APPEAL NO. 92429

On July 28, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to consider the sole issue of whether the claimant, (Mr. R), the appellant herein, injured his back in the course and scope of his employment for (employer), while stationed with (employer), on (date of injury). The hearing officer determined that the appellant had not been injured in the course and scope of his employment. As elements of this finding, the hearing officer found that, prior to the injury, the appellant had persistent low back pain and leg pain, that an x-ray taken after the date of injury remained unchanged from one taken two years before the injury, and that physical therapy records document a claimed date of injury the week before it occurred.

Appellant contends that the hearing officer erred by finding and concluding that the appellant did not sustain an injury on (date of injury); by finding that the appellant was injured the week prior to (date of injury); and by finding that his x-ray taken after the injury was unchanged from a prior x-ray. Respondent argues that the decision of the hearing officer should not be set aside simply because different inferences may be drawn from the evidence. Respondent points out that appellant was an interested witness, and that the opinion of appellant's doctor that he was injured on (date of injury), is negated by the fact that this is based upon what the appellant told him. Respondent points out the evidence, it feels, supports the hearing officer's decision.

DECISION

After reviewing the record, we reverse the hearing officer's determination that the appellant did not sustain an injury on (date of injury), in the course and scope of his employment for the employer, as against the great weight and preponderance of the evidence so as to be manifestly unjust, and render a new decision that the appellant sustained an injury to his back while working in the course and scope of his employment for employer on (date of injury).

The testimony will be summarized in the order in which it was given. (Ms. V), who was employed as office manager for the employer, stated employer furnished temporary labor to various companies. On (date of injury), she stated that appellant, who had just been hired by employer, was sent out to a Sam's Warehouse to install roofing for (employer). This was appellant's first day of work for employer. She stated that at least two other employees were also stationed there, and all of them worked alongside employees of the Roofing Company. She stated that she was contacted by the appellant on (date), and he claimed that he had been injured at the roofing job. He supplied information about the injury that she recorded. Among other things, she recorded as witnesses "Skip" (M) and (ME), recorded that appellant contended he was injured moving insulation materials, and that the time of injury was around 3:00 p.m. on the (date). He claimed injury to his lower back and left leg. Appellant did not disclose on his job application that he had a prior back injury. He indicated that he could do moderate lifting. Ms. V stated that he wrote "some" over the heavy lifting column on the job application. Ms. V indicated that although appellant would

have been hired even if he had listed a prior back injury he would not have been sent to a roofing company. Ms. V stated that she did not ask anyone at (employer) if appellant had reported an injury. She stated that it was the employer's position that, because appellant already had a doctor's appointment scheduled for (date), he was not injured on the job. (This indicates that the employer's position was that appellant had already been injured elsewhere, although Ms. V did not explain). Ms. V said there was no on-site supervisor for employer, and that the proper reporting of an accident would involve notifying the supervisor for the roofing company and then someone at employer's location. She agreed that appellant notified her two days after he contended he was injured.

The next witness was (Mr. M), a counselor at the Texas Rehabilitation Commission (TRC). Mr. M affirmed that appellant had applied for vocational rehabilitation in April 1991. Mr. M determined, on the basis of medical records from (Dr. D), appellant's treating doctor for his previous back injury, that appellant qualified for TRC services. In order to obtain current medical information about appellant, Mr. M (on July 31st) scheduled an appointment with Dr. D for the morning of (date). Mr. M stated that such an examination would be done at TRC expense. Mr. M's file notes reflected that sometime on (date of injury), he received a phone call from appellant's wife that appellant did not want to keep the (date) appointment. Mr. M admonished her that the appointment was required in order to receive services from TRC. Mr. M's notes reflected that appellant called him on August 16th to say he kept the appointment; Mr. M did not recall being told at this time that appellant had also been reinjured. Mr. M subsequently closed the file because of lack of further contact from appellant.

The respondent subpoenaed the two men identified as witnesses by appellant in his report of the injury to his employer. The first witness, (Mr. AM) had worked for employer at the roofing job for months and had no recollection of appellant or of any of the specific activities of (date of injury). Mr. AM testified that insulation was raised in bundles to the roof by forklift, and put on skids that were on rollers. His task was to then roll the insulation from place to place on the roof, and, with the assistance of others, push the bundles off the skids. He stated that three or four men would be required to push the insulation bundle off the skid.

The second witness, (Mr. E), who testified that he had not discussed his testimony with anyone prior to the contested case hearing, vividly recalled (date of injury), because "[i]t was too strenuous for the amount of money they were paying me." He was sent by employer to work at (employer). He stated he had worked only on (date of injury), that it was hot work and hard work, and that, by the end of the day, there "probably wasn't two muscles in my body didn't hurt real bad." During the morning, he stated that the workers were primarily lifting single sheets of insulation, which weighed no more than three or four pounds. But Mr. E stated that for over two hours during the afternoon of the (date), from around 3:00 to 5:30 p.m., he, along with appellant and Mr. AM, had to push skids with pallets of insulation bundles from one side of the roof to the other. Mr. E estimated that the pallets and bundles weighed 400-500 lbs. He stated that it was a "full grunt" effort just to slide the

loaded skids around the roof top. Mr. E said that to push the heavy bundle of insulation off the roller skid, all three of them had to lift and push from one side of the bundle, and "it was everything three people could do to pick up one side." Mr. E specifically recalled one occasion where the skid was at an awkward angle and moving that particular bundle was particularly cumbersome. After work that day, he invited appellant and Mr. AM briefly back to his apartment, where all three men complained about being sore and about how hard the work was. Mr. E said that appellant complained that he had a sore back. Mr. E had not seen appellant from that day until the day of the contested case hearing.

The appellant testified and readily admitted that he had a work-related injury in 1987 that resulted in a herniated disc and surgery. He said that even after surgery, he felt a dull ache in the center lower part of his back, as well as leg pain. Appellant stated that he agreed with Mr. E's recollection of the sequence of work. He testified in more detail about the specific instance alluded to in Mr. E's testimony, and stated that the "roller thing" couldn't be readily pulled from beneath the insulation pallet because it was at an angle. He stated that he felt something in his back give as the effort was made to extricate this skid. Appellant stated that he attempted to report the incident to the roofing company on-site supervisor, (RR). Appellant stated that he tried to get up the next morning and could not. Because it was nearly noon when he finally arose, and because he already had the TRC scheduled appointment with Dr. D, he waited until the next day to get medical attention. He told Dr. D about his injury. Appellant stated that the pain he felt after the injury was sharp and more-left sided than that previously experienced, and that his leg now would give out on him and cramp up. Appellant said he had not cancelled any appointments with Dr. D, but that one had been cancelled for him by the financial people at the Dr.'s clinic because of denial of payment.

Appellant stated that he saw his wife the morning of the injury around 6:30 a.m., and then not until around 7:00 p.m. at night. He agreed in cross-examination that he had not disclosed his back injury on his application with employer, and indicated that he had a reason for that (respondent did not, however, ask him the reason). Prior to working for employer, he had worked in a restaurant for two to three months. Appellant stated he had not been injured between his prior injury and (date of injury). Appellant did not work after (date of injury).

The deposition and records of Dr. D, who had treated appellant for his 1987 injury, were obtained through subpoena requested by the respondent. With no equivocation, and with reference to the definitions of injury as set forth in the 1989 Act, Dr. D states in his deposition it is his opinion there was objective evidence that appellant was injured on (date of injury); that he believes that appellant had incurred a recurrent disc herniation at the L4-5 level on the left; that the injured area of the body was the same as previously injured; and as a result, appellant was unable to continue working. Dr. D did indicate that the prior injury contributed in some degree to disability, but that it was not the sole cause. Dr. D's records and notes indicate that when he saw appellant on (date), he diagnosed an acute lumbar

sprain with possible injury to scar tissue at L4-5 as opposed to recurrent disc herniation. He records a history of the accident which matches the account given to the employer, and the testimony of Mr. E and appellant at the contested case hearing. He took appellant off work at that time. An x-ray taken on (date) indicates that the L4-5 disc space is somewhat narrow but is unchanged from previous examination of 8/1/89. Although his notes indicate that Dr. D wanted to conduct examination by magnetic resonance imaging (MRI) sometime in August, one was not conducted until May, 1992 when appellant's symptoms persisted and did not improve. That MRI disclosed a recurred disc herniation on the left side of L4-5.

Appellant also received physical therapy. A note recorded on August 15, 1991, which was a Friday, says "states that he injured himself last week at work . . ." On 8-21-91, the notes indicate that the patient "lifted object while in construction job . . ."

We agree with appellant that Finding of Fact No. 7 that the physical therapy records "indicate claimant claimed he sustained his injury the week before August 15, 1991 which . . . was prior to (date of injury) . . ." is not supported by the evidence. The Appeals Panel has indicated previously that such recorded history cannot be taken as proof of the date of injury. Texas Workers' Compensation Commission Appeal No. 92108 (Docket No. redacted) decided May 8, 1992. Therefore, Finding of Fact No. 7 sets forth matters that cannot be taken as evidence that the accident occurred prior to (date of injury). Even if the notes were tendered as impeachment, and assuming that the transcriber accurately recorded what the appellant said, the notes made on Friday, August 15th are equally susceptible to an interpretation consistent with injury that Monday of the week. Given the lack of any evidence that appellant was injured the week prior to (date of injury), it is unclear why the hearing officer would construe the ambiguous physical therapy history note inconsistently, rather than consistently, with the other available evidence.

The hearing officer's finding, and the respondent's argument, that appellant had a history of back pain and injury, is simply not inconsistent with his assertion that he incurred a new injury on (date of injury). It is well settled that the existence of a pre-existing injury or disease that aggravates a complained of injury does not defeat the injured employee's right to workers' compensation. Gonzalez v. Texas Employers Insurance Association, 772 S.W.2d 145, 148 (Tex. App.-Corpus Christi 1989, writ dism'd). An injury that aggravates a preexisting bodily infirmity is compensable if the aggravation arises out of the course and scope of employment. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston[1st Dist.], no writ). It is the burden of the insurance carrier to prove that a 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, 100 (Tex. 1977). The burden is on the claimant to prove that a compensable injury or aggravation did occur, Page, *supra*, through a preponderance of the evidence.

However, under the record in this case, that burden was more than met by the strong

medical evidence of injury (and the link drawn between the eventually-detected herniated disc and the (date of injury) injury by Dr. D, who had treated appellant for years for his back), the unprepared and vivid corroborative testimony of Mr. E concerning the activities that day and the complaints appellant made of back pain, the consistent accounts of the accident that were given by the appellant to his employer and doctor, the fact that the (date) appointment had been made for a routine physical and not because of an injury occurring prior to (date of injury), and appellant's testimony about the sequence of events and his pain. Against this was the employer's assertion that it felt the claim invalid solely because he had a doctor's appointment already scheduled for (date) (but had not contacted the roofing company to determine if an injury had been reported to them), the fact that appellant identified his pain as in a slightly different location while Dr. D attributed it to the same area as injured before, Dr. D's initial impression on (date) that appellant had a strain as opposed to herniated disc, the fact that appellant had an admitted prior back injury, the fact that appellant did not disclose that injury on his job application, and an "unchanged" x-ray. Regarding the latter, we would note that a "normal" x-ray is not inconsistent with a back injury and "abnormal' MRI result. *See* Texas Workers' Compensation Appeal No. 92140 (Docket No. redacted) decided May 20, 1992. We have already noted the effect of the "evidence" of the August 15, 1991, physical therapy note. Failure to report a previous injury on a job application does not overcome evidence that an injury has occurred while employed by that employer. Dr. D's identification of the location of pain versus that given by appellant are not necessarily inconsistent, and the MRI showing a left-sided herniation is supportive of appellant's account of the pain. A muscle strain is an injury in its own right. As noted above, an aggravation in the same location as a prior injury cannot, on that basis alone, be determined noncompensable. Finally, respondent quite simply did not present sufficient evidence that appellant's preexisting back injury (or, for that matter, any subsequent injury) was the sole cause of his lumbar strain and herniated disc.

This is not simply a case where different inferences may be drawn, but is a case where the great weight of evidence is so against the decision of the hearing officer that it would be manifestly unjust to let it stand. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); Texas Workers' Compensation Appeal No. 91038 (Docket No. redacted) decided November 14, 1991.

We reverse the decision of the hearing officer, and render a new decision that the appellant injured his back in the course and scope of his employment for the employer on (date of injury), and that the respondent is liable for medical and income benefits in accordance with the Texas Workers' Compensation Act.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge