APPEAL NOS. 94090 & 94167

These appeals are considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.*, and have been consolidated by unopposed motion of the carriers in this case. On December 14, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine issues involving consolidated claims pertaining to (claimante) (hereinafter the claimant). In the case against Highlands Insurance Company (hereinafter Carrier #1), the issues to be determined were whether the claimant, who injured his knee on (date of injury), while employed by stipulated employer (employer)(hereinafter), also sustained back injury on that date, and whether Carrier #1 timely contested compensability of the back injury, Carrier #1 had accepted liability for the knee injury that occurred on that date.

In the case involving Travelers Insurance Company of (state) (hereinafter Carrier #2), the issues were whether the claimant sustained a new injury to his knee on (date of injury), while employed by (hereinafter Trucking Company), and whether he had disability (the inability to obtain and retain employment equivalent to his pre-injury wage) as a result of that injury.[1]

The two claims were determined in a single hearing in which all parties were present. The position of the claimant with respect to his knee injury was that he had not sustained a new injury to his knee on (date of injury), but merely experienced a continuation of his (date of injury), injury. The claim against Carrier #2 was asserted by Carrier #1.

The hearing officer determined that claimant had not injured his back on (date of injury), and that Carrier #1 had timely contested compensability of the back injury. The hearing officer further decided that claimant had re-injured his knee in the course and scope of his employment with Trucking Company on (date of injury), and that claimant had disability relating to this injury. Carrier #2 was consequently determined to be liable for benefits. In so finding, the hearing officer noted that Carrier #2 had not met its burden of proving that the (date of injury), injury was the "sole cause" of claimant's disability.

The claimant has appealed the determination that his back was not injured in the (date of injury), accident, pointing out evidence that he believes preponderates in his favor. The claimant argues that the hearing officer did not properly apply the preponderance of the evidence standard. Carrier #1 responds by asking that this decision be affirmed. Carrier #2 appeals the determination that claimant sustained a new injury on (date of injury), and had disability therefrom, arguing that the preponderance of the evidence points to the conclusion that claimant's (date of injury), pain was a continuation of the original traumatic injury of (date of injury). Carrier #1 responds that the hearing officer's determination on this matter was also correct. The claimant has not responded to the appeal of Carrier #2. No

[1] The second issue as reported from the benefit review conference was whether the claimant was unable to obtain and retain employment at his pre-injury wage after July 23, 1991, as a result of his (date of injury), injury or his (date of injury), injury. No explanation was furnished in the record as to why wording of the issue was amended, however, the issue from the benefit review conference was effectively tried and decided in this case.

appeal was filed of the determination that Carrier #1 timely contested the compensability of the back injury. We note here that each carrier has filed a comment as "intervenor" in the proceeding in which it was not a nominal party, and those interventions are consistent with the positions described in this paragraph.

DECISION

We affirm the hearing officer's decisions. While we note that the hearing officer incorrectly described the sole cause burden as that of Carrier #2, we believe that the evidence sufficiently supports an implied finding that the sole cause of disability was the aggravated injury that occurred on (date of injury).

The facts will be briefly summarized.

There was no dispute over the events leading to the accident that occurred on (date of injury). The claimant stated that on (date of injury), while he was working on the second story of a building on the premises of Corporation (also referred to in the testimony as KP[2]), he stepped on a rotten area of the wood floor and fell through up to his hip. His left knee and hip hit a steel pipe that was resting on the floor. He was subsequently treated for his knee, which his first doctor, (Dr. B), opined based upon physical examination could be a torn meniscus. By July 2, 1991, claimant was referred to (Dr. H), an orthopedic surgeon, who became his treating doctor. Claimant underwent an MRI examination of the knee on July 3rd, which he testified involved only a view from the top of the knee down. According to the MRI, claimant had sustained a bruised bone but no tear was observed in any of the ligaments in the knee area. Claimant said that he mentioned his back and hip pain from the very first to Dr. H, and that requested MRIs of the back and hip have been denied by the carriers.

Effective (date of injury), Dr. H released claimant back to work, full duty. Claimant said that his pain remained constant and his knee continued to "pop." Claimant said that he had driven a truck for most of his employment life, and had only tried working at Logging Corporation to try something different. Because he didn't like it, he went to work for Trucking Company. His first day of work was on or about (date of injury), although claimant said he had passed required drug and driving tests before that date. On that day, claimant said he was loading his truck, and had climbed up onto the truck trailer to secure the load. He said that he sat down after he finished this and slid to the ground, a distance of about three feet. Claimant said that he did not hit the ground hard, or twist, or do anything out of the ordinary; however, he felt a sharp pain in his knee in the same place it had hurt before.

[2]At the time these decisions were appealed, counsel for Carrier #1 filed a letter pointing out that the parties and the hearing officer's decision have "inadvertently" referred to the employer as Corporation; she argues that the employer is in fact a subsidiary of that company, (company). We respectfully point out that all parties at the contested case hearing stipulated that Logging Corporation was the employer on (date of injury). The opportunity for sorting out any discrepancy was at the contested case hearing and will not be addressed on appeal.

He said he reported to his supervisor that he was experiencing another episode of knee pain related to a prior injury at Corporation.

He went back to Dr. H, and had another left knee MRI which detected a bucket tear of the medial meniscus. Since July 23, 1991, claimant had been off work. He stated that he was no longer able to drive a truck as a result of his knee injury and two resulting surgeries.

Claimant was adamant at the hearing that he had not done anything out of the ordinary on (date of injury). In two statements given August 1991 and October 1991 to the adjusters for both carriers, however, claimant had stated that he twisted his knee on (date of injury). Likewise, Dr. H's notes after (date of injury), document a reference to a new twisting incident. Although the record is not as fully developed as it could be[3], it appears that Carrier #1 was the moving force in making the claim against Carrier #2 for benefits relating to the (date of injury), incident. Claimant's earlier recorded statements do not assert an injury to his back.

In depositions on written questions of Dr. H, he stated that claimant did not have a back injury that he related to (date of injury). He also stated his opinion that while the (date of injury), fall was a factor, claimant sustained a new knee injury on (date of injury). Dr. H stated that the back injury was first drawn to his attention in July 1992.

BURDEN OF PROOF ON SOLE CAUSE/WHETHER THE HEARING OFFICER'S DETERMINATION THAT DISABILITY RESULTED FROM THE (DATE OF INJURY) INCIDENT IS SUPPORTED BY SUFFICIENT EVIDENCE

An aggravation of a pre-existing condition is an injury in its own right. Mountain States Mutual Casualty Co. v. Redd, 397 S.W.2d 321 (Tex. Civ. App.-Amarillo 1965, writ ref'd n.r.e.). We have stated previously two propositions of burden of proof where two contended injuries, or a pre-existing condition and subsequent injury, are involved. We've stated that a carrier who seeks to avoid liability based upon a subsequent injury has the burden to prove that the subsequent injury was the "sole cause" of disability. *See* Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992; American Surety Co. of N.Y. v. Rushing, 356 S.W.2d 817 (Tex. Civ. App.-Texarkana 1962, writ ref'd n.r.e.). We've also stated that a carrier who seeks to avoid liability for a claim when injury occurs to a person having a "pre-existing" condition has the burden to prove that the condition is the "sole cause." Texas Workers' Compensation Commission Appeal No. 92211, decided July 10, 1992. However, the party who contends that a compensable injury has occurred has the burden to prove that it did. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). As we stated in Appeal No. 92463, cited above, which also involved a "two carrier" fact situation, simply asserting an aggravation does not meet the burden of proof.

[3] For example, reference was made by the parties to a 1991 benefit review conference in which Carrier #2 agreed to assume payment of temporary income benefits, but the report is not in the record.

We believe that the way the burdens get "sorted out" in this case, where there were two argued injuries and two carriers, and the injured employee did not claim a subsequent injury by way of aggravation, is that the carrier that has accepted liability for the initial injury had the burden to prove first that a subsequent injury occurred, and, if so, that the subsequent injury was the sole cause of claimant's disability. In this case, Carrier #2 was essentially brought into the claim not by claimant, but by Carrier #1, from very nearly the beginning of the contended aggravation. Carrier #1 had the burdens of proof in this case to establish that an injury occurred on (date of injury), and then that it was the sole cause of disability.

However, although the hearing officer mistakenly recited that it was Carrier #2 that failed to sustain its burden, we believe that any error in allocating the burden is harmless because the facts of the case were fully brought forward and adjudicated, and the record supports the hearing officer's conclusion that claimant sustained an injury on (date of injury), and disability resulted from that injury.

The hearing officer evidently believed that although the knee was the area of the body that caused claimant's inability to work, the discreet injury that resulted in surgery and subsequent disability was the meniscus tear. The hearing officer could believe that the (date of injury), accident weakened the knee such that it became more susceptible to a relatively innocuous episode (to the claimant) of sliding off the trailer on July 22nd. The hearing officer evidently considered that the tear was either not present or was not detected on objective testing prior to that date and claimant had been fully released to work by (date of injury). The hearing officer evidently gave strong weight to medical evidence in this case over claimant's lay conclusions about whether his injury was a continuation. Moreover, unlike the facts in other decisions[4] where the Appeals Panel found a "continuation rather than aggravation," there was a specific episode on (date of injury), which gave rise to the new pain. All in all, we do not believe that the hearing officer's decision was so against the great weight and preponderance of the evidence so as to be manifestly unfair or unjust.

THE BACK INJURY

Claimant's assertion that his back was injured on (date of injury), is a logical argument. However, there was conflicting evidence on this point. 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 decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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.

[4] Appeal No. 92463, cited above; *also* Texas Workers' Compensation Commission Appeal No. 92518, decided November 16, 1992.

Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The hearing officer's determination on the back injury claim is supported in the record as a whole.

In summary, we do not agree that the great weight and preponderance of the evidence is against the decision of the hearing officer, and the decisions and orders in decisions on both docket numbers adjudicated in the contested case hearing of December 14, 1993, are accordingly affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge1