APPEAL NO. 94066

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On November 18 and December 6, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The respondent (claimant herein) is (claimant), who asserted that he injured his back and neck on (hearing officer), when he was involved in a rear end collision while driving heavy equipment for the City. Because the city is a self-insured governmental entity, also the carrier, it will be referred to as either employer or carrier in the rest of this opinion, depending upon the capacity in which it acted.

The sole issue determined at the contested case hearing was whether claimant sustained an injury on the date in question, which was phrased as "whether the claimant sustained a new injury in the accident which occurred on (hearing officer), or are all his present problems related to his prior injuries?" There was no clearly articulated issue on whether the claimant had disability at the time of the hearing; the carrier's position was that claimant suffered no "injury" on the date in question. In response to the benefit review conference report, the carrier had filed a response saying that it rejected the benefit review officer's statement that it had the burden to prove that the sole cause of claimant's condition was his pre-existing back and neck conditions.

The hearing officer determined that the claimant had been injured in the course and scope of his employment with the employer, and that any results of prior injuries had resolved by (hearing officer). The carrier was ordered to pay temporary income benefits (TIBS) until the claimant was determined to have reached maximum medical improvement (MMI), or until disability ended.

Carrier has appealed, arguing three major points: 1) that the hearing officer abused his discretion by overruling its objection to holding the hearing in (city), which was more than 75 miles from the claimant's residence at the time of his injury, and by ascertaining that "good cause" existed because claimant had moved; 2) that the hearing officer abused his discretion in finding that claimant's previous job-related injuries had resolved, and that such finding is against the great weight of the evidence; and 3) that the hearing officer erred by determining that claimant had sustained an injury, because there was no objective medical evidence of this. The carrier strongly argues that there is no single event or accident that can be related to the alleged injury that caused claimant to have neck surgery. The claimant responds by detailing evidence in his favor and asks that the hearing officer's decision be affirmed.

DECISION

We affirm the hearing officer's decision.

In brief summary, the relevant facts are these. The claimant worked as a heavy equipment operator for the employer, beginning employment sometime in April 1991. On (hearing officer), claimant was transporting a roller to another job site, following behind a

chip spreader. He stated that he had been standing up directing traffic around the chip spreader, which stopped suddenly. Claimant said he was able to get back into his seat and apply the brakes, which did not work. He collided with the rear of the chip spreader, at an approximate speed of 20 miles per hour. He agreed that he told the crew leader at the accident site that he was alright, but he soon thereafter had pain in his neck, back, and chest. Claimant said he took the roller to another job site at the direction of his supervisor, and thereafter to the main headquarters, where he reported his injury to superintendent (Mr. J), who then took him to the doctor.

(Mr. W), claimant's immediate supervisor, stated he took an accident report the next day. He did not witness the accident. He said claimant told him he was standing when the accident happened.[1]

(Mr. H) testified that he followed behind the roller in a pickup truck, and that claimant was standing up directing traffic, which he had no duty to do. Mr. H indicated he felt that claimant's position was not safe, and that he saw claimant look up and see that the chip spreader had stopped. Mr. H said claimant tried to return to his seat to pull the throttle. Mr. H said that the impact occurred before claimant was in his seat so that claimant was thrown forward onto the console of the roller. After this, transportation halted; Mr. H said claimant told him he bumped his knee on the console but was okay. He said that claimant did not take the roller to another job site because it was damaged, but "took it in."

According to attendance records, claimant was off work from (date) through the 21st, returned to work August 24th until September 24th, when he missed time until terminated in a work force reduction on October 30, 1992. On (date of injury), he was taken to Occupational Health Centers and saw (Dr. N). He was diagnosed with cervical strain and stress-related chest pain. Physical therapy was prescribed. Dr. N released claimant to regular duty August 25th.

Claimant said his pain continued and got worse, and he was referred to (Dr. R), a neurological surgeon, who saw him October 5, 1992. According to a brief history in Dr. R's report, claimant reported cervical disc surgery in 1970, and resolution of his symptoms and freedom from pain until the accident. More extensively reported is the history of the accident as a 20 mph rear end collision in which claimant was jerked forward and then backward. Claimant had surgery October 27, 1992, on a diagnosis of central disc herniations at the C3-4 and C4-5 levels. Lumbosacral MRI showed a small L4-5 foraminal herniation. Dr. R wrote to the adjuster on May 14, 1993, stating that he felt the head and neck injuries were related to claimant's injuries on (hearing officer), based upon a history of the collision given by the claimant. Dr. R certified that claimant reached MMI on October 11, 1993 with a 16% impairment rating. (All of the rating resulted from specific impairment of the spine, and range of motion tests were invalid.)

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[1]Although the carrier went to some effort to develop the fact that claimant was standing during the impact, rather than sitting, and put into evidence a report indicating that claimant was violating a safety procedure, we note that negligence is no defense to compensability of an injury. Section 406.031.

Claimant had worked in construction and road work over much of his work experience. Claimant stated at the beginning of the hearing that he had trouble remembering or comprehending at times; this is supported by medical records indicating that claimant had prior head injuries and some brain damage. Over the course of his working life, he had other work-related injuries. He admitted that he had not been truthful in his job application, resume, or pre-employment physical about these injuries or about the identities of all prior employers.

In accordance with his application to the employer, a pre-employment physical was conducted by Business and Industry Health Group on April 18, 1991; claimant listed on a medical history that he had broken some bones but otherwise denied he had injuries or workers' compensation claims. Results of the examination were stated as "normal" assessing claimant's ability to bend forward, backward, laterally, sit up, and elevate his extremities from prone and supine positions. His spine and neck were also characterized as "normal." An x-ray of the back was indicated as having been done, but there are no reported results in the record.

As indicated by the record, claimant made the following workers' compensation claims:

-(date): back hurt during lifting incident, re-injured (date) in a fall into a creek bed.

-(date): wrench slipped, claimant fell backward onto equipment injuring back, neck, and head. Resulted in cervical surgery at C2-3.

-(date): driving a loader which fell 8 feet off dock. Neck pain. Bulging disc at C4-5 on CT scan.

-(date): fell 25 feet onto concrete. Knocked unconscious. Cervical and lumbar radicular syndrome diagnosed, along with concussion syndrome.

A CT scan of claimant's cervical spine from C4 through C7 taken October 27, 1989, showed minimal bulge at C4-5 judged not to be significant. Other levels examined were normal. Lumbar spine showed mild degenerative disease, slight bulging of disc at L4-5. A cervical MRI taken January 3, 1990, showed mild bulges at C3-4 and C4-5, and L4-5. There was also a mild T8 compression fracture of indeterminate age.

Claimant strained his shoulder and back in February 1992 while shovelling hot mixture for the employer. Mr. J, the assistant superintendent, confirmed that claimant twisted his back while shovelling asphalt and lost the rest of the day plus five days the following week because of this. Claimant said he did not file a workers' compensation claim for this injury. Except for this, there is no evidence that claimant was treated for neck or back problems between 1990[2] and (hearing officer).

[2]Much of claimant's 1990 treatment appears to be neurocognitive therapy or psychological counselling.

Claimant was examined twice, on March 13 and September 28, 1993, by (Dr. L) on request from the carrier. Dr. L also gave a sworn statement. Claimant's medical records also were reviewed by a peer review group (and an unidentified surgeon). To briefly summarize, the prevailing opinion of these carrier consultants is that claimant's cervical herniated discs pre-existed the (hearing officer) injury; the peer review report relates the C3-4 disc to increased stress on the area due to the 1982 surgery, and states an opinion, the basis for which is not explained, that the C4-5 level also relates to "the previous trauma." The February 1992 injury is not mentioned as part of the conditions reviewed. The lumbosacral findings in 1989 and 1992 are reported as essentially unchanged.

Dr. L's sworn statement qualifies his conclusions that there were no objective signs of "significant new" injury after (hearing officer), by noting that he did not see claimant until after his cervical spinal surgery, and that he was not able to evaluate him in his post- injury state. Dr. L, however, stated also that "the pathology sounds to be more at C3-4 in 1992 than was previously noted." Dr. L opined that claimant's present problems were a continuation of pre-existing problems. He agreed that claimant's 1982 cervical surgery could have caused weakening in the surrounding areas. In response to the only question that Dr. L was asked relating to aggravation, he did not directly answer the question but deferred to the peer review report's observation that the lumbar spine was unchanged and the cervical conditions were pre-existing. The sworn statement was given only before the attorney for the carrier, and there were no representatives for the claimant present.

Although there was no issue regarding disability, there was protracted testimony about claimant's physical abilities surrounding admission of a videotape, made in 1993 after claimant's surgery, which showed, among other things, claimant playing pool (January 1993) and moving furniture (in September 1993). Claimant testified he was unable to perform most activities without pain. This tape was reviewed by Dr. L and Dr. R who both indicated it undermined claimant's credibility. Its relevance to whether an injury occurred as a result of the undisputed vehicular collision, however, was not clearly established by the carrier, and evidently, the hearing officer gave scant weight to the videotape or affect on claimant's credibility as it came to bear on the issue before him.

**THE VENUE POINT OF ERROR**

Section 410.005(A) requires that a contested case hearing be held within 75 miles of a claimant's residence at the time of injury unless there is good cause for holding it elsewhere. In this case, the claimant had moved to a location closer the (city) field office.

Carrier's point of error cannot be considered as asserted, because the hearing officer did not "overrule" any objection posed by carrier to the hearing. At the tape of the beginning of the contested case hearing, where the hearing officer questioned claimant about his current residence and agreement to hold the hearing in (city), no comment was made by the carrier, let alone an objection. The written objection cited by the carrier in its appeal does not appear in the record of this case. One of the hearing officer's exhibits is an agreed motion to transfer the case to (city) at a time when the claimant was represented by a (city)

attorney. When the attorney withdrew, the hearing was reset in (city). The agreed motion makes a passing mention that the carrier did not agree that the case should be transferred to (city). This document falls far short, we believe, of a motion opposing the November 18, 1993, hearing in (city). We would also note that carrier fails to explain how going forward with the hearing constituted error, or harm to its rights, as it appeared at the hearing with its witnesses and proceeded to try its case. As the carrier has not properly preserved any objection, we overrule this point of error. We note in any case that transferring a hearing closer to a claimant's current residence is not an abuse of discretion.

**WHETHER THE HEARING OFFICER ERRED BY FINDING THAT CLAIMANT'S PREVIOUS CONDITION HAD RESOLVED, OR THAT HE SUSTAINED A COMPENSABLE INJURY ON (HEARING OFFICER).**

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). However, we must observe that the law does not support the apparent view of the carrier as indicated both at the contested case hearing and its appeal that claimant's condition is not compensable unless a completely "new injury" is proved to have occurred on (hearing officer). We believe the law to be clear that an aggravation of a pre-existing condition can constitute a compensable injury in its own right and is effectively a "new injury." 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.). As the issue was also stated in terms of whether claimant's present problems were related to his prior injuries, carrier also had the burden of proving that claimant's pre-existing condition was the sole cause of any incapacity, whether or not it acknowledged that burden. *See* 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.

Also on point is the case of INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st Dist.] 1988, no writ) where 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 can constitute an injury in its own right, especially when there is no showing that the pre-existing condition was the "sole cause" of incapacity.

Given the lack of evidence of ongoing treatment for any neck condition in the two years prior to the injury, there is support for the hearing officer's finding that claimant's previous cervical problems had reached resolution. Also, the specific February 1992 strain was treated and claimant returned to work.

In response to the carrier's argument that there was no objective medical evidence, we note that the testimony of a claimant alone is sufficient evidence to support that a

claimant sustained injury. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). 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). There was objective evidence of disc herniation that did not exist in tests made before (hearing officer). There were conflicting accounts of facts, some about minor points not necessarily opposed to the occurrence of a compensable injury. However, the fact that claimant had been injured compensably at other times, and did not fully disclose this did not outweigh the fact that a vehicular collision happened in which the claimant was thrown forward. The hearing officer could choose to believe that claimant was injured based upon his testimony and evidence of his lost time after (date of injury) compared to the previous year.

Carrier's argument is somewhat contradictory. On one hand, it went to considerable length to convince the hearing officer that claimant was physically infirm prior to (hearing officer), and its own medical consultants freely speculate that claimant had a herniated disc before that date, and that the area surrounding his 1982 fusion operation would be weakened. On the other hand, the carrier asserts that the impaired claimant came unscathed through an unbraked rear end collision that threw him forward and which damaged the machine he was operating.

The effects of a vehicular collision like this are not, we believe, so beyond common experience that medical evidence on causation was required. *See* Houston General Insurance Co. v. Pegues, 514 S.W. 2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). The hearing officer could consider that Dr. R's opinion that the disc injury was caused by the accident may have been based upon incomplete or even misleading history provided by the claimant, but the more complete history was before the hearing officer for him to make findings of fact. A doctor's official opinion on causation was not needed.

In summary, claimant was objectively diagnosed in October 1992 with a herniated disc at the C4-5 level, which was not part of his objective test results after his 1989 injury. His pre-employment physical examination from April 1991 indicated that he moved normally. Claimant did not begin to miss time in consequence until after the undisputed accident occurred. Even if the hearing officer did not believe that the accident occurred as stated by claimant, he would be left with an arguably more serious account given by Mr. H (in which claimant is thrown down by the impact from a standing position). The hearing officer could review claimant's medical records and see that organic injury to his brain from previous injury could cause memory loss and conflicting accounts as to details. He could have chosen to believe some, if not all, of claimant's testimony and still be supported in the decision he reached.

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.

For the reasons stated above, the decision and order of the hearing officer are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge