting condition. The hearing officer determined that although the injury sustained by the claimant on _____, did not extend to degenerative disc disease, it did aggravate or worsen the claimant's preexisting spinal condition, resulting in internal disc disruption, and constituted a new injury. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly

wrong or manifestly unjust and we do not find them to be so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951).

Concerning the spinal surgery issue, Section 408.026 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206) pertain to the spinal surgery second opinion process. Rule 133.206(a)(13) provides that a concurrence is a second opinion doctor's agreement that the surgeon's proposed type of spinal surgery is needed. Rule 133.206(a)(14) provides that a nonconcurrence is a second opinion doctor's disagreement with the surgeon's recommendation that a particular type of spinal surgery is needed. Rule 133.206(k)(4) provides that, of the three recommendations and opinions (the surgeon's, and the two second opinion doctors'), presumptive weight will be given to the two which had the same result, and they will be upheld unless the great weight of medical evidence is to the contrary, and that the only opinions admissible at the hearing are the recommendation of the surgeon and the opinions of the two second opinion doctors. The hearing officer determined that Dr. M concurred with Dr. P's recommendation for spinal surgery, afforded presumptive weight to the concurring doctors' opinions, and concluded that the carrier is liable for the cost of the surgery. 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. Cain, *supra*.

The hearing officer's decision and order are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge