APPEAL NO. 92058
FILED MARCH 26, 1992

On January 8, 1992, a contested case hearing was held. (Hearing Officer) determined that the claimant, the appellant in this appeal, did not incur an injury on _____, in the course and scope of his employment with ("employer"). The appellant has asked that we review the decision of the hearing officer, noting that he disagreed with the finding of fact No. 11 of the hearing officer, and noting that even though he had suffered prior injuries, he nevertheless fell and was hurt on the date he contended an injury had occurred.

The respondent replies that the appeal was not timely served upon respondent, that the appeal fails to clearly and concisely rebut the decision of the hearing officer on the issue for which review is sought, and that the finding and decision of the hearing officer is supported by the evidence. Respondent describes the evidence it deems supportive of the hearing officer's decision.

DECISION

We find that there is sufficient probative evidence supporting the decision of the hearing officer that appellant did not sustain an injury on _____, and we affirm his decision. On the matter of timely filing of the appeal, we determine that the appeal was due February 11, 1992. The copy to the commission was mailed February 8, and received here February 13th; this complies with timely filing of appeal with the commission under Texas Workers' Compensation Commission Rules, 28 Tex. Admin. Code Section 143.3(c) [Rule 143.3(c)], and is sufficient to invoke the jurisdiction of the Appeals Panel. Although the failure to serve the other party with notice operates to extend that party's date for responding, respondent here has filed a timely and full response. No extension of time was necessary. We also note that appellant's complaint about Finding of Fact No. 11, as well as his assertion that previous back injuries does not affect his right to compensation relating to a _____ accident, are sufficient grounds of appeal under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Article 8308-6.41(b) [the 1989 Act].

Succinctly, the appellant, was washing a car in a wash rack area for employer approximately 10:30 a.m. on _____, when he slipped and fell in an oil and water mixture near the back of the car, near a slight hump in the pavement. He stated that he fell onto his buttocks on the concrete. The statements of two co-workers, ("Co-Worker G") and ("Co-worker S") state that although they did not see appellant fall, they saw him sitting on the ground behind the car that he was washing. Appellant testified that his co-workers helped him up and urged him to see the doctor; Co-worker G's statement confirms this. Appellant testified that his boots were slippery; Co-worker S's statement confirms this. Both statements say that appellant told them he had just slipped and fallen. The statements were given to respondent's adjuster on June 13, 1991.

Appellant testified he was terminated from the employer for reasons that he did not fully understand, although he stated that he understood it to relate to "misfalsification" on his employment application. He acknowledged that when he applied for employment with employer, he stated in the application that he had not filed previous worker's compensation claims. The exact date of the termination is not specified, although a note in the medical records of ("Dr. S"), of (Healthcare Provider), dated November 6, 1991, indicates that appellant had been terminated by that date. Except for doctor and therapy appointments, and some time off initially granted by Dr. S between appointments and tests, appellant essentially worked until he was terminated.

Appellant testified that he went to the company doctor, thereafter to Dr. S, then to ("Dr. B"), and then to ("Dr. R"). At some point, during this, he also was examined by a doctor for respondent, ("Dr. BK"). He has undergone x-rays and a CT scan. The medical records in the record following _____, indicate the following:

_____/ Appellant visits (Healthcare Provider) complaining of back, knee and shoulder pain. Medication prescribed.

June 7, 1991/ Returns to clinic complaining of pain and requests pain pills. Lumbar and shoulder x-rays taken. Conclusions are that left shoulder and lumbar spine are normal, possible cyst observed at head of humerus.

June 10, June 12, June 17, June 24/ Still complains of lower back pain.

July 1, 1991: x-ray of shoulder taken, normal, cyst not observed.

A letter from Dr. S, dated January 8, 1992, summarizes the treatment rendered by (Healthcare Provider), and states that respondent's lumbar spine and shoulder were normal, and that muscle spasm was diagnosed. Medication given included muscle relaxant and anti-inflammatory drugs. Dr. S notes a referral to Dr. B at appellant's request, as well as referral to rehabilitation for treatment of the muscle spasm. The letter ends "We found no physical or x-ray evidence, other than symptomatic pain, and treated patient symptomatically."

Records from Dr. B, of (Healthcare Provider), indicate normal x-rays, a "good" prognosis, and a long history of back complaints and treatment. A letter from Dr. B dated November 14, 1991, notes that appellant continues to complain of back pain, but notes that "The only thing left to offer this gentleman would be entry into a chronic back pain program in which he would undergo psychological evaluation; certainly it is my belief that his continued complaints of pain and loss of function represent a significant functional overlay rather than a demonstrable physiological pathology which is found by objective evaluation . . . . All of his examinations up to this point have not demonstrated any physiological abnormality. He does have positive Wadell's signs which are demonstrative of lack of physiological pathology and certainly present a functional overlay or symptom magnification."

Physical therapy records from (Healthcare Provider), beginning with a July 22, 1991 referral, indicate that appellant was treated for pain and that he demonstrated limited motion, with increased mobility over the course of treatment.

A record from Dr. R, of (Healthcare Provider), shows analysis of two examinations conducted on December 4, 1991 (CT scan), and December 16, 1991. The physician notes that the scan shows some cervical spine abnormalities, but notes that the lumbar spine is normal. Dr. R further shows that appellant complained primarily of lower back and leg pain and only minimally of neck pain. Dr. R states: "It is my opinion that [appellant] is magnifying his symptoms. There is nothing objective on his examination or on his tests to support his subjective complaints of low back pain and leg pain . . . . His diagnosis is : 1) cervical spondylosis which is minimally symptomatic, 2) lumbosacral sprain with symptom magnification. I believe the patient does not wish to return to work. I do not believe there is any reason why the patient should not be able to return to work with some restrictions." Dr. R released him effective December 17, 1991 with a 20 lb. lifting limit.

There were no records from Dr. BK, the doctor selected by respondent, in the record. None of the records after the _____ incident state a conclusion that there was an aggravation of previous conditions.

Much of the record consists of past workers' compensation claims or lawsuits filed by the appellant for injuries prior to _____, admitted without objection from appellant. In a nutshell, the records indicate back injuries, as well as notations of lumbar strain, chronic back pain and "functional overlay". Dr. S, who consulted with appellant relating to a 1984 back injury, stated that he felt that appellant was permanently disabled from work due to cervical and lumbar strain and bilateral nerve root irritations. This same physician, who also treated appellant for a work-related injury occuring prior to 1984, continued to render considerable treatment to appellant up to and throughout 1987, prescribing pain pills (including Codeine). The unvarying part of his diagnosis through this time was "lumbar strain."

Regarding the claim for the injury immediately prior to the one under consideration in this case, ("Dr. BW"), in a May 1989 report, indicated that x-rays were normal, noted appellant's complaints of back pain that prevented him from activity, and, although he diagnosed lumbar strain, he noted that "we are basically treating a minimal physical disorder and a maximal functional disorder," and noted as well the lack of physical signs. Dr. BW also notes a history of chronic back pain. This claim was eventually settled on the basis of a hernia, with appellant agreeing that any back injury was incurred outside the course and scope of employment.

An insurance carrier's liability for compensation under the 1989 Act is for an "injury" that arises out of the course and scope of employment. Article 8308-3.01 (a). The Act defines "injury" , in pertinent part, as: "Damage or harm to physical structure of the body . . . ." Art. 8308-1.03(27). An aggravation of a pre-existing injury can itself constitute a compensable injury. Gulf Insurance Company v. Gibbs, 534 S.W.2d 720, 724 (Tex. Civ.

App.-Houston [1st Dist.] 1976, writ ref'd n.r.e.). Thus, the fact of previous injuries or workers' compensation claims is irrelevant to liability for temporary income benefits if the evidence establishes that a work-related accident causes an injury that results in disability. (Liability for medical benefits is not, of course, dependent upon disability.) However, an accident does not necessarily equate to an "injury." *See* Jarrett v. Travelers' Insurance Co., 66 S.W.2d 415 (Tex. Civ. App.-Amarillo 1933, writ dism'd agr.). And, mere pain is not compensable under the workers' compensation statute. National Union Fire Insurance Co. of Pittsburgh v. Janes, 687 S.W.2d 822 (Tex. Civ. App.-El Paso 1985., writ ref'd n.r.e.).

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Art. 8308-6.34(e). His decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The burden is on the claimant to prove, by a preponderance of the evidence, that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). When an accident is proven, however, the burden shifts to the insurance carrier to prove that any injury resulted solely from pre-existing conditions. Gonzales v. Texas Employers' Insurance Ass'n, 772 S.W.2d 145 (Tex. Civ. App.-Corpus Christi 1989, error denied). In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951). While we believe that the evidence that the appellant slipped and fell on _____, is essentially strong, the medical evidence indicates, as noted by the hearing officer, that subjective symptoms and complaints were not substantiated by objective medical findings. Further, evidence from the time period prior to _____, shows that similar complaints and pain existed prior to the slip and fall. Therefore, there is probative evidence in support of the hearing officer's decision that "Claimant's injury did not arise out of the course and scope of employment with the employer on _____."

The decision of the hearing officer is affirmed.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Joe Sebesta
Appeals Judge