APPEAL NO. 950196

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 19, 1994, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer to resolve disputes arising from two claims with a different carrier providing workers' compensation insurance coverage for each claim. The parties agreed that the hearing officer was to resolve the following three disputes: (1) is the (date of injury), injury the sole cause for (claimant) need for the July 1994 spinal surgery; (2) if (carrier 1) is responsible for the surgery, does carrier 1 owe temporary income benefits (TIBS) after April 4, 1994, as ordered by the interlocutory order; and (3) did the claimant have disability as a result of either injury, and if so, when. The hearing officer determined (1) that the (date of injury), injury is the sole cause for the claimant's need for spinal surgery that was performed on July 8, 1994; (2) that carrier 1 owes TIBS after April 4, 1994, as ordered by the interlocutory order; (3) the claimant had disability from May 5, 1994, to May 12, 1994, and from June 30, 1994, to November 5, 1994, and carrier 1 owes TIBS for those periods; and (4) the claimant did not have disability as a result of the April 9, 1994, injury and the claimant is not owed TIBS by (carrier 2); and the claimant reached maximum medical improvement (MMI) for the (date of injury), injury on November 5, 1994. Carrier 1 appealed urging that the decision of the hearing officer is not based on the evidence, is not confined to the issues agreed to at the CCH, and is contrary to the 1989 Act and the Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE, Rules; and requesting that the decision of the hearing officer be reversed and remanded for a new CCH with another hearing officer presiding. Carrier 2 responded urging that the decision of the hearing officer be affirmed. A response from the claimant has not been received.

DECISION

We affirm.

The claimant was the only witness at the CCH. He testified that he was a maintenance worker for the (employer). He said that on (date of injury), he injured his lower back throwing trash bags into an incinerator. He said that he felt real sharp low back pain that radiated into his right leg. He testified that a supervisor took him to an emergency room and that he was sent to the (Center) where he was seen by (Dr. H) and (Dr. S). He said that an MRI was performed and revealed a mild disc herniation. He said that he was referred to (Dr. N), a neurosurgeon, who advised him that surgery was not required. The claimant testified that he was also referred to (Dr. Y), a neurosurgeon, who told him that he did not have a herniation and did not need surgery. He said that the employer's director of personnel sent him to (Dr. BR), a chiropractor. The claimant testified that he went to Dr. BR every day for about a month, that his pain worsened, and that Dr. BR referred him to (Dr. L). He said that Dr. L told him that his right leg was weak, ordered a CAT scan, referred him to another doctor for bowel incontinence, and told him that he did not need surgery. He said that he was over the bowel problem. He testified that he returned to light duty with the employer as a ticket taker on February 20, 1993, and

returned to regular duty in September 1993. He said that he returned to light duty at about the time that Dr. L said that he had reached MMI. The claimant testified that he did his regular duties without any problem until April 9, 1994, when he bent to grab the handles of a wheelbarrow, felt pain in his back, reported it to his supervisor, and saw Dr. H at the Center. He said that Dr. H put him on therapy for a few days and when he did not improve Dr. H referred him to (Dr. G-V), a neurosurgeon. The claimant said that Dr. L had also referred him to Dr. G-V, and that he had seen Dr. G-V on April 4, 1994. He said that after the injury on April 9, 1994, he had "foot drop" and used a cane to walk. He testified that Dr. G-V performed surgery on his back in July 1994, that at the pre-hearing in August he had to wear a belt for back support and used a cane to walk, and that now he is better and does not have to wear the belt or use the cane and does not have a bowel problem.

