APPEAL NO. 92060

On January 17, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that appellant had not sustained an injury in the course and scope of his duties as a housekeeper at the (city) State Hospital (Employer) on (date of injury), and, that respondent had timely disputed appellant's claim. Accordingly, the hearing officer ordered that appellant be denied benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant challenges the sufficiency of the evidence to support the hearing officer's decision and seeks our reversal and the rendering of a decision to the contrary.

DECISION

We affirm the decision of the hearing officer since his findings and conclusions are not against the great weight and preponderance of the evidence.

The evidence showed that appellant had sustained a work-related injury to his lower back sometime in March 1990 while lifting a color television. He was referred to (Dr. F), M.D., of the (city) Orthopedic Clinic, who diagnosed a herniated disc at L5-S1 on the left side. In May 1990, appellant underwent back surgery (laminotomy and discectomy) and returned to work in August 1990. In October 1990 appellant settled his workers' compensation claim for his back injury for a cash settlement together with the payment of his future related medical bills for two years.

Appellant testified that while at work on (date of injury), he had cleaned a rug and when moving the furniture back into place felt something pull in his back and thought something was wrong. No one witnessed the incident. The next day he went to Dr. F and told her he had felt something pull in his back and that that is when his back started hurting. He doesn't know why his statement doesn't appear in Dr. F's records but appellant did tell her something pulled in his back. Dr. F took appellant off work, obtained x-rays and a CT scan, and told appellant he had a "new injury." According to appellant, Dr. F told appellant that "it was a new injury that could have been caused by the old injury but there was definitely a new injury in there." Dr. F subsequently recommended he undergo spinal fusion surgery which he did, apparently in June 1991. Appellant testified that Dr. F had told him she was having trouble getting the surgery approved because respondent wanted a second opinion. Appellant further testified that, although he didn't know why, respondent paid for his second operation pursuant to its obligation to pay appellant's medical expenses for two years under the compromise and settlement agreement of October 1990.

A form entitled "Payment of Compensation or Notice of Refused/Disputed Claim" (TWCC-21), dated "4/17/91," was admitted into evidence. This form pertained to appellant, showed a date of injury of "(date of injury)" and showed that respondent's first written notice of injury was received "4/10/91." A second TWCC-21, dated "7/1/91" was admitted. This TWCC-21 contained the additional information that temporary income benefits (TIBs) in the

amount of $2,690.73 had been paid to appellant from "3/29/91" to "6/16/91" and were thereafter terminated for the following reason:

"Although claimant reported an alleged injury on (date of injury), his treating physician, Dr. F, stated that any disability and the surgery of 6/17/91 was a result of the 3/16/90 alleged injury which was settled by agreed Judgement (sic) on 10/2/90. S.E.W.C. does not feel, due to Dr. F's statement and medical reports, that this is a compensable claim. This information became available to S.E.W.C. on 6/17/91."

In evidence from appellant was an Employer's form entitled "Physical Capacity Report - Attending Physician's Statement" completed by appellant's supervisor on "3-7-91" and by Dr. F on "3-11-91," prior to appellant's claimed new injury of "(date of injury)." No evidence was adduced as to the reason this report was prepared. This report stated that the employee's description of injury was "back hurting" and the date of injury as "unknown." Dr. F's portion of the report stated the diagnosis as "post-op laminectomy," that further treatment was required, and that appellant could resume regular duties on "3-12-91."

Dr. F's 1991 records regarding appellant's back problem reveal that on (date), appellant complained to Dr. F of "severe lower back pain going on now for about two months . . . he's working doing housekeeping and custodial services at the (city) State School . . . says when they clean the cottages, he has to move furniture and his back has been getting worse and worse . . . ." Dr. F's "impression" on that date was: "Acute back strain with muscle spasm. Cannot rule out an inflamed disc or central bulging disc." On May 20, 1991, Dr. F reviewed an MRI scan and reported it showed "a large disc herniation at L5-S1, central and slightly left-sided as well as a broad-based disc bulge at L4-5 and significant degeneration at both levels." Dr. F reported that "[T]hese are the same levels that we operated on a year ago that he [had] such good relief from, but the disc has degenerated so much in one year at 5-1, that I'd recommend he have it fused at the same time that we did a laminectomy and discectomy . . . ." The MRI report, dated "5-3-91," contained the observation: "[S]imilar to the CT of 3-22-90, but increased in size, is a left paramedian herniation at the L5-S1 level. A complete tear of the annular fibers posteriorly at this level is seen . . . ."

Respondent introduced an entry from Dr. F's records on appellant, dated June 17, 1991, pertaining to his "pre-op check," which stated in part as follows:

"I do feel that this problem that he has is a result of his chronic ongoing degeneration from his previous injury. His radiographs from a year ago showed definite narrowing and degeneration of both 4-5 and 5-1 discs. Therefore I do think this is a continuous problem going on since last year . . . ."

It was the obtaining of this report on June 17, 1991, that respondent contends was the basis for its reopening the issue of compensability under Article 8308-5.21(a) (1989 Act) and issuing the second TWCC-21 on July 1, 1991, terminating payment of TIBs to appellant

effective June 17, 1991.

Respondent also introduced an "Employee's Notice of Injury or Occupational Disease and Claim for Compensation" (TWCC-41), signed by appellant on "5/30/91" and received by respondent on June 5, 1991, which reported appellant's injury as occurring on "(date of injury)," and which described how it happened. As previously mentioned, both TWCC-21 forms stated that the insurance carriers' first written notice of injury was received on "4/10/91," a date more than 60 days preceding respondent's July 1, 1991, termination of TIBs.

Appellant introduced a letter from his counsel to Dr. F, dated December 17, 1991, which requested an opinion from Dr. F as to whether the injury appellant "sustained on (date of injury)," was a producing cause of his incapacity. Dr. F checked the "yes" block on this letter and commented that appellant had "degenerative disc disease."

The hearing officer had to determine whether appellant established by a preponderance of the evidence that he had, in fact, sustained an injury on (date of injury), as he claimed, and, whether respondent timely contested the compensability of appellant's claim. To make this determination the hearing officer had to consider the conflicting evidence and assign to it the weight and credibility he felt it deserved. Appellant did not allege the aggravation of a preexisting injury or condition. He argued that he sustained a new injury when moving furniture onto a rug on (date of injury), that he told Dr. F about it on (date), that Dr. F told him it was a new injury, and that Dr. F's comments back to appellant's attorney on the latter's letter of December 17th, which referred to a (date of injury) injury, all showed that appellant did indeed sustain a new injury on (date of injury). Appellant also urged that the reference in the MRI scan report of May 3, 1991, to "a complete tear of the annular fibers posteriorly" further supports the contention that a new injury occurred on (date of injury). Respondent's position at the hearing was that Dr. F's report of June 17, 1991, established that appellant's back problem was not a new injury but rather a continuation of his original back injury for which appellant had already been compensated. After this June 17th report became available, respondent prepared the second TWCC-21 terminating payment of TIBs. Respondent did not file a response to the appellant's request for review.

We find the evidence sufficient to support the hearing officer's conclusion that appellant did not suffer a new compensable injury on (date of injury), as he claimed. The Employer's Physical Capacity Report, dated "3-7-91," contained statements to the effect that appellant had described his injury or illness as "back hurting" and the date of injury as "unknown." Dr. F's diagnosis on that form, dated "3-11-91," was "post-op laminectomy." Dr. F's report of (date), contained no indication of a specific injury or traumatic occurrence on (date of injury), but rather refer to appellant's duties as including moving furniture when cleaning the cottages and stated that "his back has just been getting worse and worse." This report also indicated that Dr. F had "many, many times in the past" indicated that appellant needed to get into some therapy, and that he was then given a brace. Dr. F's report of April 26, 1991, indicated that appellant was 15-20% better after going to therapy and that she recommended obtaining an MRI scan "just to see if have (sic) a recurrent disc

problem." The MRI scan revealed a large disc herniation at L5-S1 and a disc bulge at L4-5. Dr. F stated that "[T]hese are the same levels that we operated on a year ago that he had such good relief from, but the disc has degenerated so much in one year at 5-1 . . . ." The MRI scan report of "5-3-91" contained the observation "[S]imilar to the CT of 3-22-90, but increased in size, is a left paramedian herniation at the L5-S1 level . . . ." Dr. F's report of June 17, 1991, stated that she felt appellant's problem was "a result of his chronic ongoing degeneration from his previous injury . . . a continuous problem going on since last year." In our view, the evidence regarding the nature of appellant's back problem up to the June 17th report was equivocal in terms of its establishing whether appellant sustained an injury on (date of injury) or was instead continuing to manifest symptoms from the prior injury. It was the June 17th report of Dr. F, however, that clearly raised this issue involving medical judgment and justified respondent's reopening the compensability issue. We believe the hearing officer had sufficient evidence before him to support his conclusion that appellant did not sustain an injury on (date of injury). Appellant's testimony alone could and did raise an issue of fact as to whether he was injured on (date of injury). Gonzales v. Texas Employers Insurance Ass'n, 419 S.W.2d 203, 208 (Tex. Civ. App.-Austin 1967, no writ). However, the hearing officer was the sole judge of the credibility and weight to be given not only appellant's testimony but all the evidence. Article 8308-6.34(e) (1989 Act). We will not disturb the hearing officer's findings and conclusions unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, 662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Turning to the hearing officer's conclusion that respondent timely disputed appellant's claim we also find sufficient supporting evidence.

The dates of significance to this issue follow:

March 16, 1990	Approximate date of appellant's initial lower back injury - herniated disc L5-S1.
April 25, 1990	Approximate date of appellant's laminotomy and discectomy.
August 1990	Appellant returned to work.
October 1990	Appellant settled workers' compensation claim for lower back injury - included medical payments for two years.
March 7, 1991	Employer's Physical Capacity Report on appellant for
"	back hurting" with "unknown" date of injury.
March 11, 1991	Dr. F's statement on Physical Capacity Report stating diagnosis as "post-op laminectomy" and returning appellant to regular duties 3-12-91.

(date of injury) Date of new injury claimed by appellant.

(date) Appellant seen by Dr. F for acute back strain with muscle spasm; taken off work for three weeks.

April 10, 1991 Respondent received first written notice of injury. Sixty-day dispute period under article 8308-5.21(a) began.

April 26, 1991 Dr. F decided to get an MRI scan to see if there is a recurrent disc problem.

May 13, 1991 Date respondent received Dr. F's report of (date of injury).

May 20, 1991 Dr. F reviewed MRI scan showing large disc herniation at L5-S1 and disc bulge at 5-1 with comment that disc has degenerated so much at 5-1 that surgery is recommended.

May 28, 1991 Date respondent received Dr. F's report of May 20, 1991.

May 30, 1991 Appellant signed Employee's Notice of Injury (TWCC-41) stating injury date of (date of injury) and describing accident.

June 4, 1991 Date respondent received MRI report of 5-3-91 showing increase in size of herniation at L5-S1 level and a complete tear of the annular fibers posteriorly at this level.

June 5, 1991 Respondent received Appellant's TWCC-41 dated 5-30-91.

June 9, 1991 (Sunday) Sixtieth day after respondent received first written report of injury of (date of injury)

June 17, 1991 Dr. F's pre-op report stating appellant's problem is result of chronic, ongoing degeneration from previous injury.

July 1, 1991 Respondent prepared TWCC-21 terminating TIBs as of 6/17/91 based on Dr. F's report of 6/17/91.

The evidence showed that respondent's first written notice of appellant's claimed injury was received on "4/10/91" and that respondent paid TIBs to appellant retroactively to "(date)." After receiving medical information on "6/17/91," the apparent date of appellant's second back operation, that he was suffering from his previous injury of "3/16/90," which had been settled on "10/2/90," respondent stopped paying TIBs effective "6/16/91." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(c) (TWCC Rules) provides that "[I]f a carrier disputes compensability after payment of benefits has begun, the carrier shall file a notice of refused or disputed claim on or before the 60th day after the carrier received written notice of the injury or death . . . ." Respondent's 60-day period following its receipt of its first written notice on "4/10/91" would have expired on June 9, 1991. However, article 8308-5.21(a) (1989 Act) provides that "[A]n insurance carrier shall be allowed to reopen the issue of compensability if there is a finding of evidence that could not have been reasonably discovered earlier." The provisions of article 8308-5.21 have been adopted by the statute providing workers' compensation insurance for state employees. TEX. REV. CIV. STAT. ANN. art 8309g.

Dr. F's report of June 17, 1991, stated that she had seen appellant for a "pre-op check" and it was in this report that Dr. F made the statements that appellant's back problem "is a result of his chronic ongoing degeneration from his previous injury" and "a continuous problem going on since last year." Obviously, this report was not available to respondent before June 17, 1991, the date it was authored. The evidence doesn't indicate whether the information in this report could have been earlier obtained. The hearing officer found that respondent became aware of this report on June 17th, that after receiving this report respondent stopped paying TIBs in accordance with article 8308-5.21, and, that article 8308-5.21 "enables [respondent] to terminate compensation on the grounds of newly discovered evidence that could not reasonably have been discovered at an earlier date."

Appellant urges that article 8308-5.21(a) requires "significant new medical data" and that Dr. F's June 17th report did not meet that test because her May 20th report had referred to appellant's discs as having degenerated in one year and that "the June 17th report was a mere restatement of the earlier report of the May 20 findings." Though not cited in appellant's request for review, appellant did cite in argument at the hearing below our opinion in Texas Workers' Compensation Commission Appeal No. 91035 (Docket No. AU-00056-91-CC-1) decided November 7, 1991. In that decision Appeals Panel No. 1 had occasion to consider the application of TWCC Rule 124.6(c) in a factual setting where the carrier had the newly discovered evidence 15 days before the expiration of the 60-day period for controversion but failed to act within that period. The hearing officer in that case determined that the carrier had not timely disputed the claim and had stopped the payment of TIBs without justification and we affirmed. In this case respondent contends, in essence, that if respondent intended to stop the payment of TIBs upon discovery that appellant did not sustain a new injury on (date of injury), it should have acted upon Dr. F's May 20th report, not her June 17th report, because the May 20th report first mentioned "the degeneration" of appellant's disc at 5-1 so much in one year and the June 17th report simply iterated information about this degeneration which did not constitute "significant new medical data." The decision in Appeal No. 91035, in comments unnecessary to the decision, did discuss

the article 8308-5.21(a) provision which permits a carrier to reopen the compensability issue if there is a finding of evidence that could not have been reasonably discovered and did use the term "significant new medical data." However, article 8308-5.21(a) speaks only in terms of "evidence" not reasonably discovered earlier. The term "significant new medical data" as used in that opinion was clearly not inclusive but merely illustrative of the type of evidence which could permit the reopening of the compensability issue by a carrier. In the instant case the hearing officer could consider that prior to receiving Dr. F's June 17th report, the information known to respondent included whatever information of new injury that appellant may have provided including at the least his TWCC-41, information in the MRI report including a complete tear of the annula fibers, Dr. F's impression of acute back strain with muscle spasm on (date), and information in Dr. F's report of May 20, 1991, that the L4-5 disc was involved in addition to the L5-S1 disc which was the area of the earlier injury. We believe the information in Dr. F's June 17th report which explicitly related appellant's current back problem to his prior injury was "a finding of evidence that could not have been reasonably discovered earlier." Further, appellant did not complain below nor does it on appeal that respondent failed to timely dispute the claim after obtaining Dr. F's June 17th report. Accordingly, we will not address such issue.

Appellant asserts that appellant's prior injury doesn't defeat his right to benefits for his subsequent injury citing our decision in Texas Workers' Compensation Commission Appeal No. 91051 (Docket No. FW-00041-91-CC-1) decided December 2, 1991. In that case the hearing officer determined that the employee had sustained a new compensable injury in (date of injury) notwithstanding the evidence that the employee had prior back problems going back to 1987 which were similar in degree and location to the current injury. In that case the evidence did not show the herniation of a disc until an examination after the date of the new injury. *See also* Texas Workers' Compensation Commission Appeal No. 92047 (Docket No. FW-00063-91-CC-6) decided March 25, 1992. The evidence in Appeal No. 91051, as in this case, was in conflict respecting whether the employee sustained a new injury, and we concluded the hearing officer had sufficient evidence to support his determination that the employee had proven a new injury. As we have earlier stated, we find the hearing officer in this case had sufficient probative evidence before him to support his findings and conclusions.

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge