APPEAL NO. 931117

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* (formerly TEX. REV. CIV. STAT. ANN. Article 8308-1.01 *et seq.*). On August 17, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The claimant (respondent herein) is AA, who asserted that he was injured on (date of injury), when he slipped and fell while employed as a salesman by (employer).

The issues determined at the CCH were whether claimant sustained an injury on the date in question, or whether his problems were related to a pre-existing condition; whether he had disability as a result of his claimed injury of (date of injury); whether he was entitled to receive temporary income benefits (TIBS); and, if so, what TIBS was he entitled to receive. The hearing officer determined that the claimant sustained an injury to his back on (date of injury), and that his condition was not caused solely by his pre-existing cancer; that he had disability from his injury beginning January 29, 1993; and that he was entitled to payment of TIBS from that date until such time as he reached maximum medical improvement or no longer had disability from his injury, whichever occurs first.

Carrier has appealed, arguing that the hearing officer erred by determining that claimant had sustained an injury and pointing out that claimant cannot work because of his cancer, not as a result of his injury. Carrier further argues that it is obvious that the sole cause of claimant's disability was his cancer, which pre-existed his back injuries. Carrier argues that expert medical testimony was required to establish the slip-and-fall as the cause of claimant's disability. The carrier argues that pain alone is not compensable. No response was filed.

DECISION

We affirm the hearing officer's decision, reforming the beginning date of disability to conform to the evidence.

In brief summary, the facts are these. Claimant stated that he had shown a car to a customer on a rainy day, and as he came into the showroom, he slipped on the wet floor. The claimant said that he grabbed for a car as he fell, struck his upper back on the car, and his lower back in the fall. Claimant said he reported the wet floor and his fall within 20 minutes to his sales manager, because the customer had almost fallen as well. Claimant could not recall the name of the customer, but stated that the employer would be able to derive the name of this witness from paperwork relating to the sale made to that customer. (The name of the customer is listed as a witness on the Employer's First Report of Injury, which was admitted into the record with no objection from carrier).

The claimant, who stated that he had no back pain or problems prior to (date of injury), said he at first thought he had pulled a muscle. He came into work the next day, but left early because of the pain. Claimant stated that he thought he also tried to work one other day within a week after his accident, but had to leave early that day as well. Other

than this, claimant had been off work. The Employer's First Report of Injury noted January 12, 1993, as the first day lost time began.

The claimant said that he complained to a Dr. K, whom he knew through his wife, about his continuing pain, and was referred by him to (Dr. S), D.C. She examined him on January 27, 1993, and characterized his major complaint as one of low back pain. She noted, in a referral letter to neurologist (Dr. K), dated February 23, 1993, that claimant had gotten progressively worse and recently developed thoracic pain as well.

Dr. K evaluated claimant on February 23, 1993, and recorded impressions of : 1) mid-thoracic pain, possible neuralgia superimposed on protruded or herniated lumbar disc, 2) lumbar radiculopathy with possible herniated or protruding disc, and 3) significant spasms to the thoracic and lumbar areas. On March 4, 1993, Dr. K's associate noted that an MRI performed on claimant showed a compression fracture of the thoracic spine and a bulging annulus at L4-5. Claimant was given three lumbar epidural steroid blocks and referred to physical therapy.

Claimant testified that he was hospitalized in March for severe pain, and it was there that metastatic cancer was diagnosed. Claimant stated that he dealt primarily with Dr. T, who told him he had a fast-moving cancer. A radiology report of a March 18, 1993, MRI examination detected a compression fracture at around the T5 level described as "pathologic compression," and minimal posterior disc bulges at L4-5 and L5-S1 without neural compromise. A report of a March 19, 1993 CT scan noted lytic lesions scattered throughout the thoracic and lumbar spine.

The claimant moved to M in April 1993. He was treated there by (Dr. AB), a specialist in cancer. Claimant stated that Dr. AB has told him that although the cancer will ultimately be terminal, it would not prevent him from working. Claimant testified that he wore a prescribed elastic brace, and at times a more rigid brace, for his back. Dr. AB wrote a "To Whom It May Concern" letter on May 17, 1993, which stated that claimant was under his care for lung cancer which had spread to the spine. Dr. AB noted that claimant had continued pain in the dorsal spine, but that no tumor had been found in that area. Dr. AB related that discomfort in his letter to claimant's injury in Texas.

Claimant testified that he believed both Dr. S and Dr. K had provided information to the carrier recommending that he not work. Claimant stated that painful spasms and back pain kept him from working. He said that he specifically asked Dr. AB about returning to work, and was told "no way" because of his back. He had not been released to work.

On September 17, 1993, claimant was examined by (Dr. A), as a result of an order for medical examination (MEO) obtained by the carrier. Dr. A stated that claimant had intermittent muscle spasms, and concluded, "It is likely that this patient's cancer was present in January when he fell. It is also possible that, because of the cancer in his bones, they were weakened and, therefore, more likely to fracture from the trauma of the fall. At this time it is not possible to tell how much of this patient's back pain is related to his previous fall and how much is related to metastatic cancer to bone." An affidavit completed by Dr. A

on November 4, 1993, stated that claimant's type of cancer would not, in his opinion, preclude claimant from seeking treatment for an injured back.

The definition of "pathologic fracture" put into the record defines it as "a fracture which occurs in a diseased (and weakened) part of a bone, without unusual impact or violence."

Although the carrier's attorney at the hearing questioned claimant closely about whether he had been given an off work slip by any doctor, we would note that this would be but one fact to consider on the issue of disability, and is not essential to prove that an inability to work is due to an injury. A fact finder may conclude that disability began the day a claimant left work, whether he or she has yet seen a physician.

We agree that the burden is on the claimant to prove that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). A strain or a rupture on the job is compensable notwithstanding that predisposing factors may have contributed to incapacity. Mountain States Mutual Casualty Co. v. Redd, 397 S.W.2d 321 (Tex. Civ. App.-Amarillo 1965, writ ref'd n.r.e.). Predisposing bodily infirmity will not preclude compensation so long as a work-related injury contributes to disability. *See* U.S. Fidelity & Guaranty Co. v. Herzik, 359 S.W.2d 914 (Tex. Civ. App.-Houston 1962, writ ref'd n.r.e.). A carrier that wishes to assert that a pre-existing condition is the sole cause of an incapacity has the burden of proving this. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992.

The facts here parallel those in INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st Dist.] 1988, no writ); the Court of Appeals noted that notwithstanding claimant's pre-existing spinal tumors, his incapacity would be compensable if his work-related injury was "a" cause, even if there were other causes. That case further notes that aggravation of a pre-existing condition constitutes an injury in its own right.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. TEX. LAB. CODE ANN. § 410.165(a). The testimony of a claimant alone is sufficient evidence to support that claimant sustained disability. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). That is not the case here.

The claimant was not contending that his fall aggravated the course of his cancer, which was the situation in the case cited by carrier, Schulle v. Texas Employers' Insurance Ass'n, 787 S.W.2d 608 (Tex. App.-Austin 1990, writ den'd), as support for its argument that medical evidence was required to prove the cause of disability in this case. As noted in Texas Employers' Insurance Ass'n v. Thompson 610 S.W.2d 208 (Tex. Civ. App.-Houston [1st Dist.] 1980, writ ref'd n.r.e.), the requirement for medical evidence of causation is a narrow one not generally applied where there has been a traumatic event that the claimant points to as the basis for disability. Dr. A, the carrier's MEO doctor, was unable to attribute claimant's disability and back problems solely to cancer, and, although he noted that claimant's weakened back gave claimant a propensity to sustain injury from the fall, Dr. A did not state that a work-related injury had not occurred. His opinion that he did not know how much of claimant's current pain was related to cancer and how much to the fall essentially concedes that the fall contributed to the disability. Although there is some evidence that one fracture in the spine could have occurred spontaneously, there was no evidence that linked muscle spasms solely to cancer. Further, claimant's testimony that he had no problems prior to his fall, but only afterwards, support the hearing officer's conclusion that claimant's fall was a producing cause of his disability. The claimant's condition goes beyond mere pain, and there is in addition objective evidence of injury to support the hearing officer's findings that claimant was injured as a result of his fall.

We note that the hearing officer began the period of disability on January 29, 1993, rather than January 12, 1993, the date listed in the benefit review conference report and employer's report of injury as the date lost time began. Although he did not recite a specific date, claimant testified that he worked two working days after January 9th, with his last day being sometime the week after the fall. We are unable to find support in the record for the date of January 29th, as opposed to January 12th, and therefore reform the findings and fact, conclusions of law, and order of the hearing officer as to the beginning of the period of disability to match the evidence, and thus begin the period of disability at January 12, 1993.

For the reasons stated above, the determination of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge