APPEAL NO. 92565

On September 2, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to consider the issues of whether the claimant, (claimant), the respondent herein, injured his back in the course and scope of his employment for (employer), and whether he gave notice of such injury within 30 days to his employer. The hearing officer determined that an injury occurred on (date of injury), which was aggravated on (date), both times while lifting on the job, and that the claimant gave timely notice of injury to his employer.

The carrier appeals and contends that the hearing officer erred by finding and concluding that the claimant sustained an injury on (date of injury) and an aggravation of that injury on (date), or that he gave notice. Respondent argues that the decision of the hearing officer was correct.

DECISION

Finding no reversible error in the hearing officer's decision, we affirm her decision.

When the claim was filed, and at various times throughout his medical treatment, the claimant contended that he was injured on (date), while working as a laborer on a dam project. As part of his job, he fabricated metal plates for the dam, which was done on the bank of the lake. The plates were carried to and from a boat which in turn took the plates to the dam. In the course of lifting a 100 lb. plate onto a truck to take to the boat, the claimant said he injured his back.

During the hearing, the recollection of the claimant was that this happened on a Wednesday, and that he did not work the next two days but went to a chiropractor, (Dr. P). He stated that he returned to work the following Monday, told his foreman, (Mr. B), about his injury, but went back to work after being cautioned by Mr. B to take it easy. He experienced pain that day while helping to load some iron on the bank, and took off to go to the (Hospital) emergency room. The claimant's first medical treatment from Dr. P was rendered (date), a Thursday. Dr. P's notes indicate that the claimant reported that he was injured on the previous Friday, (date). The claimant's attorney filed a claim on claimant's behalf, using this same date. When questioned about the apparent discrepancy between the first-asserted date of injury and the testimony at the hearing which indicated a date of (date of injury), the claimant said he had never been really sure of the date. The claimant said that he did not call in to work on the (date) or (date) to report the reason for his absence, and indicated that this was not inconsistent with employee practices.

The claimant stated that he called in to work after he was treated at the emergency room and spoke with supervisor (Mr. S) to report that he would have to be off work due to his back. Mr. S told him he wasn't needed anymore. He noted that he had received a job-related injury in the prior month, for which he received workers' compensation medical benefits. He had a prior compression fracture in his back in 1986, but had not been treated

for this since 1987.

Mr. B testified that the claimant reported to work on Monday the (date), and that they talked before work about claimant's failure to show up two days the week before. He stated that claimant told him that he had been treated for a recurring back injury, and showed him the medical bills. Mr. B said that claimant did not say he was injured on the job. However, Mr. B acknowledged that he scolded claimant during the conversation for not reporting an injury, and further advised him that he was supposed to see the company doctor. Mr. B agreed that the claimant told him later in the day that he "aggravated" his back lifting iron angles, that he let him go early as a result, and that he reported this in turn to his own supervisor, Mr. S.

Dr. P's notes indicate that he treated claimant on (date) and (date) for lower back pain; his notes contain many abbreviations which were not deciphered, so his diagnosis is not readily apparent. The notes from (Hospital) on (date) indicate that claimant asserted he was injured lifting a "week ago Friday;" there is no mention of a (date) lifting incident. That report diagnoses lumbar strain and radicular pain. The claimant saw (Dr. B), at the request of the carrier, pursuant to a medical examination order.[1] Dr. B examined him on June 30, 1992, recited a history of injury on (date), and opined that a further workup should be conducted on his lumbar spine. Dr. B reviewed his x-rays and found it essentially unchanged from those taken in 1986. While Dr. B recorded no diagnosis, he nevertheless stated that claimant's condition was not an aggravation of the 1986 compression fracture injury, but was a separate "injury." He recommended an MRI and therapy. The claimant testified that he was also treated by a doctor recommended by his attorney, but there were no documents concerning this treatment entered into the record.

Transcripts from various coworkers of the claimant are of limited value because of the many inaudible portions noted. However, (JJ) did indicate that he recalled seeing the claimant limping around the job site, and that this could possibly have been the (date) or (date) of (month). He also recalled that the claimant said he had been going to a chiropractor about his back and had maybe aggravated it that day.

The carrier notes that the only evidence supportive of the hearing officer's findings and conclusions comes from the claimant. We have noted many times in the past that the claimant's testimony alone will support a finding that an injury on the job occurred. It is true that an accidental compensable injury must be traceable to a definite time, place, and cause. Olson v. Hartford Accident & Indemnity Co., 477 S.W.2d 859 (Tex. 1972). The Appeals Panel has previously held that the hearing officer is not confined only to the date alleged as

[1] Dr. B is erroneously described in the hearing officer's decision and the carrier's request for medical examination order as a "designated doctor". We would note that there was no issue at the time of his appointment over maximum medical improvement or the extent of impairment, and the order itself recites that it is issued under authority of Art. 8083-4.16.

the date of injury, if the evidence indicates to the trier of fact that the incident occurred on another date. Texas Workers' Compensation Commission Appeal No. 92022, decided March 11, 1992. We believe that there is evidence which sufficiently supports the hearing officer's determinations that notice was given to the employer, and that the claimant was injured on (date of injury). While we acknowledge that another finder of fact could well have found that an injury occurred on (date), the hearing officer could have believed claimant's hearing testimony and explanation for the discrepancy and reached the conclusion that she did. She could also have believed that Mr. B, a supervisor under art. 8308-5.01(c) for purposes of receiving notice, would not have scolded claimant before work on (date) about the importance of relating injuries on the job except in response to claimant's report of a job-related injury.

In response to the points of error that have been raised about the findings and conclusions that an injury was sustained on (date), we would note that it is well settled that the existence of a preexisting injury or disease that is aggravated by 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.] 1988, 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. As the Appeals Panel has indicated in the past, however, an aggravation must qualify as an injury in its own right. The claimant in his testimony described the pain on the 17th associated with a new lifting incident. Such testimony is sufficient basis on which to affirm the hearing officer's decision on aggravation.

One matter bears comment although not appealled by the parties. The parties agreed to have the hearing held in (city), although they noted that claimant resided 90 miles away. The parties did not, as recited in the hearing decision, stipulate that the claimant resided within 75 miles of the field office. As such a residence stipluation is

commonly made in contested case hearings, we conclude that this is likely in the nature of a clerical error.

The decision of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Thomas A. Knapp
Appeals Judge