APPEAL NO. 93226

On February 8, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act).

The case involves an uncontested compensable injury on (date of injury), to the left shoulder of appellant (hereinafter claimant) followed by a subsequent nonjob-related incident involving the same shoulder on (1st date of injury).

The claimant argued at the contested case hearing that the issue in this case was whether the subsequent incident of (1st date of injury), was a new and intervening injury that was the sole cause of the claimant's disability or whether the incident was a continuation of the disability resulting from claimant's (date of injury), uncontested injury. The claimant submitted that the burden of proof on the issue of sole cause was on the appellee (carrier herein).

The carrier contended that the issue was whether the injury of (date of injury), was a "producing cause" of the claimant's disability. The carrier asserted that the burden of proof on this issue was the claimant's.

The hearing officer ruled at the hearing that the issue was whether the claimant had disability and continues to have disability resulting from his injury of (date of injury), and that it was claimant's burden to prove this by a preponderance of the evidence. The hearing officer held in her decision that the incident of (1st date of injury), did not result in any injury which flowed naturally from the (date of injury), compensable injury, concluding that the (1st date of injury), incident was not compensable and that claimant had failed to establish disability.

The claimant in his request for review states that the hearing officer erred in failing to decide the issue of sole cause which has been repeatedly raised in the case, and which he contends is in fact the ultimate issue of the case. Claimant argues that to frame the issue in terms of whether claimant has disability resulting from the (date of injury), injury is misleading. First, it skirts the issue of causation entirely since a finding of no disability could be just as easily based upon the claimant's failure to suffer a loss in actual wages, when he is working on light duty at higher than pre-injury wage, as based upon his present condition being due to the (1st date of injury), incident. Second, claimant argues that it misplaces the burden of proof on the claimant to disprove, rather than on the carrier to prove, the carrier's contention that the (1st date of injury), incident is the sole cause of his present condition.

Carrier argues that the findings and conclusions of the hearing officer have support in the evidence and are not so against the great weight and preponderance of the evidence as to manifestly wrong and unjust. Carrier then argues that "sole cause" is not an issue because it is an inferential rebuttal, and as such should not be submitted to the fact finder.

Carrier further asserts that since sole cause is an inferential rebuttal there is no burden of proof on carrier on this issue.

DECISION

After reviewing the evidence we reverse the decision of the hearing officer and remand for further consideration and development of evidence in order to resolve the disputed issues that was actually addressed by the parties at the hearing, that is, whether the incident on (1st date of injury), was the sole cause of claimant's current condition. We take such action because we hold that the evidence in the record establishes that there has not yet been any period of disability as defined by the 1989 Act, and we hold that the foregoing issue has been raised by the parties and is the controlling issue in this case.

It is stipulated by all parties that claimant suffered a compensable injury on (date of injury). Claimant describes this injury as occurring when he lifted and attempted to empty a heavy trash can on (date of injury), while working as a utility worker for (employer). Claimant testified that as he lifted the heavy trash can he felt his left shoulder pop. Unable to lift the weight of the can above his head to empty it, claimant stated that he lowered the can and as he brought the can back down, his shoulder popped in again.

Claimant reported his injury to his supervisor. During this time the claimant's shoulder became very stiff, and he wasn't able to move it. Claimant was taken to a local hospital where he explained his injury and had x-rays taken. He was also seen the day of the injury by his employer's occupational health clinic. On December 6, 1991, he was seen by (Dr. M) with the occupational health clinic. His injury was treated as a strained shoulder muscle, and he spent three days on light duty work.

In January, 1992, Claimant was promoted to a lighter duty, higher paying job as a dairy worker. On April 4, 1992, while working for the employer claimant felt his left shoulder pop out of place, and then as he stood up, it popped back into place again. Claimant testified that he reported the incident to his supervisor, but since he was only 30 minutes from the end of his shift, he agreed with his supervisor that he would complete his shift, go home and soak his shoulder, and go to the emergency room the following morning if the shoulder stiffened up over night. Claimant finished his shift, went home, soaked his shoulder in hot water, put some "icy hot" on it and rested his shoulder. Claimant did not seek medical treatment as a result of the April 4, 1992, incident.

On (1st date of injury), the claimant worked at his regular job from 9:30 a.m. until 6:00 p.m., and after work went to the Six Flags Amusement Park. While claimant was on a roller coaster he lifted his arms and his left shoulder again popped out of place. Claimant was treated at an emergency room where he was diagnosed as having a dislocated shoulder and where his left shoulder was popped back into place. Claimant was off work until May

1, 1992, when Dr. M at the employer's occupational health center placed him on light duty and referred him to (Dr. Mo).

When claimant tried to see Dr. Mo, he was told that the insurance company had not verified it. Claimant then returned to his employer who sent him to see (Dr. R), an orthopedic surgeon. Dr. R stated in his initial report claimant was suffering from recurrent subluxation--dislocation of the shoulder, and stated that it was his opinion based upon a reasonable medical probability that this began when the claimant injured his shoulder on (date of injury). Dr. R also expressed the opinion the claimant "will not improve until the shoulder is repaired surgically." Dr. R then continued the claimant on light duty work until an arthroscopy could be done to determine "what type of repair should be performed on the shoulder."

Employer's occupational health center then sent the claimant for a second opinion to (Dr. C), an orthopedic surgeon, who diagnosed a subluxation of claimant's shoulder and who prescribed physical therapy because "[o]ccasionally this will settle down the symptoms and prevent recurrent subluxation." Dr. C further expressed the opinion that if physical therapy did not resolve the problem that the claimant would need to have a "capsular shifting operation to restore stability."

The carrier has refused to pay for the treatment recommended by either Dr. R or Dr. C. The carrier's handling adjuster testified, by bill of exceptions, that the carrier's refusal to pay for treatment was because the carrier disputed the claim on the basis that the (1st date of injury), occurrence was a new injury that was not work related.

At the time of the hearing, the claimant remained on light duty work, as recommended by all the doctors he has seen since May 1, 1992. Due to his January, 1992, promotion he is still at a higher wage than prior to his (date of injury), injury. The only time claimant has lost from work is the period between (1st date of injury), and May 1, 1992.

The hearing officer and the parties have framed this case in terms of disability. Article 8308-1.03 provides, in relevant part:

> (16)'Disability' means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury.

In the present case, given that the April 24th incident was determined not to be a compensable injury, the claimant has not suffered a period of disability under the above definition. Furthermore, the claimant has continued to work at a higher than preinjury wage and, therefore, has not suffered disability as defined in the 1989 Act. There is, however, a hotly contested dispute as to injury. The claimant contends that his injury of (date of injury), requires further medical treatment. Both Dr. R and Dr. C state that claimant requires further

medical treatment. The carrier refuses to pay for this medical treatment contending that an intervening injury is the cause of claimant's need for medical treatment. These are the issues which need to be addressed to resolve this case. We have recognized the change in the character of the issue to what is actually being contested by the parties. *See* Texas workers' Compensation Appeal Panel No. 93094, decided March 19, 1993.

The legal standards which apply in making these determinations are set out in our opinion in Texas Workers' Compensation Appeal Panel No. 91038, decided November 14, 1991. In that decision we held that an injury may be compensable even though aggravated by an existing injury or condition, or by a subsequently occurring injury or condition, citing Hardware Mutual Casualty Co. v. Wesbrooks, 511 S.W.2d 406 (Tex. Civ. App.-Amarillo 1974, no writ) and Guzman v. Maryland Casualty Co., 107 S.W.2d 356 (Tex. 1937) as authority. We have repeatedly reaffirmed this doctrine. *See* Texas Workers' Compensation Appeal Panel No. 91085A, decided January 3, 1992; Texas Workers' Compensation Commission Appeal Panel No. 92018, decided March 5, 1992; Texas Workers' Compensation Commission Appeal Panel No. 92692, decided February 12, 1993.

In regard to the issue of sole cause, we clearly held in Appeal No. 91038, *supra*, that to defeat a claim for a current injury because of a preexisting or subsequent injury, the burden is on the carrier to show that the preexisting or subsequent injury is the sole cause of the present condition. We reject carrier's argument that this is not the law because "sole cause" is an inferential rebuttal. The authority cited by carrier for this proposition deals with the proper method of charging a jury on the issue of sole cause, and is thus inapplicable where a hearing officer is making findings of fact and conclusions of law, a process analogous to a bench trial.

For the reasons expressed above, the hearing officer's decision is reversed and remanded for further consideration and development of evidence, as appropriate, and to resolve the issue of whether the incident of (1st date of injury), was the sole cause of claimant's current condition.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings,

pursuant to Article 8308-5.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Philip F. O'Neill
Appeals Judge