APPEAL NO. 92483

A contested case hearing was held in (city), Texas, on August 7, 1992,(hearing officer) presiding as hearing officer. He determined the appellant (hereinafter called claimant) did not sustain a hernia in the course and scope of his employment and, accordingly, was not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). The claimant disagrees with the hearing officer's decision and asserts that he did sustain a compensable injury and that he filed as soon as he was aware of the internal injury. Both respondents (hereinafter called carrier(s)) urge that the decision of the hearing officer is supported by the evidence and should be affirmed. Lumberman's response further agrees with the claimant's claim that his injury occurred subsequent to the time that their coverage ceased the first part of April 1992.

DECISION

The decision is reversed and remanded for further consideration and development of evidence.

Two issues were stated to be under consideration at the beginning of the hearing: whether the claimant sustained a compensable injury in the course and scope of employment on either (date of injury), or (date of injury), or (date of injury); and, if so, whether claimant gave timely notice of the alleged injury to the employer. The hearing officer did not make any findings on the second matter as he determined it to be moot in view of his determination there was no compensable injury sustained. In any event, the claimant explained the confusion surrounding the (date of injury) and (date of injury) matter by stating he made a mistake when using only numbers to list the date rather that writing out the month. He also stated that he amended his claim form when he discovered this mistake. This matter was not controverted by any other testimony or evidence and the hearing officer apparently accepted this when he stated in the record that he would take official notice of the amended claim form should it be located, "but I recognize a decision in this case will reflect a claim injury date of (date of injury)."

The claimant had worked for the employer for over two years as a driver handling compressed gas. He would deliver containers of gas weighing from 50 pounds to 450 pounds. He testified he would sometimes do a lot of lifting of containers of gas at work and would sometime use a dolly. He stated he had never been diagnosed with a hernia before he started working for the employer and that at the time he was hired he had to take a physical. The report of that physical was in evidence and it specifically indicates "no" in the area regarding the presence of any hernia. The claimant testified that around (date of injury) he began to experience discomfort and knew he needed to see a doctor because he did not know if he "had a hernia or a tumor or bad kidneys or what." He did not realize it was work related until he was referred to a surgeon on (date). He subsequently informed his supervisor that he had a work related hernia but that he could not identify a specific incident or occurrence that caused it, rather that it resulted from the repetitive trauma of

lifting over a period of time. He stated he told this repeatedly to the people in Austin but they kept demanding he give a specific date.

The claimant testified that he had a scheduled physical for April 22, 1992, but went to (Dr. J.) two days earlier because he was "leery about the way I felt." Dr. J. diagnosed umbilical and ventral hernias. Claimant states he did not mention the type of work he did but only answered Dr. J.'s questions which did not include anything about his work. He subsequently saw a surgeon, (Dr. K.), on (date) and after Dr. K. questioned him about his work and they discussed the matter, the claimant concluded his hernias were work related. Claimant states this was the first he was aware that his injury was work related. He told his supervisor about this within the next couple of days. The claimant also indicated that he saw two other doctors that same week. However, there are no medical reports in the record from these doctors.

A statement dated June 1, 1992 from Dr. K. to a claims adjustor in this case provides as follows:

> At request of the above named patient I am writing on his behalf to indicate to you that I feel that it is entirely likely that the problem for which he had surgery last month would be work related. He did, in fact, have a significant split in the upper mid-line fascia, or linea alba, in association with a widened umbilical hernial defect.
>
> He cites most specifically a date of occurrence of an accident and relates it to the onset of this deformity. His original information to me indicated a three week progressive enlargement of the umbilicus and upper abdominal mid-line, that particular historical point being given on (date) at my initial consultation.
>
> I will be pleased to provide any further information which might be needed in his case.

A TO WHOM IT MAY CONCERN statement dated May 5, 1992, from Dr. J. sets forth the following:

> I first examined (claimant) on April 20, 1992. The patient did not mention that this was in anyway related to workmans compensation. After examining him and diagnosing I cannot see how this can be considered a workmans compensation claim. Therefore there will be no initial report TWCC-61.
>
> Please contact me if I can be of any further assistance.

The president of the employer testified and indicated the claimant reported the injury but did not give a specific date of injury.

There is considerable emphasis in the record that the claimant could not and did not

cite a specific event or incident that immediately caused his hernias. Rather, the claimant made clear that it was the continuous and repetitive gas canister lifting requirements of the job that resulted in the claimed injury which manifested itself on or about (date of injury). As we have previously stated, the elements or requirements to establish a compensable hernia injury under the prior law have been specifically excluded from the 1989 Act. *See* Texas Workers' Compensation Appeal No. 92092, decided April 27, 1992. Under the prior workers' compensation law there was a specific requirement that there be an injury resulting in the hernia and that the hernia appeared suddenly and immediately following the injury. Under the 1989 Act, a hernia is treated no differently than any other injury, and, as we observed in Appeal 92092, *supra*, the definition of "injury" includes "occupational diseases" which includes "repetitive trauma injury." Article 8308-1.03(27) and (36). A "repetitive trauma injury" means "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(39). Under the circumstances presented in this case, and applying the 1989 Act, the appellant's hernias would be a compensable injury if the requisite causal connection between his employment and the hernia injury is established.

In this case, and given the fact there was no specific and immediate incident wherein the hernias suddenly appeared which might give rise to lay testimony sufficient to establish a causal connection, there was medical evidence introduced on the matter. There are two different medical opinions expressed; however, it is not clear from the limited doctor's statements proffered that appropriate and necessary factors were known or considered in arriving at the opinions. In this regard, there is no indication that Dr. J. was aware of or in any way considered the claimant's job activities and requirements in rendering his statement. Rather, he states the claimant did not mention that his medical problem or condition was in any way related to "workmans compensation" and that he did not see how it can be considered a "workmans compensation claim." In this regard, the claimant testified that he had no idea at the time he was examined by Dr. J. what was wrong with him or that it might be work related. He also testified that he did not discuss nor was he ever asked by Dr. J. what his job was or entailed. The claimant stated it was only later, on the (date) of (month) when he was examined and discussed his job with Dr. K. that he became informed that his injury was job related. Dr. K., in his statement that causally connects the claimant's hernias to his job, indicated that the claimant cites "most specifically a date of occurrence of an accident and relates it to the onset of this deformity." The claimant testified that he did not give a specific date of any injury but "explained to him from the time I had discomfort (date of injury) until the time I came in to see him." Although not clear, it may well be that Dr. K.'s statement is referring to this date, (date of injury), when the claimant experienced "discomfort" causing him to seek medical attention. In any event, we are left in doubt concerning the potential confusion and resulting impact from the unclear state of the medical evidence at the hearing. This is exacerbated by the emphasis that seemed to be misplaced in this case on the criticality of establishing a specific or sudden incident resulting in the hernias. Even the hearing officer's finding that the claimant did not injure himself by repetitive lifting on three specific dates is confusing. We are concerned whether a proper application of the 1989 Act has been make in this case and find it speculative to evaluate the medical evidence as it now stands. It is for these reasons that we remand for

the purpose of further consideration and development of the evidence.

We observe in this case that the claimant had a physical examination before starting to work for this employer and was found not to have any hernia condition. Also, we note the type of work he performed in repeatedly lifting heavy gas containers is not inconsistent with sustaining the type of injury asserted in this case. Although not directly raised in this case, denial of benefits for an otherwise compensable injury cannot appropriately be based upon the fact that an employee was not in top physical condition at the time of employment. An employer takes an employee in the condition in which he finds him at the time of employment. *See* Gill v. Transamerica Insurance Company, 417 S.W.2d 720 (Tex. Civ. App.-Dallas 1967, no writ). Generally, to defeat a claim because of a preexisting injury or condition (for example, a weakened condition which makes one more susceptible to a particular injury), such preexisting injury or condition must be shown to be the sole cause of the present incapacitating condition. *See* Texas Employer Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92047, decided March 25, 1992.

For the reasons stated, the decision is reversed and remanded for further consideration and development of evidence not inconsistent with this opinion. Pending resolution of this case on remand, a final decision is not rendered.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge