APPEAL NO. 93759

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, to determine the following issues: whether the appellant (hereinafter claimant) sustained a new back injury in the course and scope of employment on (date of injury); whether the claimant notified her employer of a new injury in a timely manner; and how should the average weekly wage (AWW) be calculated. The claimant appeals the decision of hearing officer (hearing officer) that claimant did not sustain a new back injury in the course and scope of her employment and did not give the employer timely notice of the alleged injury. She also alleges error in the hearing officer's failure to determine that AWW should have been determined by a fair, just, and reasonable method.

DECISION

We affirm the hearing officer's decision and order.

The claimant, a registered nurse in primary patient care at (employer), suffered a compensable back injury on (date of injury), when she felt a pop while lifting a patient. She was diagnosed with a ruptured disk at L5-S1 for which she had surgery (hemi-laminectomy); she also underwent work hardening. Her treating doctor was (Dr. W), who released her to light duty work on March 23, 1992, and to full duty work on April 23rd. She also saw a designated doctor, (Dr. J), who found she had reached maximum medical improvement (MMI) on November 10, 1992, with an 18% impairment rating.

In July of 1992 the claimant had reported to Dr. W that she was experiencing snapping, popping and pain in her lower lumbar spine. A CT scan of claimant's lumbar spine was performed on November 2nd; that report stated that the claimant was post hemi-laminectomy at L5 and that the findings "could represent epidural fibrosis or residual-recurrent disc herniation," but that a gadolinium enhanced MRI or contrast enhanced CT scan would be necessary to differentiate these possibilities. Increasing pain and popping were noted by Dr. J in the November 10th report accompanying his report of medical evaluation (Form TWCC-69); he stated claimant had post laminectomy syndrome with pain he suspected was due to "settling of the discs."

An MRI of the lumbar spine with gadolinium was performed on November 15th; the report showed there was "moderate central and left sided posterior disc herniation" at L5-S1. Claimant testified, however, that she discussed the result of this test with Dr. W and he told her the MRI confirmed that there was no herniated disc.

On (date of injury) the claimant stated that she felt back pain from lifting patients; she said she could not say which incident first caused the pain, but that it was different, and more localized, than her previous pain. She continued to work during that day, but her pain increased each time she did anything. She said that day she notified (Ms. V), who was the nurse manager, of her back pain and was told to go home. The next day claimant returned and said she told (Ms. B), the employee health and safety coordinator, the same thing she

had told Ms. V; that is, that she had lifted a patient and hurt her back, but that she could not say the pain came from any one patient. She said Ms. B sent her home and told her not to return until she had seen Dr. W. Claimant has not returned to work since that time.

Claimant said she first tried bed rest, hoping the problem would resolve, then returned to Dr. W on January 18, 1993. Dr. W's notes from that day state claimant's "studies are equivocal, I think most probably consistent with post operative scar reaction." He stated, however, that in view of her "abnormal MRI scan," a myelogram and CT scan should be performed. Although claimant said she told Dr. W on that date about her symptoms and what had happened on (date of injury), this is not reflected in the January 18th report.

The report from a January 26th lumbar myelogram identifies a "severe indentation on the left anterolateral aspect of the thecal sac at the level of the L5-S1 disc space, consistent with a disc herniation," as well as mild disk bulges at L3-4 and L4-5. The follow-up CT scan report also found minimal and mild posterior bulging of the discs at L3-4 and L4-5, with a "large left posterolateral disc herniation at L5-S1," with "severe indentation of the thecal sac and posterior deviation of the proximal portion of the left S1 nerve root and mild impingement on the proximal portion of the right S1 nerve root." The report noted the claimant had had a left L5 laminotomy at L5-S1.

A January 27th EMG report stated that those test findings were consistent with residual nerve root irritation predominantly in the S1 nerve root on the left with some overlap to the L5 nerve root which "may be old or new," either "secondary to old root compression or maybe secondary to new root disease. . .without benefit of an MRI, it is difficult to say whether this is residual scar tissue or a recurrent disk. . . ."

On March 31, 1993, claimant was seen by Dr. J for a follow-up visit. He reported that claimant had hurt her back while bending and lifting patients on (date of injury), and stated his opinion that it was a reinjury because claimant had right leg pain, which she had never had before. Dr. J noted the central protrusion at L5-S1 and discussed possible surgery with claimant, but advised her to wait a month or two "to see what happens."

On February 4th Dr. W wrote claimant's employer stating that claimant had developed a "recurrent herniated lumbar disc at L5-S1 which, in my opinion, will need repeat surgery," and stated his recommendation that she continue with bed rest. On April 1st Dr. W stated his opinion that claimant had "sustained a new injury to her back which has resulted in a recurrent disc herniation."

On the issue of timely notice of a new injury, Ms. B testified that she does not remember claimant notifying her of a specific accident or incident on (date of injury), and that the first time she was aware claimant was alleging she had suffered a new injury was in April of 1993 when she was instructed by the carrier to fill out an accident report. She stated that claimant talked to her on January 18, 1993, but that she only said she had talked to Dr. W and he thought there was a possibility of a herniated disc. In a signed and

notarized statement, Ms. V said claimant came to her on (date of injury) stating she was having difficulty walking and saying that her back was bothering her. Ms. V said she told claimant to go home and not to return to work until she was cleared by a doctor.

On the issue of AWW, the claimant argued at the hearing that her AWW should be calculated based upon the 13 weeks prior to her original injury, as a fair, just and reasonable method, because during the 13 weeks prior to the alleged second injury she had been working fewer hours and at a reduced rate of pay, due to the first injury.

The claimant on appeal takes issue with the following findings of fact and conclusions of law:

FINDINGS OF FACT

6.A CT Scan and a MRI were conducted on Claimant on November 1992. This test revealed residual disc herniation which will require removal of the disk at L5-S1.

8.Claimant was unable to establish a definite time, place, or cause for the alleged new injury.

9.Claimant was sent home by her supervisor on (date of injury) and on the subsequent day when she attempted to work. Claimant cannot attribute her alleged new injury to any specific cause on (date of injury).

10.Claimant did not make anyone in a supervisory or management position aware that she was alleging a new injury as a result of an incident on (date of injury).

11.If there was a new injury, the wage rate would be calculated on the wages Claimant was making during the 13 weeks prior to that injury.

CONCLUSIONS OF LAW

2.Claimant did not sustain a new back injury in the course and scope of her employment on (date of injury).

3.Claimant did not notify her employer of a new injury timely.

4.Any wage rate will be calculated from the date of a new injury.

While there certainly is evidence to support a determination that claimant suffered a new injury, we cannot say that the hearing officer's decision was supported by insufficient evidence or that it is so against the great weight and preponderance of the evidence as to be manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). While both Drs. W and

J stated their opinions that claimant's herniation was a "new injury," and claimant's testimony was that the pain she experienced on (date of injury) was new and different, the November 15th MRI report on its face found claimant to have a moderate disc herniation at the same level (L5-S1) of her original injury for which she had the surgery. Notwithstanding Dr. W's initial reading of these results as "equivocal," and claimant's testimony that he told her, following the MRI, that she had no herniation, the hearing officer was entitled to give more weight to the plain language of the MRI report, which preceded the events of (date of injury). Also, the January 27th EMG report indicated the S1 nerve root irritation was "residual" and the L5 nerve root irritation "may be old or new." Further, other medical reports indicate that claimant had continuing complaints of pain and "popping" in the months leading up to the (date of injury) incident. The hearing officer, as sole judge of the relevance and materiality of the evidence and of its weight and credibility, Section 410.165(a), was entitled to resolve these conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This applies equally to expert medical testimony, as the hearing officer is entitled to judge the weight to be given such testimony, and to resolve conflicts in such evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

To the extent that the hearing officer's finding that claimant was unable to establish a definite time, place, or cause for the alleged injury played a role in his determination of the issue of new injury, we note that the claimant's unrefuted testimony was that she first felt pain around midday on (date of injury), but that she could not attribute it to the lifting of any specific patient. We would point out that in Hartford Accident and Indemnity Company v. Contreras, 498 S.W.2d 419 (Tex. Civ. App.-Houston [1st Dist.] 1973, writ ref. n.r.e.), the court held that where the medical testimony supported that the claimant's injury was probably caused by lifting one of the 50 pound bags of chemical on the date in question, there was sufficient proof of an undesigned, untoward event traceable to a definite time, place, and cause. That case cited Transport Insurance Company v. McCully, 481 S.W.2d 948 (Tex. Civ. App.-Austin 1972, writ ref. n.r.e.), in which the court said that the claimant did not need to "shoulder the near impossible burden of proving which specific task during the two hour period" precipitated his heart attack. Notwithstanding the foregoing, however, we believe there is still sufficient evidence to support the hearing officer's holding on this issue.

We have also reviewed the hearing officer's findings and conclusions on the issues of timely notice and AWW, and have determined that under the circumstances of this case there is nothing in those determinations which requires our reversal. One final point bears mentioning, however. We note that the hearing officer's decision and order concludes with the language that "claimant is not entitled to medical or income benefits." While the hearing officer's decision certainly forecloses new income benefits based upon her current back condition, the 1989 Act provides that an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed, from the date of the injury. Section 408.021. In addition, the Act's definition of "injury" includes "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). Thus, the hearing officer's decision and order should not be read to imply that the carrier is not liable

for all medical treatment to which the claimant would otherwise be entitled as a result of her original, compensable injury.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge