APPEAL NO. 012185
FILED NOVEMBER 5, 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 August 14, 2001. The appellant (carrier) appeals the hearing officer's determinations that the respondent's (claimant) compensable injury of _____, includes the lumbar spine and that the Texas Workers' Compensation Commission (Commission) has jurisdiction to determine whether the lumbar spine was part of the _____, compensable injury. The claimant responds, urging affirmance.

DECISION

Affirmed.

The hearing officer determined that the Commission has jurisdiction to determine whether the lumbar spine was part of the _____, compensable injury. The carrier contends that the issue was previously litigated at a prior CCH, in which a Decision and Order was issued dated July 25, 2000, and that the doctrine of *res judicata* applies. Regarding *res judicata*, the Texas Supreme Court has stated that "any cause of action which arises out of the same facts, should if practicable, be litigated in the same law suit." Barr v. Resolution Trust Corp., 837 S.W.2d 627, 630 (Tex. 1992); Amstadt v. US Brass Corp., 919 S.W.2d 644 (Tex. 1996). *Res judicata* has been found applicable to administrative proceedings generally, *see* Bryant v. L.H. Moore Canning Company, 509 S.W.2d 432 (Tex. Civ. App.-Corpus Christi, 1974), cert. denied 419 U.S. 845, and by the Appeals Panel to the dispute resolution process. *See*, *e.g.*, Texas Workers' Compensation Commission Appeal No. 93993, decided December 15, 1993.

The hearing officer determined that the previous CCH only addressed the issue of whether the claimant sustained a compensable injury and had disability. She noted that the hearing officer in the first CCH commented on the body parts the claimant injured on _____, but the first hearing officer had only made findings of fact and conclusions of law that the claimant had a compensable injury and disability. The claimant explained that at the previous CCH she claimed an injury to her thoracic spine and chest wall but shortly after that CCH she began treating with another physician who discovered that the claimant had actually injured her upper lumbar spine. The claimant alleged that she learned that, because of the way her body is built, what she thought was a thoracic spine injury, and what was being called a thoracic spine injury, is really an upper lumbar spine injury. The hearing officer could have found that this determination would not have been practicable at the previous CCH because it was a condition that was misidentified at that time by the claimant's physicians, and certainly unknown to her because she was relying on their diagnoses.

We are mindful of the dissent, and agree that there are times when the scope of the injury is actually litigated within the broadly stated issue of whether an injury occurred at all. Also, we note that there are occasions where a separate "extent" issue cannot properly be litigated. We believe that would include a case such as this where there was a misidentification of the claimant's injury. Consequently, there is evidence to support the hearing officer's determination that the Commission has jurisdiction to determine whether the lumbar spine is part of the _____, compensable injury.

Further, there is sufficient evidence to support the hearing officer's determination that the claimant's compensable injury includes her lumbar spine. It was stipulated that the claimant sustained a compensable injury on _____. Conflicting evidence was presented at the CCH on the disputed issue of whether the compensable injury included the lumbar spine. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. As a general rule, in workers' compensation cases, the issue of injury may be established by the testimony of the claimant alone. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). In this case, we note that there is also medical evidence to which the hearing officer specifically referred in concluding that the claimant met her burden of proof. The hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **PACIFIC INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

PARKER W. RUSH
1445 ROSS AVENUE, SUITE 4200
DALLAS, TEXAS 75202-2812.

Michael B. McShane
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I dissent, and would reverse and render on the basis of *res judicata*. The matter of whether the claimant had any injury other than her chest and thoracic spine that was part of her compensable injury was determined in a prior proceeding, when the claimant was also represented by counsel. Where the issue in a prior contested case hearing (CCH) is broadly stated as whether the injury occurred at all, the scope of such injury is necessarily subsumed in that issue; there does not have to be a separate "extent" issue articulated. *See* Texas Workers' Compensation Commission Appeal No. 011678, decided September 5, 2001; *compare* Texas Workers' Compensation Commission Appeal No. 991305 (unpublished), decided July 27, 1999. To cast a dispute over the nature of the injury that occurred on the date of injury as an "extent" issue would, in light of the literal reading of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 124.3(c) (Rule 124.3(c)), open a considerable hole in the waiver provisions that apply when a carrier does not investigate and dispute the compensability of the injury within 60 days.

However, it is unnecessary to rely on any subsumed issue theory in this case, because the prior CCH expressly and actually litigated the nature of the injury; the claimant was adamant at her prior hearing (and the hearing officer commented on this) that her injury did not include parts of her body than chest and thoracic spine, even if medical records in evidence in that CCH indicated more widespread injuries. The hearing officer stated in his discussion that it was not the claimant's idea "to enlarge the

injury beyond the chest wall strain and thoracic spine." If this does not underscore "actual litigation" of the scope and sequelae of the injury in that CCH, I am hard pressed to know what would. The claimant testified at that CCH that her prior lumbar fusion surgery was to alleviate a birth defect and this is why she was not claiming any further lumbar injuries. Eyes were wide open and choices were made in the previous CCH about what to pursue as a work-related injury. The fact that the claimant's new treating doctor cast an L3-4 finding as an "aggravation" of a preexisting condition does not constitute a "misidentification" of her injury at the time of the previous CCH.

Leaving this aside, it is clear from reviewing the record that the protrusion in the lumbar spine was a late-developing condition; it wasn't objectively identified in September 2000 (where only stenosis was shown on objective tests) but had become a protrusion by April 2001. This corroborates medical evidence that this resulted from the natural progression of a degenerative process as well as weakening of that level because of the prior fusion just below.

Susan M. Kelley
Appeals Judge