APPEAL NO. 94128

On December 16, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issue at the hearing was whether the compensable injury the respondent (claimant) sustained on (date of injury), is a producing cause of the claimant's current back problems. The hearing officer concluded that the claimant's injury of (date of injury), is a producing cause of the claimant's current back problems and that the claimant remains entitled to medical benefits for the back injury of (date of injury). The appellant (carrier) disagrees with the decision and requests that we reverse it and render a decision in its favor. The claimant requests that we affirm the hearing officer's decision.

DECISION

The hearing officer's decision and order are affirmed.

On (date of injury), the claimant sustained a work-related back injury, and the carrier in this case was the carrier for the claimant's employer. On December 3, 1991, the claimant had back surgery consisting of L2, L3, and L4 partial hemilaminectomy and a foraminotomy at L5-S1. Except for getting prescriptions for pain pills from his family doctor, the claimant testified that he did not seek medical treatment for his back after December 19, 1991, until September 16, 1993. The claimant said he paid for the pain medication himself. The claimant explained that he had failed to get a second opinion for his surgery of December 3, 1991, so the carrier refused to pay for surgery costs. Thus, a lawsuit was filed and it was finally resolved in July 1993, that the claimant's health insurance carrier would cover the cost of the surgery and the carrier would cover post-surgery medical expenses. The claimant testified that he did not seek medical treatment for his back until September 1993 because he did not know who would pay the medical bills until the lawsuit was settled. At some point in time, (Dr. M) certified that the claimant had reached maximum medical improvement (MMI) from his injury of (date of injury), on February 12, 1992, and assigned the claimant a zero percent impairment rating despite the fact the claimant had multi-level back surgery. MMI and impairment rating were not issues before the hearing officer.

The claimant said that after his 1991 surgery he returned to work on February 12, 1992, and worked until September 16, 1993. He testified that he had continuously taken pain medication during this period in order to be able to work. Meanwhile, in June 1992, the carrier in this case ceased to be the carrier for the claimant's employer. According to the owner of the company, who is the claimant's brother, about September 10, 1993, the employer obtained workers' compensation insurance coverage from another carrier but the policy did not cover the claimant or the owner of the company until September 24, 1993.

On September 16, 1993, the claimant went to (Dr. MA) and this doctor's report of the same date revealed that the claimant reported to the doctor that he had had back surgery in December 1991 and had last seen Dr. M on December 19, 1991; that there was an insurance mix up which was responsible for the claimant not returning to Dr. M despite

continued difficulties; that the claimant had been working but continued to have pain in both hips and lower back; and that the claimant had some continued numbness in the right thigh as he had had before his surgery. Dr. MA further noted that the claimant told him that his family doctor had been giving him pain pills, but he had seen no one for re-evaluation of his spine. Dr. MA noted that on physical examination straight leg raising was strongly positive bilaterally; that the claimant was unable to walk on his heels because of marked increase in discomfort in his back; and that there was significant paraspinous musculature spasm bilaterally. The doctor also noted that the claimant had considerable difficulty getting from a chair to the standing position because of discomfort in the back. Dr. MA stated that the claimant's problem seemed to be "quite significant" and that it was amazing that the claimant had continued to work. Dr. MA recommended an MRI scan of the lumbar spine, muscle relaxants, and two weeks of physical therapy. Dr. MA also stated in the report that he had "no objection" to the claimant continuing work.

The claimant testified that on September 16, 1993, Dr. MA told him to stay off his feet as much as he could and to try and get some rest until the MRI was done, but that he could work if he had to work. The claimant said he did not work after September 16, 1993, until (date of injury). On September 23rd, the claimant said that he was at work pulling hoses off of a truck and when he bent over to screw the hoses together he "had an occurrence pretty much like the original, just a severe sharp pain in my lower back, which was, you know, the same thing I had been having." However, the claimant also said that it was a very sharp increase of pain from what he had been having. The claimant said he fell down on the ground and could not move or get up for two or three minutes. He used the truck radio to summon his brother to take him to the hospital. At first, the claimant testified that he thought he had aggravated his injury of (date of injury), but later testified that it was his position that the incident of (date of injury), was just a continuation of his prior back injury of (date of injury).

On (date of injury), the claimant was examined by Dr. MA at the hospital. Dr. MA reported that the claimant had had a significant increase in his discomfort in his back when he bent over to put a hose together. Dr. MA again found that straight leg raising was strongly positive bilaterally. Dr. MA recommended hospitalization and the claimant was in the hospital for four days. In another report dated (date of injury), Dr. MA noted that on September 16, 1993, he had seen the claimant for "recurrent discomfort" before the rather acute episode of September 23rd, and that the claimant had reported that he had had intermittent discomfort in his back and into both hips for the entire period since his surgery, but never as severe as the episode of September 23rd. Dr. MA's impression was that the claimant had a possible recurrent lumbar disc disease with significant nerve root compression.

In a hospital discharge report dated September 26, 1993, Dr. MA stated that a lumbar myelogram showed changes at the L3-4 level, which were present before the surgery in December 1991 and which Dr. MA did not think were significant. Dr. MA further noted that an MRI scan of the lumbar spine revealed "a rather severe change at L-3-4 which was thought initially to be disc rupture but after myelography with comparison of previous

myelography this was not felt to be anything in the way of an acute herniation." Dr. MA diagnosed a severe lumbar strain and recommended that the claimant should go to a back school as an outpatient. The claimant said he attended the back school and had physical therapy for about four weeks. He also testified that he has subsequently seen (Dr. G) who had unspecified tests done, the results of which were not available at the time of the hearing. The claimant said that after the incident of (date of injury), Dr. MA initially wanted to perform surgery, but that after the diagnostic tests were done at the hospital, Dr. MA told him that he didn't believe he had another ruptured disc and that he didn't think he was going to perform surgery.

The issue at the hearing was whether the compensable injury of (date of injury), is a producing cause of the claimant's current back problems. The carrier contended at the hearing, as it does on appeal, that the claimant had a new injury on (date of injury), that medical treatment after that date is related to the new injury, and that it is not responsible for payment of the medical treatment because it was not the employer's carrier on (date of injury). The claimant's position was that the carrier is responsible for the medical treatment following his incident of (date of injury), because his current back problems are simply a continuation of his injury of (date of injury).

The hearing officer found that the claimant continued to experience back problems with his back after the December 1991 surgery but he did not seek medical treatment until September 16, 1993, due to a conflict with the carrier; that the claimant sought treatment on that date due to severe pain and muscle spasm; that the claimant suffered an increase of his symptoms while working on (date of injury), but he did not suffer a new injury on (date of injury); and that the objective testing following (date of injury), revealed no new disc herniation or other identifiable injury. The hearing officer concluded that the claimant suffered an increase in pain on (date of injury), which did not amount to an aggravation or new injury. The hearing officer further concluded that the claimant's injury of (date of injury), is a producing cause of the claimant's current back problems and that the claimant remains entitled to medical benefits for the back injury of (date of injury).

Section 408.021(a) relates to entitlement to medical benefits and provides that:

(a)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. The employee is specifically entitled to health care that:

(1)cures or relieves the effects naturally resulting from the compensable injury;

(2)promotes recovery; or

(3)enhances the ability of the employee to return to or retain employment.

The Appeals Panel has observed that entitlement to medical benefits does not necessarily cease just because MMI has been reached. Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992.

It has been held that 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.). Also, strains and sprains due to unexpected, undesigned or fortuitous events have been held to be compensable. Hanover Insurance Company v. Johnson, 397 S.W.2d 904 (Tex. Civ. App.-Waco 1965, writ ref'd n.r.e.). However, whether an injury has occurred is an issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts and contradictions in the evidence, it is the duty of the finder of fact, in this case the hearing officer, to consider the conflicts and contradictions and determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.).

In this case, we believe there is sufficient evidence to support the hearing officer's findings and conclusions. Basically, the hearing officer has determined that the claimant's current back problems are a continuation of the injury of (date of injury), and do not result from an injury on (date of injury). Of significance is the fact that the claimant went to Dr. MA on September 16, 1993, seven days before the alleged injury of (date of injury), and on September 16th reported that he had been having continuing difficulties with pain in his hips and lower back, that he had been taking pain medication, and that he had not gone to a doctor sooner due to the dispute with the carrier. While the claimant did have an increase in pain while at work on (date of injury), that circumstance alone does not compel a determination that the claimant sustained an injury on that date in view of his report of continuing pain on September 16th and diagnostic tests which did not reveal any new damage or harm to the physical structure of the body. In addition, the hearing officer was not bound by the opinion of Dr. MA that the claimant had sustained a back sprain on September 23rd because it has been held that the opinion evidence of expert medical witnesses is but evidentiary and is not binding on the trier of fact. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). We conclude that the hearing officer's findings of fact, conclusions of law, and decision are not against the great weight and preponderance of the evidence.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge