APPEAL NO. 92267

A May 14, 1992, contested case hearing was held at (city), Texas, (hearing officer) presiding. Both parties agreed the issues were as follows: (1) Did respondent (claimant below) suffer an injury to his back on (date of injury), during the course and scope of his employment with (employer); and (2) Did respondent receive a *bona fide* offer of light duty employment from employer. The hearing officer held that the respondent suffered a compensable back injury on (date of injury) while working for employer, and that no *bona fide* offer of light duty employment was made.

On appeal, appellant (carrier below) argues that the hearing officer erred in finding as a matter of fact that respondent suffered a back injury on (date of injury) while fulfilling his job duties as a floor hand; that he was unable to work after (date) because of the injury he suffered (date of injury) while working for employer; and that respondent's 1988 back injury was not the sole cause of his being unable to work after (date). Appellant also said the hearing officer erred in concluding that respondent showed by a preponderance of the evidence that he suffered a back injury on (date of injury) while in the course and scope of his employment with employer, and stating that appellant is liable for benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Article 8308-3.01, and that appellant failed to show that respondent's current incapacity was solely caused by the 1988 back injury. The issue of *bona fide* offer of employment was not raised on appeal.

DECISION

The decision of the hearing officer is affirmed.

Respondent testified that he started working for employer, an oil field service company, as a floor hand around the end of December 1991. He said his duties included keeping the oil rig clean and pulling pipe and tubing, or rods, in and out of the hole. On Friday, (date of injury), he said he was "wrenching rods," which involved holding on to two rods with a wrench in each hand, screwing them together, then snapping them together by putting his whole body behind them. He said he felt a "jolt" in his back, so he stopped to get a drink of water and to stretch; then he felt better and went back to work. He finished working that day; however, on the way home in the company truck he felt pain in his left leg. He rested that weekend at home, then came back to work the following Monday, where he worked moving the rig. He said he had trouble working that day; however, he did not tell anyone at work about his injury the day it occurred or the following Monday, even though he was working with several people, some of whom he rode to and from the job site with. He did not tell his supervisor about his injury even though he said it was company policy to do so. He said he did not tell anyone "Because I didn't want anybody thinking nothing of me." The next morning, (date), respondent said when (Mr. W) and another coworker came to pick him up for work, he told them he was hurt and needed to see a doctor, but he did not tell them he was hurt on the job. He went to the emergency room and was X-rayed. The same day, he saw his own doctor, (Dr. L), who gave him a work excuse and referred him to an orthopedist, (Dr. R). Dr. R. ordered a myelogram and CT scan, and told him not to go

back to work.

Respondent said he had suffered a prior back injury in 1988, while lifting weights in a high school gym class. He saw Dr. L at that time, had a lumbar CAT scan, and was told he had a herniation at the L5, S1 level. He also had physical therapy, and was told that his injury could require surgery. He claimed, however, that he missed no time from any of his prior jobs because of back pain.

On cross-examination, respondent said he told the doctor at the emergency room that the injury was caused by a particular incident at work, and that if the emergency room report did not reflect that it was not because he had not mentioned it. He also said that he told the doctor that the back pain had been increasing; that the pain was gradually getting more and more painful down his leg.

Respondent also admitted under cross-examination that he was asked about prior back injuries on the job application for his current job, but that he had indicated he had had no such injuries. He indicated that was because the 1988 injury was a long time ago; that he had continued to work since that time; and that he didn't even think about that injury.

Respondent's wife, (Mrs. H), testified that he came home from work saying he had hurt himself, but that he hadn't told anybody. She said she applied a heating pad and topical medicine but that it didn't seem to do too much good.

Appellant's witness, (Mr. H), was a senior rig supervisor with employer at the time of the accident. He said he first learned respondent had filed a workers' compensation claim on the afternoon of (date), when respondent's doctor called. He said he was not aware of whether or not respondent had reported any injury on the job to his immediate supervisor.

Medical information made a part of the record included the following:

1.Records from Dr. L containing, in pertinent part, summaries of the following visits: March 31, 1988 recheck--"[patient] was sent to get CT scan of lumbar spine...CT scan showed L5 S1 on the left pos (sic)...he should come see me to wrap this all up & plan ahead, probably eventually for surgery;" April 12, 1988 recheck--"...could get his fingers only within 19" of floor...he had sciatic L5 distribution to the popliteal level;" May 18, 1988 exam--"Lumbar spine CT showed herniation of disc material to the left at L5-S1 disc space. The S1 nerve root looks impinged upon." June 7, 1988 recheck--"Could get his fingers 14" from floor. Adv. to cont (sic) his physio-therapy. Got DT inj." December 6, 1989--"...could get fingers 16" from toes, walks ok on heel & toe...migraine...sent for CT scan of head...CT scan was neg (sic) without enhancement." March 20, 1991--"Has finally given up on recovering from his pain. He could get his fingers about 16" from floor,

walked ok on heel & toe. We will refer him to (Mr. S), UTMB..." May 10, 1991--"He wants to know whether we have ever heard from UTMB. As I remember, we filled out an application." (date)--"He claimed that he developed recurrence of his pain on 24 Jan working with a crew for an oil company lifting heavy pipes. He also claimed that since his last visit he had been comfortable and able-bodied. He said the pain was aggravated with cough (sic) and sneezing and it followed the L5 distribution. He could get his fingers only 27" within his toes...he refused to walk on his heel presumably because weight bearing on the left foot was too painful. Strangely, he could walk okay on his toes which is a little mysterious if this is truly an L5 lesion...He said that he immediately wanted to be sent to an orthopedic surgeon..."

2.May 6, 1992, letter from (Dr. Li) to (Ms. P), adjuster, Crawford and Company. Dr. Li performed physical and neurologic exams, including electromyography in the left L4, L5, and S1 distributions. His assessment was acute left S1 radiculopathy secondary to herniation of the L5-S1 disc, and herniation of the L5-S1 disc with resolution of symptoms in 1988. He recommended L5-S1 laminectomy and discectomy, and stated as follows: "This patient has symptoms and findings compatible with a left S1 radiculopathy. The EMG study clearly shows abnormalities of the paravertebral muscles and the left gastroc an (sic) S1 innervated muscles. The findings are acute rather than chronic. These findings are compatible with a history of an injury in (month) and subsequent back and left leg pain. While he had an abnormal CT scan in the past, the history is that he recovered fully and had been working without difficulty. It should be possible to try to substantiate this by looking at his employment records if necessary. Current information suggests that he has an active S1 radiculopathy secondary to his work related injury in (month)...He definitely has not reached the maximum medical improvement at this time. There has been a clear-cut and definite worsening since 1988. His current symptomatology and findings are much worse now than any reported by [Dr. L] in 1988."

3.April 20, 1988 physical therapy initial evaluation by (Ms. C), LPT. This report said, in part, that "Patient has nerve root irritation possibly due to disk (sic) reported from CT scan. This condition could be irritated by patient's habitual posturing and activities." An attached "Progress Notes" dated May 16, 1988, says in part that "Presently [patient] has only occasional ‘twinge’ in hip and leg which still occurs after long period of sitting or excessive activity...Feel [patient] has received max. benefit @ this time..."

4.April 1, 1992, diagnostic imaging report, CT examination of lumbar spine. The report says in part that "[t]he scan show (sic) the disc at L3-L4, L4-L5 to be within normal limits without evidence of significant bulging or herniation. There is a left sided herniation of the disc at L5-S1. There is compression of the left S1 nerve root..."

5.April 1, 1992, diagnostic imaging report, lumbar myelogram. The report said in part that "[t]here is an extradural defect at L5-S1 on the left side with compression of the left S1 nerve root. This is consistent with disc herniation..."

6.(date), emergency room report. The report described, in part, "gradually increasing pain from low back down through [left] hip" for three-four days..."repeated bending/lifting at work." Diagnosis was "low back strain with nerve root irritation."

Also admitted into evidence were transcribed statements taken from the following coworkers of respondent: (Mr. G), (Mr. H), (Mr. McG), and (Mr. W). Mr. G said respondent did not say anything about being hurt or going to see a doctor, and that he did not recall respondent talking about any other accidents. Mr. H also said respondent said nothing about an injury, and that while respondent had never said anything to him about a prior accident, he had heard from some other men that respondent had said something about being hurt on an earlier job with another employer. Mr. McG said he did not recall respondent mention being injured. Mr. W was not at work on (date of injury), but said he worked with respondent the following Monday and that he did not complain of an injury. He said that on Tuesday morning when he stopped by respondent's house to pick him up, he said he had had leg cramps and muscle aches all night Monday night and he was not able to work.

Appellant contends that the overwhelming weight of the evidence in the case is against the hearing officer's findings that the injury was job related. In support of this position, appellant says that respondent continued working after the alleged injury and did not report it to his coworkers; that respondent's previous injury revealed a herniation at the L5, S1 level, the same as the current diagnosis, and that as late as 1991 respondent was continuing to see a doctor for this condition; that the emergency room reports suggest that respondent did not relate his back pain to any specific incident, only that the pain was gradually increasing. Appellant contends the evidence shows that respondent's problems or disability is the result of his prior injury.

Under the 1989 Act, a compensable injury is defined as "an injury that arises out of an in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). An injury is defined as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm." Article 8308-1.03(27). The claimant has the burden of proving that his injuries

were suffered while acting in the course of his employment. Reed v. Casualty & Surety Co., 535 S.W.2d 377 (Tex. App. - Beaumont 1976, writ ref. n.r.e.). The mere existence of a preexisting injury or disease which aggravates or enhances a complained of injury does not defeat a claimant's right to recover workers' compensation benefits. Gonzales v. Texas Employers Insurance Association, 772 S.W.2d 145 (Tex. App.-Corpus Christi 1989, writ dism'd). In order to defeat a claim, the carrier must show that the prior injury or illness is the sole cause of the claimant's present incapacity. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). An injury that aggravates a preexisting infirmity is compensable provided overexertion or an accident arising out of employment contributed to the incapacity. INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st Dist.] 1988, no writ).

The record in this case demonstrates that respondent had suffered a 1988 back injury, diagnosed as an L5-S1 herniation, for which he had received treatment and therapy for some period of time. By his testimony, on (date of injury) he hurt his back while he was "wrenching rods" on an oil rig which he said entailed "snap[ping] them together real hard," and which Mr. H testified required the employee to "pop it back" and "slam it with your hands." These activities indisputably were in the furtherance of the employer's business. The post-1992 medical reports indicated injury of a similar nature with that which occurred in 1988, although the report of Dr. Li called the findings "acute rather than chronic," and said they were compatible with a (date of injury) injury. The emergency room report, rather than indicating a gradually worsening condition, speaks of pain which gradually increases from the low back to the hip; while it is true the report does not mention a specific incident, it does say respondent "does a lot of bending and lifting at work." While respondent admittedly did not report his injury immediately, it was undisputed that he informed coworkers and sought medical attention four days later.

Given the foregoing, we cannot say that the appellant met its burden of establishing that the 1988 injury was the sole cause of respondent's current problems, nor that the decision of the hearing officer that respondent suffered a compensable injury on (date of injury), goes against the great weight and preponderance of the evidence.

The 1989 Act provides that the hearing officer is the trier of fact and the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g).

The decision and order of the hearing officer are accordingly affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge