APPEAL NO. 92216

On January 2, 1992, a contested case hearing was held in (city), Texas, with (hearing officer), presiding as hearing officer, to consider whether appellant was injured in the course and scope of his employment with (employer). The hearing officer found that appellant sustained repetitious trauma from early April 1990 through (date of injury), which aggravated a previous work-related injury sustained in October 1989; that the symptoms of appellant's alleged injury of (date of injury), related solely to the aggravation of his preexisting condition; and, that appellant did not sustain a specific injury on (date of injury). Based on these findings, he concluded that appellant did not sustain an injury in the course and scope of his employment on (date of injury). Appellant has requested our review of this decision pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.41 (Vernon Supp. 1992) (1989 Act). Appellant contends that not only was there sufficient evidence for the hearing officer to have found that he sustained an injury on (date of injury), but also that the hearing officer's finding that appellant aggravated a preexisting injury by repetitious trauma from April 1990 through (date of injury) was a sufficient basis upon which to conclude that appellant did sustain a compensable injury. Respondent urges that there is sufficient evidence to support the hearing officer's finding that appellant did not sustain a specific injury on (date of injury), and, that the findings relating to appellant's having aggravated a preexisting condition are neither inconsistent with nor necessary to support his decision.

DECISION

Finding the hearing officer's findings and conclusions to be mutually inconsistent, we reverse and remand for further consideration.

Confusion may have crept in at the very outset of the contested case hearing. The hearing officer did not adduce into evidence as hearing officer's exhibits, or otherwise make a part of the record, the benefit review conference report and statement of the unresolved disputed issue. The first indication in the record of the disputed issue was the following statement of the hearing officer: "I understand the issue today, the sole issue, is the question of whether or not [appellant] was injured in the course and scope of his employment with this employer." The hearing officer did not query the parties as to whether they agreed with his framing of the disputed issue nor was any objection thereto lodged. As can be seen, that broad statement of the issue did not state a date of injury nor did it indicate whether the claimed injury involved a specific, new work-related injury, the aggravation of a preexisting injury or condition by repetitious trauma over a period of time, or both. Neither party made an opening statement which might have shed light on their respective theories as to the nature of the claimed injury.

Claimant was the only witness at the hearing. He testified, through a translator, that he had worked for employer for approximately five years in the manufacture of mattresses. Appellant's and his coworker's jobs involved taking mattresses off the assembly line, placing them on a work table, installing various components such as springs, snaps, borders, and

covers, and then placing them back on the line. Such mattresses were of various sizes weighing from 80 to 300 pounds, and appellant fabricated 150 mattresses each day. In October 1989, appellant was injured when he lifted and threw a mattress back on the line and it bounced back and struck him on the back of the head injuring his neck and shoulders. He was treated by (Dr. A), was off work for six months, and returned to his same duties in April 1990. Upon returning to work, he continued to have "some problems" with his injury including experiencing pain in his neck and shoulders when lifting mattresses and he would tire quickly. He said he worked for about the first two weeks without pain and believed his work caused the pain he began to experience. However, he continued to work and made no report to employer before Monday, (date). He worked to and through Friday, (date of injury). Sometime during that day, appellant, while lifting a mattress, said he "felt something pop in my neck, something new, and it hurt me all the way down to my waist and my right leg and my shoulders. That's what caused my injury, that's why I'm not working now." When asked if he thought he had a "new injury" in (date) because his back now hurts, appellant responded: "I don't know, but in 1989 my back didn't hurt." He later said that on (date of injury), when he lifted a mattress, he felt a different pain in his back and leg, that pain ran down his back, right leg and knee. It was not clear from appellant's testimony, however, when he concluded he sustained an injury on (date of injury), as distinguished from his belief the pain may have been from his prior injury. He doubted his coworker, (Mr. A), or anyone else at his place of employment became aware of his injury on (date of injury) since he didn't mention the injury to anyone. He didn't report it to anyone on (date of injury) "because this was sort of like the pain that I had before." Instead, he went home for the weekend to see if the pain would abate but it persisted.

On the following Monday, appellant went on his own for medical treatment to a clinic and was seen by (Dr. L). He said that (Dr. L) took x-rays and took him off work. According to (Dr. L's) report of that visit, appellant presented with pain in his neck, low back, both shoulders, and both knees. (Dr. L) diagnosed cervicolumbar strain, right cervical paravertebral muscle spasms, and right knee strain. He was to review reports of appellant's "previous evaluation" (an apparent reference to appellant's prior injury) and see him again on March 11th. The report stated that at that the present time appellant was "medically disabled from work," notwithstanding that the slip given to appellant that day to give to employer stated he could return to work. The history portion of the report related that appellant had come to the clinic "for further evaluation of a work related injury which the patient is unsure about the dates"; that appellant was working for employer making beds when he slipped backwards causing the bed to fall on him; that appellant couldn't recall the exact date of this injury but remembered seeing (Dr. A), a company doctor; that appellant worked for approximately 10 to 12 months without problems; and that appellant "thinks he may have re-injured himself at work, but again he cannot recall any specific incident."

Appellant testified that after seeing (Dr. L) that Monday morning he went to employer to report his injury and asked his supervisor, (Ms. W), to send him to a doctor used by employer. She refused his request, apparently not believing he had been injured on the job. Appellant then obtained her consent to take his two weeks of vacation so he could go

to (state) and obtain treatment. In (state), he was examined by (Dr. B) and x-rayed by (Dr. H). He brought their reports back to employer. (Dr. B's) report of March 15, 1991, stated that appellant had sustained an injury to his cervical spine and that his x-rays revealed cervical lordosis and bulging/herniation at C-6.

After his return from (state) appellant said he saw (Dr. L) five or six times and obtained more slips taking him off work. (Dr. L's) slips stated that appellant was under his care "for injuries sustained on (date of injury)" and that due to those injuries he was unable to return to work. (Dr. L's) report of his examination of appellant on April 15th indicated that appellant continued to be "medically disabled from work," that his medications were to be continued, that further improvement was anticipated with additional treatment, and that the diagnoses remained "cervicolumbar strain/right knee strain." His report of May 9, 1991 stated that appellant "still has much pain in all areas [and] may never be able to return to work as laborer."

Appellant later came under the care of (Dr. C). In his September 30, 1991 report, (Dr. C) stated that appellant "sustained an injury to his neck in 1989 as well as an injury to the neck and low back in (date)" and that "[t]he injury on (date of injury) was evidently related to lifting a mattress when he felt a snap in his back." (Dr. C's) report described appellant's pain as having been immediate in the neck, shoulder, and low back with radiation to both shoulders, and with the low back pain radiating to the right hip and down the right leg to the knee. This report commented that appellant sought (Dr. C's) services after the clinic (Dr. L) discontinued his care due to insurance coverage denial based on a contention that appellant's pain "was due to some old injury." In a subsequent report, dated October 2, 1991, (Dr. C) addressed "the issues of causation of the present difficulties and disability of [appellant]" and opined in pertinent part:

> My records indicate that the patient suffered a rather severe neck injury in 1989 that kept him from work. He was eventually released, and returned to his previous heavy lifting manual labor type of work. He probably should not have returned to this type of work so quickly after this type of injury. This type of disposition of post work related injury in a patient is not recommended. Rather, it is more appropriate that the patient be eased into the work force, carefully evaluating his progress along the way.
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> His present disability relates directly to the heavy lifting that occurred from the time he returned to work until present. The incident in 1991 clearly has contributed to his present disability. Now that he has superimposed repetitious trauma on his pre-existing condition, his disability may be permanent.

(Dr. C) stated he has repeatedly advised appellant that he needs neurosurgical and possibly orthopedic evaluations, that he may end up with a "surgical disability," and that he may have to be retrained for light duty work.

Respondent introduced a neurosurgical consultation report from (Dr. C), M.D., dated January 15, 1990, which indicated appellant's referral by (Dr. A), M.D. According to this report, appellant was injured in October 1989 when he threw a mattress up on a conveyance for inspection and it bounced back down hitting him in the neck and resulting in pain to appellant's neck radiating into his right shoulder. About one week after the neck injury appellant began to have pain in his low back with radiation into his right leg as far as his calf. According to this report, (Dr. A) arranged for a myelogram and CAT Scans, which apparently didn't reveal the source of appellant's problem and thus he was referred to (Dr. C). (Dr. C's) impression was "cervical and lumbar pain with some radicular complaints, all on the right side, after an injury in October."

The remainder of respondent's case, admitted without objection, consisted of transcripts of telephone interviews with employees (JH), (JA), (MW), and (Mr. A). These interviews occurred on April 3 and 4, 1991. Three were signed and notarized on January 2, 1992. (Mr. A's) transcript was not signed and the hearing officer said he gave it no weight for that reason. (Ms. H's) statement indicated that appellant's last full day of work was (date of injury) and that he did advise employer on (date) that he was unable to work. (Mr. A), appellant's coworker, said through a translator that when appellant returned to work after his prior injury, he was never the same, that he would be all right in the mornings but later complain of neck and back pain. On (date of injury), appellant mentioned to (Mr. A) that he felt bad, apparently from the injury he had been complaining of, and was going to see a doctor. (Mr. A) didn't think appellant got hurt on (date of injury). He also stated that it had become difficult for appellant to do his part of their two-man job. (Ms. W), appellant's supervisor, said that appellant seemed all right at the end of his shift on (date of injury), came in Monday morning saying he slipped and fell at work the preceding Friday and twisted an ankle, sprung a knee, and wrenched his back. She said he also had a black eye which prompted her to ask him who had "whipped" him. She said she told appellant she didn't believe he had hurt himself at work and didn't feel she should send him to a doctor. When he told her he didn't get hurt and asked for two weeks of vacation to go to (state) for treatment, she agreed to that request. He never complained to her that his old injury hadn't completely healed after 1989. (Mr. A) said that he attended, apparently as a translator, the meeting on (date) at which appellant's injury was discussed. Appellant said he was hurt and his neck was still bothering him, that it was probably a recurrence of his 1989 injury, that he had not told anyone how he had felt, that he had gone to see the doctor and came back to work to get permission to go because they wouldn't see him otherwise. Appellant didn't say in that conversation that he got hurt on (date of injury). Incidentally, the interviewer told (Mr. A) during his interview that appellant was actually injured in 1989 and had received a settlement but that his medical benefits had run out and he had filed a new claim. According to (Mr. A), appellant had told him that "it was a re-occurrence of the accident . . . that happened in 1989," and that it was not until April 3rd that he understood that appellant claimed he slipped and fell while lifting a mattress on (date of injury).

In his closing statement appellant contended that he had proven that he had sustained a compensable injury both from the incident at work on (date of injury) as well as from the repetitious trauma which aggravated his preexisting condition. Respondent countered that appellant had alleged only the specific incident and not an occupational disease in his notice of injury and in his claim (neither document was in evidence) and so addressed only the claimed specific injury of (date of injury) in argument.

The pertinent findings and conclusion are as follows:

Findings of Fact

4.The claimant sustained repetitious trauma during the period of early April 1990 through (date of injury), which aggravated an earlier work-related injury he had sustained in October, 1989, while doing the same or similar work for this Employer.

5.The symptoms of the Claimant's alleged (date of injury), injury were related solely to the aggravation of this previously mentioned pre-existing condition.

6.The claimant did not sustain a specific injury on (date of injury).

Conclusions of Law

3.The Claimant did not sustain an injury in the course and scope of his employment (date of injury).

On appeal the appellant, in essence, not only challenges the sufficiency of the evidence supporting Finding of Fact No. 6 but also contends that Finding of Fact No. 4 should entitle him to benefits. Respondent contends that Finding of Fact No. 6 is not inconsistent with Finding of Fact Nos. 4 and 5; that the hearing officer "may also have recognized the distinction between a new injury and work activities which merely serve as the opportunity for preexisting injury to manifest itself;" and that "[i]n any event, Findings of Fact 4 and 5 were not necessary to the issues and decision at hand and should be disregarded."

Article 8308-6.34(e) vests in the hearing officer the sole authority to judge the relevance, materiality, weight, and credibility of the evidence. When reviewing issues of factual sufficiency, we consider and weigh all the evidence, both in support of and contrary to a challenged finding. We do not substitute our judgment for that of the hearing officer and must uphold a challenged finding unless the evidence is so weak or the finding so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. With regard to Finding of Fact No. 6, the evidence may be sufficient to support it. We are concerned, however, with the inconsistency of the findings and the conclusion that appellant was not injured in the course and scope of employment.

The 1989 Act defines injury to include "occupational diseases," occupational disease to include "repetitive trauma injuries," and defines repetitive trauma injury to mean "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Article 8308-1.03(27), (36), and (39). The date of injury for an occupational disease is defined as "the date on which the employee knew or should have known that the disease may be related to the employment." Article 8308-4.14.

We observed in Texas Workers' Compensation Commission Appeal No. 91094 (Docket No. redacted) decided January 17, 1992, that "[a]n `injury' is defined the same way in the `old' law, Article 8306, Section 20; under cases construing the prior statute, an injury includes an aggravation of a preexisting condition, whether or not that condition was job-related. Gulf Insurance Co v. Gibbs, 534 S.W.2d 720 (Tex. Civ. App.-Houston [lst Dist.] 1976, writ ref'd n.r.e.)." In Texas Workers' Compensation Commission Appeal No. 92047 (Docket No. redacted) decided March 25, 1992, we noted that "[t]o defeat a claim for compensation because of a preexisting injury, the carrier must show that the prior injury was the sole cause of the worker's present incapacity. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977)." In Gill v. Transamerica Insurance Company, 417 S.W.2d 720, 723, (Tex. Civ. App.-Dallas 1967, no writ), a case involving an employee who claimed worker's compensation benefits for a January 1965 back injury notwithstanding that he had a previous back injury in 1962 and a congenital defect, the court observed that "an employer accepts an employee as he is when he enters the employment, . . . " and construed "injury" to include, *inter alia*, the aggravation of a preexisting disease or condition. We presume this holds true for an employer who accepts an employee such as appellant back after treatment for an injury. In Sowell v. Travelers Insurance Company, 363 S.W.2d 350, 352 (Tex. Civ. App.-Beaumont 1962, rev'd on other grounds, 374 S.W.2d 412 (Tex. 1963), a case involving an injured employee with a current back injury as well as two prior back injuries, the court observed that "[i]t is elementary that injury as applied in the Workmen's Compensation Act not only covers the primary physical impact or harm, but as defined above, includes aggravation of any disease or condition previously existing."

Our decisions in Texas Workers' Compensation Commission Appeal No. 91051 (Docket No. redacted) decided December 2, 1991, Texas Workers' Compensation Commission Appeal No. 92047 (Docket No. redacted) decided March 25, 1992, Texas Workers' Compensation Commission Appeal No. 92060 (Docket No. redacted) decided April 1, 1992, and Texas Workers' Compensation Commission Appeal No. 92080 (Docket No. redacted) decided April 14, 1992, are instructive. Those cases involved employees claiming benefits for various injuries notwithstanding the existence of prior injuries, and issues were presented as to whether new injuries were proven. We reviewed the sufficiency of the evidence and affirmed the hearing officers' decisions. However, in those cases we were not called upon, as we are here, to attempt to reconcile findings and a conclusion to the effect that while one type of injury was not proven, another type of injury was proven and yet the appellant was determined not to have sustained a compensable

injury. Nor were we called upon to decide issues relating to a variance between a claim for an accidental injury or an occupational disease. *See e.g.*, United States Fire Insurance Company v. Alvarez, 657 S.W.2d 463 (Tex. App.-San Antonio 1983, no writ); and Treybig v. Home Indemnity Co., 632 S.W.2d 896 (Tex. App.-Dallas 1982, writ ref'd n.r.e.). (Dr. C's) report of October 2, 1991 made reference to repetitive trauma superimposed on a preexisting condition. However, we do not know when such potential notice to respondent of the possible alternative theories of appellant's claimed injury was exchanged. Particularly analogous is Appeal No. 92060 involving an employee who had settled a workers' compensation claim for a back injury and approximately one year later claimed a new back injury. The evidence was in substantial conflict as to whether the later injury was a new injury or the continued manifestation of the original injury and the hearing officer determined that the employee did not sustain a new injury.

We reverse and remand for further development of the evidence, as appropriate, and for reconsideration not inconsistent with this opinion. Pending resolution of the remand, a final decision has not been made in this case.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Joe Sebesta
Appeals Judge