APPEAL NO. 012162
FILED OCTOBER 29, 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 July 27, 2001. The hearing officer determined that the respondent (claimant) sustained a compensable cervical and lumbar spine injury "on or about _____" (all dates are 2001 unless otherwise noted), and that the claimant had disability from February 14 through the date of the CCH.

The appellant (self-insured) appeals, contending that the claimant's "condition" was preexisting and consisted of degenerative disc disease and congenital defects which were present prior to the date of injury. The file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant was employed by the self-insured as a bus driver and it is undisputed that the claimant had been treating for bilateral carpal tunnel syndrome prior to _____. There was testimony that Mr. A, a supervisor who did employee evaluations, had noticed that the claimant was walking in a "strange manner" and acted as though he was in pain on or about _____. The claimant testified that on _____, as he was attempting to adjust the right outside mirror of his bus, from the outside, he lost his balance and fell to the pavement striking his neck and low back. The claimant said that he quickly picked himself up and continued working. Although not entirely clear, a few days later, Ms. B, either a coworker or a risk manager, saw the claimant limping and asked the claimant what was wrong and the claimant reported the fall while adjusting the bus mirror. Ms. B reminded the claimant that all accidents needed to be reported. Subsequently, on February 13, Mr. A and another supervisor also noticed the claimant taking very short steps, limping, and having trouble maintaining his balance. The self-insured's supervisors determined that the claimant was not fit to drive a bus and sent him to (clinic) for evaluation.

The clinic report dated February 14 recited a history of falling while adjusting the mirror and noted complaints of left hip pain. The claimant next saw Dr. M, an orthopedic surgeon, who assessed "Cervical HNP at C3/4, C4/5, and C6/7, with severe lumbar HNP at L2/3 and L4/5." The claimant was referred to Dr. Youngblood (Dr. Y) for a neurological assessment. Dr. Y, in office notes dated April 28, found cervical spondylosis and "multi-level disc protrusions/ herniations." Dr. Y noted that the claimant's "symptoms have been present since the on-the-job injury of 1/20/01 [sic, date is different than that alleged by the claimant]." Dr. Y performed cervical surgery on May 7.

There are no reports which indicate that the claimant does not have the conditions alleged or that he did not need surgery. The self-insured argues that the fall was unwitnessed, was not reported that day, that the claimant was observed walking in pain both before the asserted fall and afterward, before he was asked why he was limping, and that the claimant's condition was due to degenerative and/or congenital conditions. The hearing officer commented:

> It appears from the evidence that prior to the fall the Claimant was capable of performing his job duties and following the fall was not. The medical evidence indicated many congenital problems with the Claimant's back. However, while disc bulges can be common in older individuals, disc herniations are not. Clearly, the Claimant was in a worse medical state after the fall. Therefore, it is this Hearing Officer's finding that the Claimant's cervical and lumber herniations are a result of the incident which occurred on or about _____.

The self-insured asserts that the hearing officer's comment that disc bulges are common in older individuals but disc herniations are not was "baseless and unsupported by medical evidence." We agree that there is no medical evidence in this case to support the hearing officer's comment, however, we consider that comment as only the hearing officer's general personal perception. We decline to hold that comment as reversible error. The self-insured's conclusion that the observation is baseless is equally unsupported by medical evidence.

There were certainly conflicting inferences which could be drawn from the evidence. However, it is the hearing officer who 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 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.

The true corporate name of the insurance carrier is **VIA METROPOLITAN TRANSIT** and the name and address of its registered agent for service of process is

ANDREW E. MORALES
1021 SAN PEDRO
SAN ANTONIO, TEXAS 78212.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge