APPEAL NO. 011451
FILED JULY 26, 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 (CCH) was held on May 21, 2001. The only issue before the hearing officer was:

1. Did the injury sustained on _____, extend to and include degenerative disc disease and lumbar spondylosis?

The hearing officer determined that it did not.

The appellant (claimant) appealed on some procedural grounds, including that she did not live within 75 miles of city W and that the hearing officer misstated her position. Otherwise, the claimant appeals, generally on a sufficiency of the evidence basis. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The claimant was a 51-year-old cashier at a convenience store and it is undisputed that she sustained a compensable low back strain injury on _____, taking out some trash. The claimant continued to work. Diagnostic testing performed on August 15, 1997, was essentially normal. Dr. B, the claimant's then treating doctor, referred the claimant to Dr. V for consultation and in a report of August 28, 1997, wrote to Dr. V that an MRI "demonstrated only degenerative changes at L3-4 and L4-5." Dr. V saw the claimant beginning September 9, 1997, with an impression of degenerative disc disease at L3-4 and L4-5. Dr. V assessed the claimant at maximum medical improvement (MMI) on November 11, 1997, with a 7% impairment rating (IR). The claimant continued to work and testified that she quit her job and moved to City C, Texas, in February 2000.[1] In dispute are whether other nonwork-related incidents in 1997 and 1998 were new injuries or "aggravation" of her compensable _____ back strain. The claimant has seen a number of doctors, including Dr. DBs, who has suggested surgery. Other doctors, including Dr. V, do not think the claimant is a surgical candidate. A second lumbar MRI performed January 17, 2001, was "negative" and demonstrated "no evidence of HNP or evidence of acquired stenosis."

The claimant on appeal argues that the hearing officer misstated her position and that her position is:

My position is, the injury of _____ was a Lumbar Disc Injury with a

[1]One of the claimant's procedural points was that the hearing officer incorrectly recited that she moved to City C "in late 1999" instead of February 2000. We do not consider that minor misstatement reversible error.

> concomitant strain. The incident did not aggravate, but was the cause of the Lumbar Disc Injury. The only injury I have sustained to my spine is the injury of _____. The compensable injury is Degenerative Lumbar disc disease (Intervertabral Disc Disorder) w/o myelopthy and Lumbar Spondylosis w/o myelopthy (reference [IR] and form TWCC-69 [Report of Medical Evaluation].

The medical evidence to support that position is certainly in conflict. The hearing officer found that the claimant sustained a lumbar strain in 1997, that she reached MMI for that injury in _____, and that the compensable injury "has not caused a continued exacerbation of her pre-existing degenerative disc disease or her current spondylosis." We note that MMI was not a disputed issue at the CCH and we regard the hearing officer's determination on MMI as surplusage. The determination on the extent-of-injury issue is supported by the evidence.

The claimant also asserts that she does not live within 75 miles of City W but that she lives in City C, which is 109 miles from city w. The hearing officer, at the CCH, asked if the parties could stipulate "that venue is proper in the [City W] Field Office" and the Ombudsman replied "Yes." The claimant did not indicate any disagreement with the Ombudsman's answer. In any event, the claimant's assertion was not preserved for appeal and does not constitute reversible error on the merits of the case.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). 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 so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge