APPEAL NO. 93839

This appeal arises out of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S. 8308-1.01 *et seq.*). On August 17, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues determined at the contested case hearing were whether AV, the claimant, continued to suffer the effects of a prior compensable injury on (date of injury); whether he sustained a new compensable injury on (date); and the "correct date" of injury. On (date), claimant was employed by (employer), which had workers' compensation coverage through (Carrier #2). On (date of injury), claimant also had been employed by the same employer, but it had workers' compensation insurance through (Carrier #1) at that time.

The hearing officer found that claimant sustained a compensable injury by aggravation of his pre-existing back condition, on (date), and that appellant, carrier #2, was liable for benefits. The hearing officer determined that carrier #2 had not proven that the sole cause of disability was due to claimant's (date of injury), injury (so that carrier #1 would be liable for additional benefits).

Carrier #2 has appealed, arguing that the hearing officer erred by determining that claimant had sustained an injury on (date). Carrier #2 further states that claimant performed no task which could constitute a repetitious trauma injury on (date); as part of this point of error, carrier #2 states that raising hands above the head is an activity engaged in by the general public. Carrier #2 states that it was error to totally discharge carrier #1 from liability for medical benefits. Carrier #2 states that the hearing officer erred by placing "the entire burden of proof" on carrier #2. Carrier #2 argues that the hearing officer further erred by excluding testimony regarding a conversation that the human resources director for the employer had with a clerk at claimant's doctor's office. Carrier #2 argues that this was harmful error because the hearing officer "apparently" placed significant weight on the report from this doctor.

The claimant responds that the decision of the hearing officer should be upheld, and the Appeals Panel should not substitute its judgment for that of the hearing officer. Carrier #1 responds that to the same effect, pointing out that an aggravation is a new injury and a matter of determination by the finder of fact. Carrier #1 otherwise specifically refutes carrier #2's points of error. (A reply to the response filed by carrier #2 has not been considered, as same is not provided for by Section 410.202).

DECISION

We affirm the hearing officer's decision, finding carrier #2's appeal without merit.

In brief summary, the facts are these: Claimant injured his back (date of injury). He returned briefly to work for two weeks in May, but left again. On December 2, 1991, he was certified as having reached MMI with a 5% permanent impairment. He was indefinitely restricted from lifting in excess of 30 lbs., but was otherwise released to work. Except for one or two doctor's appointments, and renewal of prescriptions for pain medication, he

worked satisfactorily (according to two supervisors) and without further absence, until (date). Claimant testified that on that date, after working on a "press machine," which involved pushing two buttons at a level over his head at a rate (corroborated by testimony from the employer) of 100-150 times an hour, he began to feel pain in the center of his back above the belt line; as he had only a couple of hours left, he continued to work. Later, the pain radiated down one leg. By the next day, claimant called in to report he could not work because of his back pain. He sought treatment beginning March 16, 1993, from (Dr. H), who diagnosed displacement of lumbar disc as well as sprain and strain. Claimant consulted with (Dr. D), who had treated him for the 1991 injury. Dr. D's letter of June 22, 1993, noting that it was the first time had seen claimant since January 1992, opines that claimant's current symptoms represent an exacerbation of his previous condition. This letter notes that there is "no way to absolutely guarantee that he will not hurt his back again." In a letter dated July 23, 1993, directed to the attorney for carrier #2, Dr. D expressed the opinion that the 1993 back pain was a continuation of the same injury from 1991, which had never completely resolved. (Dr. D, however, had found claimant to have reached MMI on November 26, 1991, with only mild pain on examination of that date). No one disputed that claimant worked on the press machine on (date). Claimant's supervisor, (Mr. F), stated that claimant told him that day his back hurt, and called in the next day to report absence due to this. (Mr. C), the human resources director for the employer, stated that the buttons required both hands to be used simultaneously, and that the buttons would be around six feet above the ground. Claimant was five feet, seven inches. Both claimant and his wife testified that his activities and physical condition were worse after (date), than in the period from December 2, 1991, to that date.

Mr. C stated that after he was notified of claimant's claim by Dr. H's office, he initially contacted the adjuster for carrier #2, and was referred by that adjuster to carrier #1. Mr. C stated that he had a question as to who the appropriate carrier would be.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The testimony of a claimant alone is sufficient evidence to support that claimant sustained injury. 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.).

The burden is on the claimant to prove, by a preponderance of the evidence, that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). As we have stated many times, an aggravation of a pre-existing condition is an injury in its own right. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.- Houston [1st Dist.] 1988, no writ). 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.). A carrier that wishes to assert that a pre-existing condition is the sole cause of an incapacity has the burden of proving such. 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.

Although carrier #2 argues that sole cause was not an issue, it expressly defended against liability on the basis that claimant was merely suffering the effects of a prior injury. Once claimant made a prima facie case of injury by an aggravation, which he did through his testimony and the medical evidence, it was incumbent upon carrier #2 to carry its burden to prove that claimant left work on March 12, 1993 due solely to the effects of that previous injury. This it wholly failed to do; in fact, carrier #2's witnesses supported the fact that claimant worked satisfactorily and without back-related absence until after he worked on the press machine. (Although carrier #2 raises a point of error about whether claimant's activities on March 11th establish a repetitive trauma injury, the hearing officer did not hold that this was repetitive trauma, as opposed to an accidental injury, nor did carrier #2 defend the claim on the theory that the raising of arms was not a risk incident to this employment.) In summary, the evidence is more than sufficient to support the hearing officer's determinations that claimant was compensably injured through aggravation by his work-related activity, that carrier #2 did not prove that any incapacity was solely caused by the prior injury, and that carrier #2 is liable for all benefits. Indeed, a decision to the contrary may well have been against the great weight and preponderance of the evidence in this case.

As to whether the fact that claimant continued to experience pain from his January 1991 injury outweighs a finding of aggravation in March 1993, we would note that in the context of adjudicating issues of MMI, we have observed that a person who has reached MMI and is assessed to have lasting impairment may indeed continue to experience pain as a result of an injury. *See* Texas Workers' Compensation Commission Appeal No. 93007, decided February 18, 1993.

We find no error in the hearing officer's exclusion of hearsay testimony from Mr. C about his conversation with a clerk in the doctor's office. First of all, we fail to see how exclusion of a conversation with a clerk (who was not a doctor) could have led to the rendition of an erroneous decision. The opinion of a clerk on the issue of compensability would seem to have scant weight when compared to claimant's testimony and a doctor's written report. Second, carrier #2 indicated at that time that it would present similar evidence in written form but did not. The ruling made the hearing officer was plainly within his power and discretion to make.

As to whether discharge of carrier #1 from medical liability for the claim was appropriate, we would note that the hearing officer ruled that carrier #1 was not liable for "additional" medical benefits: in short, those attributable to the aggravation. We believe that such is sufficiently supported by the evidence and authorized under Section 408.021. Disputes over specific medical bills must be addressed through the procedure set forth in Sections 408.027 and 413.031 and applicable rules.

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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Philip F. O'Neill
Appeals Judge

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Gary L. Kilgore
Appeals Judge