On cross-examination by carrier 2 the claimant testified that he lifted the wheelbarrow, felt immediate pain, and did not move the wheelbarrow, reported the injury about 30 or 45 minutes after it happened, and did not finish working his shift on that day. He said that Dr. L sent him to Dr. G-V to make sure that he was OK, that he saw Dr. G-V on April 4, 1994, about five days before his second injury. The claimant said that he had no reason to disagree with the reports of Dr. G-V, but when asked to read some sentences in the reports he responded that he did not know what the doctor was talking about. He said that he was able to work before the injury on April 9, 1994, that he felt bad when the weather changed but he was able to work, and that he does not work now. On cross-examination by carrier 1, the claimant testified that he injured his back on April 9, 1994; that he filed a claim in May 1994, that he did his regular work from September 1993, until April 1994; that Dr. L provided Tylenol for pain; that he took minimal doses; and the April 1994 injury is the cause for his need for back surgery.

The hearing officer admitted numerous medical records offered by the parties. In a return to work certificate dated November 2, 1992, in which Dr. S reported that the claimant was unable to return to work, Dr. S reported his diagnosis as a herniated disc. The record contains 26 medical reports and letters from Dr. L including a Report of Medical Evaluation (TWCC-69) dated February 15, 1993, in which Dr. L certified that the claimant reached MMI on February 15, 1993, with a seven percent impairment rating (IR). On February 15, 1993, Dr. L wrote a letter to Dr. B containing the following:

> At this time the patient states that with rectal discomfort there may be loss of bowel control for a short period of time. Lower back pain still persists with radiation to the right lower extremity and right inguinal area, as well as the "rectal region."
>
> He had made an attempt to work but was unable to continue. Consequently, it is felt that he should be hospitalized for myelography and post myelographic CT scan.

In a progress note on the same day Dr. L noted trauma to the lumbar and lumbosacral region manifested by lumbar and lumbosacral neuromyofascial ligamental injury; probable L4-L5 disk protrusion on the right side with mild root involvement; CT scan of the lumbar spine on November 21, 1992, revealed no evidence of disk protrusion; EMG had been normal. In progress notes dated February 2, 1993, Dr. L made similar entries except that on that day he noted that "CT scan of the lumbar spine on 21 November 1992 revealed disk protrusion." A letter to Dr. B dated January 14, 1993, and progress note dated the same date indicate that the CT scan revealed disk protrusion. In a letter to Dr. B dated March 18, 1993, Dr. L stated that myelography revealed mild extradural defect at L4-L5 (L-5-L-6: Extra lumbar vertebra) that has been confirmed by CT scan and in a letter dated April 28, 1993, wrote "[i]t would appear that neurosurgical intervention may be indicated since conservative measures have all been exhausted with the exception of epidural injections." In other medical reports dated after February 15, 1993, Dr. L reported mild disk protrusion with mild root involvement. In reports dated November 18, 1993, and December 28, 1993, Dr. L continued to report disk protrusion and also mentioned fecal incontinence and sacral root involvement. In a letter dated January 12, 1994, Dr. L sought approval of an MRI of the lumbar spine, stated that the fecal problem was of recent onset and could not be reflected in studies performed in 1992 or mid-1993, and wrote "[t]he significance of bowel involvement means that the lower sacral roots have been involved and this is a danger signal in terms of worsening of the condition and production of pathology which may eventually become irreversible." In progress notes dated February 3, 1994, Dr. L wrote:

> MRI was performed on 27 January 1994 revealing degenerative changes at L4-L5 with mild bulging of the disc at L4-L5 and L5-S1. Personal review of the MRI revealed moderate degenerative disc disease at L4-L5. A disc herniation on disc protrusion is not confirmed.

In a letter dated November 12, 1992, Dr. S wrote that an MRI of the lumbar spine shows decreased signal at L4-L5 with a mild central bulge, no definite evidence of root compression, and no definite evidence of disc herniation. In a report dated December 3, 1992, Dr. Y reported that an MRI of the spine shows a disc bulge with small disc protrusion, that the claimant's symptoms suggest radiculitis in the right lower extremity, and that he recommended myelography and CT scan.

The record contains numerous documents signed by Dr. G-V. In a letter dated January 4, 1994, Dr. G-V stated that the claimant has a ruptured disc at L5-L6, that in time may require surgical treatment, and that conservative measures will be used at this time. In a letter dated April 4, 1994, Dr. G-V reported that the claimant recently reinjured himself, that the claimant noted increasing symptoms which required a repeat MRI on January 24, 1994, that the report says that the MRI is normal but that it is not in that it shows a subligamentous herniation where the annulus is ruptured at L5-L6 which was present in 1992, that he disagrees with Dr. L's statement that the disc has improved, and that the

claimant feels he is clearly getting worse and wants to consider surgical treatment. In a letter dated May 5, 1994, Dr. G-V makes basically the same comments and adds that the claimant has had low back pain radiating to the right leg for about two years. Dr. G-V recommended back surgery in a Required Medical Report - Spinal Surgery Recommendations (TWCC-63) that was received by carrier 1 on May 10, 1994. Carrier 1 responded that it was not the carrier responsible for the spinal surgery. In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated May 17, 1994, carrier 2 disputed the claim stating that the claimant's need for spinal surgery was solely caused by a pre-existing condition; that all medical documentation necessitating surgery is prior to claimant's alleged date of injury of April 9, 1994; and that medical documentation after April 9, 1994, does not support a causal relationship between need for spinal surgery and the April 9, 1994, date of injury. Dr. G-V performed spinal surgery on July 8, 1994. On August 8, 1994, Dr. G-V wrote:

> I am somewhat confused. You say there is a new injury on 04-09-94. I have been seeing this gentleman since 1992 or 1993. Basically these are the same symptoms from the 1992 injury. I suppose you can consider it an aggravation of a pre-existing condition that he had on 04-04 or 04-09 of 1994 which ever date you wish, but the fact of the matter is, his symptoms were the same back in 1992. He has had the low back pain, right leg radiation with a foot drop on that side, that is, the right side every [sic] since 1992. That is documented on our records. So it appears he definitely had a pre-existing condition since 1992. As I said before, I suppose you can call it an aggravation of the pre-existing condition but clearly this is an old problem.

The three parties stipulated that Dr. G-V initially examined the claimant on January 4, 1994, after referral by Dr. L. On August 30, 1994, Dr. G-V wrote:

> [Claimant] injured his back originally in 1992. The symptoms for which he had surgery are solely, only, directly, primarily and originally due to only the injury of 1992. I realize he continued to complain in '94, but he was advised to have surgery back in '92 and '93 for this condition. His symptoms, in fact, never changed. He was actually put back to work continuing with the same signs and symptoms all along. . . . the sole cause for this man's surgery is from the injury of (date of injury).

The parties entered into extensive stipulations. At a pre-hearing held on August 26, 1994, the following stipulations were made:

Stipulations made between carrier 1 and the claimant:

1.On (date of injury), the Claimant sustained a compensable injury in the course and scope of his employment with the Employer, and [Carrier 1] had paid income and medical benefits to him, including benefits ORDERED by the Interlocutory Order (of July 1, 1994, *which Orders both Carriers to assume the costs on [TIBS] and medical benefits).*

2.The Claimant had disability as a result of the injury of (date of injury), from November 2, 1992, to February 15, 1993.

3.[Dr. L] was the treating doctor in 93-016652; he certified [MMI] on February 15, 1993 with a seven percent (7%) [IR].

4.The attorney for [carrier 1] agrees that although her law firm would ordinarily represent [carrier 2] in its, [Carrier 2's], dispute with the Claimant, because it also represents' [Carrier 1], the law firm elected to represent only [Carrier 1] and asserts it notified [Carrier 2] of this election on June 16, 1994; the attorney for [carrier 1] further represents that her firm will never represent [carrier 2] in any matter related to Claim Number 94-005751 other than forwarding mail as the Austin representative for [carrier 2].

5.[Carrier 1] provided a policy of workers' compensation insurance to the Employer from August 1, 1992, to August 1, 1993.

6.The Claimant has never filed a request to change treating doctors in Claim Number 93-016652.

7.[Carrier 1] agrees that if the Hearing Officer determines that it is responsible for the spinal surgery and that it should not have been ORDERED to pay [TIBS] by the interlocutory Order of July 1, 1994, it will not contest the Claimant's right to raise the issue of decertification of [MMI].

8.[Dr. G-V] notified [carrier 1] about the proposed spinal surgery on May 10, 1994; [carrier 1] informed the doctor that it was not the proper Carrier on May 24, 1994.

Stipulations made between the claimant and carrier 2:

1.[Carrier 2] provided a policy of workers' compensation insurance to the Employer from August 1, 1993, to the present.

2.[Carrier 2] did not contest compensability of the Claimant's alleged injury on April 9, 1994, within sixty (60) days and agreed that it is responsible for any injury sustained on that date.

3.[Carrier 2] asserts than no notice of the proposed spinal surgery was sent to its office by [Dr. G-V].

4.[Dr. G-V] is the treating doctor for the Claimant's 1994 injury.

Stipulations made among carrier 1, carrier 2, and the claimant:

1.The Claimant had spinal surgery July 8, 1994, performed by [Dr. G-V]; no second opinion was requested by either Carrier, pursuant to Commission Rule.

2.The Claimant was initially examined by [Dr. G-V] on January 4, 1994, upon referral of [Dr. L]; he was seen again (by [Dr. L]) on April 4, 1994 and May 5, 1994, when spinal surgery was recommended.

3.The Claimant did not work for four and one-half (4 1/2) days from May 5, 1994, to May 12, 1994; the Claimant did not work from June 30, 1994, to the present (day), due to his spinal fusion and laminectomy and had not been released to return to work; the Claimant has an extra vertebrae in his back which is numbered as L4-5 and L5-6, and is described by [Dr. G-V] as, "Claimant has six lumbar vertebra," in his report of April 4, 1994.

At the CCH held on December 19, 1994, the following stipulations were made:

1.The parties all agree that the Claimant has not worked since June 30, 1994, as a result of the spinal surgery of July 8, 1994, and has not been released to return to work.

2.The parties all agree that the Claimant had disability from February 3, 1994, to February 15, 1994, and was paid [TIBS] for this period by [Carrier 1].

3.The parties all agree that although there may be other issues in dispute, the parties want the Hearing Officer to resolve the three issues they agree were in dispute at the Pre-hearing Conference of August 26, 1994, and included as Hearing Officers Exhibit 7-93 and Hearing Officer's Exhibit 5-94.

4.All parties all agree that [Dr. M] was a peer review doctor.

We first address the hearing officer's determination that the (date of injury), injury is the sole cause for the claimant's need for the spinal surgery. The agreed to issue was not whether the (date of injury), accident is the sole cause of the claimant's back injury, but whether it is the sole cause of the need for spinal surgery. The claimant testified that he injured his back on April 9, 1994, and Dr. G-V stated that the accident on April 9, 1994, aggravated the claimant's pre-existing condition. The record contains statements from two co-workers that contain slight differences in how the April 9, 1994, accident happened, but the record does not contain information to establish that the claimant did not injure his back on April 9, 1994. Carrier 2 and the claimant stipulated that carrier 2 did not contest compensability of the claimant's alleged injury on April 9, 1994, within sixty days and carrier 2 is responsible for any injury sustained on that date. The agreed to issue is whether the (date of injury), injury is the sole cause for the claimant's need for the July 1994 spinal surgery. The hearing officer found that it is. The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact can believe all, part, or none of any witnesses' testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to their testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An Appeals level body us not a fact finder, and it does not normally pass upon the credibility of witnesses and does not substitute its own judgment for that of the fact finder, even it the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The claimant, carrier 1, and carrier 2, presented conflicting evidence. Doctors made conflicting reports on the claimant's condition as a result of the injury on (date of injury); the extent of his recovery form the (date of injury), injury; and his need for surgery prior to the injury on April 9, 1994. Even though a reviewing body might, from the evidence of record, reasonably draw inferences different from those deemed most reasonable by the fact finder, this is not sufficient basis to reject the fact finder's findings and substitute for them with those of the reviewing body. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). Only were we to conclude, which we do not in this case, that the hearing officer's determination that the (date of injury), injury is the sole cause for the claimant's need for spinal surgery that was performed on July 8, 1994, is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Carrier 1 also complains that it was not provided the opportunity to dispute the need for spinal surgery under the provisions of Section 408.026 and that under the provisions of

Rule 133.201, only the treating doctor could recommend spinal surgery and that Dr. L, not Dr. G-V, was the treating doctor for the 1992 injury. The hearing officer determined, and we found the evidence to be sufficient to support the determination, that the (date of injury), injury is the sole cause of the claimant's need for surgery performed on July 8, 1994. This Appeals Panel does not address issues that may arise under the procedure regarding second opinions for spinal surgery.

Carrier 1 urges that it was denied due process by the hearing officer's expanding the agreed issue "[i]f [carrier 1] is responsible for the surgery, does [carrier 1] owe [TIBS] after April 4, 1994, as Ordered by the Interlocutory Order" to include the issue of MMI. In stipulation No. 7 between the claimant and carrier 1, the two parties agreed that carrier 1 will not contest the claimant's right to raise the issue of decertification of MMI. The stipulation does not address the time to resolve a "decertification issue." The parties stipulated that the claimant did not work from June 30, 1994, to the present due to his back surgery. Section 408.101(a) provides "[a]n employee is entitled to [TIBS] if the employee has disability and has not attained [MMI]." The agreed to issue put the parties on notice of disputes involved in determining whether a claimant has attained MMI, and if so, the date MMI was attained. Matters pertaining to MMI could have been more fully litigated and specifically asserted in defense, but the opportunity to litigate MMI was present insofar as it related to the issues before the hearing officer. Considering the stipulations, MMI is potentially an unresolved, separate issue since the parties specifically limited the issues before the hearing officer. The hearing officer's findings on MMI went beyond the specific issues and are not considered in arriving at our decision.

Carrier 1 urges that the hearing officer improperly stated the burden of proof when she wrote "[carrier 1] had the burden to prove that it did not owe [TIBS] after April 4, 1994." First, we note that the claimant testified that he injured his back at work on April 9, 1994, indicating that he was at work on that day. We are not sure why the parties agreed to use the date April 4, 1994, in the agreed issue since it does not appear in either interlocutory order in the record. Perhaps the date of April 9, 1994, in the interlocutory orders was misread to be April 4, 1994. In Texas Workers' Compensation Commission Appeal No. 93143, decided April 9, 1993, the Appeals Panel cited Texas Workers; Compensation Commission Appeal No. 92322, decided August 14, 1992, and stated "the burden of proving disability always rests with the claimant." However, the issue before us is not stated using the term disability. Again, the parties stipulated that the claimant did not work from June 30, 1994, to the day of the hearing because of his back surgery. The disputed issue is whether carrier 1 owes TIBS, not whether the claimant sustained disability. The hearing officer did not improperly place the burden of proof. *See* Texas Workers' Compensation Commission 92463, decided October 14, 1992.

The hearing officer used words in the decision that could possible lead to confusion on the amount of TIBS to be paid by carrier 1, but the decision section of her Decision and Order makes it clear that the claimant did not have disability as a result of the April 9,

1994, injury; that carrier 2 does not owe TIBS; and that carrier 1 owes TIBS. The words "as ordered by the Interlocutory Order" which ordered carrier 1 to pay 50% of the income benefits, is surplusage and may be disregarded.

Carrier 1 also states that the hearing officer erred in denying contribution. Section 408.084 (a) provides:

> At the request of the insurance carrier, the commission may order that [IIBS] and [SIBS] be reduced in a proportion equal to the proportion of a documented impairment that resulted from earlier compensable injuries.

Neither IIBS nor SIBS were ordered to be paid, and contribution was not a factor in the agreed issues at the CCH.

Finding the complained of determinations of the hearing officer to be supported by sufficient evidence and no reversible error, we affirm.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge