

APPEAL NO. 012501
FILED NOVEMBER 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 September 26, 2001. The hearing officer resolved the disputed issues by determining that the respondent/cross-appellant's (claimant) on-the-job accident of _____, is not a producing cause of her current cervical, lumbar, and right shoulder injuries; that the claimant's noncompensable accident of _____, constitutes the sole cause of the claimant's current cervical, lumbar, and right shoulder injuries; that the claimant sustained damage or harm to the physical structure of her body while she was engaged in the exercise of her job duties with her employer on _____; that the claimant sustained disability from March 25, 2000, through July, 26, 2000; and, that the claimant has sustained no disability since _____. The appellant/cross-respondent (carrier) appealed the hearing officer's determination that the claimant sustained disability from March 25, 2000, through _____. The claimant responded, urging that the hearing officer be affirmed on that determination, and cross-appealed the hearing officer's determinations that the claimant's on-the-job accident of _____, is not a producing cause of her current cervical, lumbar, and right shoulder injuries; that the claimant's noncompensable accident of _____, constitutes the sole cause of the claimant's current cervical, lumbar, and right shoulder injuries; and that the claimant has had no disability since _____. There is no response to the claimant's cross-appeal from the carrier in the file.

DECISION

Affirmed.

On the morning of Friday, _____, her first day of employment, the claimant was working in her employer's furniture warehouse unloading furniture from a delivery truck. The claimant testified that she began to feel sore and after sitting for approximately one hour during her lunch break, she noticed extreme tightness in her lumbar area when she got up. By the end of the claimant's shift the pain had gotten worse, so she reported the injury to her supervisor. The supervisor transported the claimant to the emergency room (ER) where she was treated and released with instructions to rest over the weekend and follow-up with her family doctor the following Monday. The ER records indicate a lumbar sprain with pain shooting down the leg. The claimant began treating with Dr. P for her injuries on March 27, 2000. Dr. P's records indicate that the claimant has consistently complained of cervical, right shoulder, and lumbar pain. The treatment has consisted of medications and some physical therapy. The claimant's condition and pain level did not improve so Dr. P recommended an MRI as early as July 24, 2000. On _____, the claimant had a fall while going down a step at her mother's house. The claimant testified that the fall merely caused a temporary flare-up of her symptoms from the _____ injury, and did not in any way exacerbate the severity of that injury. The MRI, performed on August 10, 2000, showed lumbar degenerative disc disease below the L3 level; central

disc herniation at the L4-L5 level with some impingement on the anterior thecal sac; small herniation at L3-L4 that does not impinge the thecal sac or neural foramina; and right paracentral disc bulge at the L5-S1 level that is narrowing the right neural foramina.

Neither party appealed the hearing officer's determination that the claimant sustained damage or harm to the physical structure of her body while engaged in the exercise of her job duties with the employer (a compensable injury) and that determination has become final. Section 410.169.

Conflicting evidence was presented on the disputed issues. Both parties offered medical evidence to support their respective positions. The claimant submitted medical records which clearly indicate that she has consistently complained of neck, shoulder and lumbar problems since the date of the accident, and that Dr. P had taken her off work. The carrier submitted evidence which showed that until August 10, 2000, there was an absence of objective findings to support the claimant's subjective complaints, that she was overusing her prescription pain medication, and that she was experiencing an appreciable degree of psychological overlay.

The 1989 Act makes the hearing officer the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. The finder of fact may believe the claimant has an injury, but disbelieve that the injury occurred at work. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). A fact finder is not bound by the testimony (or evidence) of a medical witness where the credibility of the testimony (or evidence) is manifestly dependent upon the credibility of the information imparted to the medical witness by the claimant. Rowland v. Standard Fire Insurance Company, 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). In this case, the hearing officer could have reasonably inferred from the medical records that the claimant sustained a compensable lumbar sprain on _____, that the compensable injury caused disability, and that the compensable injury had resolved by _____, thereby ending the claimant's disability. Additionally, the hearing officer could believe that the claimant's current symptoms and inability to obtain or retain employment at wages equivalent to the wages she earned prior to _____, are related to her nonwork-related fall on _____. An appellate level body is not a fact finder and does not normally pass on the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the challenged findings, conclusions, and decision are supported by sufficient evidence and that they are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

DISSENTING OPINION:

I dissent. I find no evidence in the record supporting the hearing officer's finding that the subsequent noncompensable injury was the sole cause of the claimant's condition and inability to work since _____. Nor do I find any evidence to support the proposition that the claimant's compensable injury was not a producing cause of her inability to work after July 26, 2000. The only thing that changed between July 26, 2000, and _____, is that the claimant had suffered an intervening noncompensable injury. It is well-established that such an intervening injury does not in and of itself end compensability or disability. See Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Indemnity Ins. Co. v. Staggs, 134 Tex. 318, 134 S.W.2d 1026 (Tex. 1940); Gonzalez v. Texas Employers Insurance Association, 772 S.W.2d 145, 148 (Tex. App.-Corpus Christi 1989, writ denied); Panola Junior College v. Estate of Thompson, 727 S.W.2d 677, 679 (Tex. App.-Texarkana 1987, writ ref'd n.r.e.); Liberty Mutual Insurance Company v. Peoples, 595 S.W.2d 135 (Tex. Civ. App.-San Antonio 1979, writ ref'd n.r.e.); Evans v. Casualty Reciprocal Exchange, 579 S.W.2d 353, 356 (Tex. Civ. App.-Amarillo 1979, writ ref'd n.r.e.); American Surety Company of New York v. Rushing, 356 S.W.2d 817 (Tex. Civ. App.-Texarkana 1962, writ ref'd n.r.e.); Zellerback v. Associated Employers Lloyds, 200 S.W.2d 653 (Tex. Civ. App.-Galveston 1947, no writ) and cases cited therein; Federal Underwriters Exchange v. Tubbe, 193

S.W.2d 563 (Tex. Civ. App.-Beaumont 1946, writ ref'd n.r.e.); Texas Indemnity Ins. Co. Arant, 171 S.W.2d 915 (Tex. Civ. App.-Eastland 1943, writ ref'd). See also Texas Workers' Compensation Commission Appeal No. 94844, decided August 15, 1994; Texas Workers' Compensation Commission Appeal No. 952061, decided January 22, 1996; and Texas Workers' Compensation Commission Appeal No. 992587, decided December 30, 1999.

The hearing officer states in her discussion that the claimant's noncompensable _____, injury "probably increased the severity of Claimant's underlying injury." I find this less than consistent with the disappearance of all effects from the claimant's compensable injury on _____. As far as aggravation is concerned, we have stated the definition of injury, derived from Texas appellate law in Texas Workers' Compensation Commission Appeal No. 951313, decided September 20, 1995, and other cases, to be as follows:

Injury means damage or harm to the physical structure of the body and such diseases or infections as naturally resulting therefrom, or in the incitement, acceleration, or aggravation of any disease, or infirmity or condition, previously or subsequently existing, by reason of such damage or harm. Gill v. Transamerica Ins. Co., 417 S.W.2d 720 (Tex. Civ. App.-Dallas 1967, no writ); McCartney v. Aetna Casualty & Surety Co., 362 S.W.2d 838, 839 (Tex. 1962); Matson v. Texas Employer's Insurance Ass'n, 331 S.W.2d 907, 908 (Tex. 1960).

Applying this definition, the aggravation of a subsequent injury by the compensable injury makes the subsequent injury compensable. Appeal No. 94844, *supra*. The hearing officer does not address this concept. I would remand for her to do so and to provide a more coherent explanation for her rationale regarding sole cause so that it may be determined whether or not she is correctly applying the law to the facts of this case.

Gary L. Kilgore
Appeals Judge