APPEAL NO. 94217

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 3, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer announced that the issues at the CCH were: 1. did the appellant (claimant herein) report the injury to her employer within 30 days of the date of injury and 2. did the claimant sustain a compensable injury while in the course and scope of employment on or about (date of injury). The claimant objected to the inclusion of an issue as to notice as this issue had not been properly raised by the respondent (carrier herein). The hearing officer overruled this objection. The hearing officer found that the claimant fell at work while cleaning a floor, that the claimant timely reported her fall, but that the claimant did not injure her back at work causing the large herniated disc with related pain and numbness. The hearing officer concluded that the claimant did not suffer a compensable injury.

The claimant appeals contending that the defense raised by the respondent's controversion of the claim was intervening injury and that the carrier did not submit any evidence on this issue. The claimant argues that without such evidence that there is no basis for the hearing officer's ruling that the claimant did not suffer a compensable injury. The carrier responds that the claimant waived the issue as to the adequacy of the carrier's controversion by not requesting it be added as an issue between the Benefit Review Conference (BRC) and the CCH and that the decision of hearing officer is supported by the evidence.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm.

The claimant testified that she was working weekends for the employer, a convenience store, as a clerk while attending school. The claimant alleged on (date of injury), that, while cleaning the shelves at work, a bottle of lead substitute fell to the floor. The claimant testified that she slipped and fell in lead substitute. The claimant testified that she called (Ms. D), the employee who trained her, and told her about the fall. The claimant stated that Ms. D told her to call (Ms. O) to report the fall. A written statement from Ms. D corroborating her conversation was admitted into evidence.

The claimant testified that she called Ms. O and reported the fall and then called (Ms. C), a friend, to bring her clean clothes as the ones she was wearing had been soiled in her fall. A written statement from Ms. C concerned her bringing clean clothes to the claimant and her observation that there was lead substitute on the claimant's backside. The claimant testified that she had discomfort, but finished her shift. The claimant's mother testified that the claimant told her that evening that she had slipped and fallen at work.

The claimant testified that she continued to work for the employer on weekends until June 7, 1993, when having finished her schooling, she sought and obtained full-time work

as a secretary. The claimant testified that on (date), she felt pain in her back and legs and that these symptoms increased the following day. The claimant and her mother testified that the claimant sought medical treatment and obtained an appointment with (Dr. C), a physician who had treated the claimant for a previous back injury in 1991 and had previously operated on her back. The claimant testified that she had fully recovered from the prior injury and had ceased treatment with Dr. C in April 1992. On August 5, 1993, the claimant underwent an MRI which showed she had a large herniated disc for which she underwent surgical repair on August 11, 1993. The claimant testified that Dr. C discussed trauma with her and the only trauma she could recall was her fall at work on (date of injury).

Dr. C states as follows in letter dated October 18, 1993:

[Claimant] is a patient of mine who has previously had back surgery. I performed a right L4-5, L5-S1 hemilaminotomy/discectomy on 11/18/91. She had a slow but progressive post operative course. In looking at her post operative records, I find that she was in the office on 4/17/92 for evaluation of headaches which were related to a motor vehicle accident on 2/13/92 in which she sustained a blow to the head. At that time, we specifically asked how her back and right leg were and she denied any pain.

On 7/13/93, she was seen again with recurrent low back pain and right greater than left sciatica which developed about ten days prior. She had tingling in the legs with increased numbness into the right foot and lower leg. At the time of her visit on 7/13/93, she denied any specific precipitating event leading to the onset of her symptoms.

She was seen again on 8/5/93 after a repeat MRI showed a large recurrent disc herniation at L4-5. She continued to have persistent low back pain with right greater than left sciatica. At the time of her visit on 8/5/93, she was further questioned regarding any type of possible injury and she stated that she did slip and fall at work in May of this year. Due to the large disc noted on the scan from August, it was felt nothing short of surgical treatment would relieve her symptoms and this was carried out on 8/11/93.

At this time, the question has come up whether the injury from May was related to the surgery in August. Obviously, the time "gap" raises some questions about the causal relationship of the fall to the development of her symptoms in early July.

It is certainly unusual, but not out of the realm of medical possibility that the fall might have contributed to the recurrent disc herniation. Typically, a disc recurrence as large as the one which required the second operation requires a fairly abrupt force to occur. Further questioning fails to reveal any other incident that might have contributed to the recurrent HNP. It is conceivable that her symptoms did not develop right away because of the previous surgery which

> allowed the nerve roots to move away from the recurrent ruptured disc, as part of the lamina had been previously removed. Only after the herniation enlarged did the nerve roots finally reach a point where they became compromised.
>
> I realize that this issue is speculative, but I certainly feel that the scenario that I have described is not totally out of the question. If there are further concerns regarding this matter, please do not hesitate to call me.

The claimant's mother testified she spoke to the owner of the employer in early August concerning the claimant's injury. The owner states in an Employer's First Report of Injury or Illness (TWCC-1) dated August 13, 1993, that her first knowledge of any injury was when claimant's mother informed her of the accident on August 10, 1993. On August 27, 1993, the carrier filed a Notice of Refused/Disputed Claim (TWCC-21) which states in relevant part:

> Carrier controverts claim. Evidence of investigation does not support an on-the-job injury. Clmt first sought treatment over 60 days after reported injury. Carrier concludes an intervening injury occurred.

The BRC report only lists one issue: "Did the claimant sustain a compensable injury while in the course and scope of employment on or about (date of injury)." In describing the positions of the parties in regard to this issue the Benefit Review Officer (BRO) discusses the position of the parties regarding injury, timeliness of reporting, previous injury and intervening cause.

The first and most troubling problem concerning this case is the jumbling of the issues. This problem was initially created by not recognizing and separating the issues presented in this claim. The parties are also to be faulted for perhaps confusing the issues at the BRC and certainly for not attempting Straighten out the disputed issue using procedures provided under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7).

We do not find intervening cause or the claimant's prior injury to be an issue before the hearing officer. While the carrier presented evidence concerning the claimant's previous injury and argued that her subsequent employment was evidence of an intervening cause, such evidence and argument would be primarily relevant to an issue of sole cause. *See* Texas Workers' Compensation Commission Appeal No. 93266, decided May 13, 1993; Texas Workers' Compensation Commission Appeal No. 93864, decided November 10, 1993. If the carrier had desired to litigate an issue of sole cause (essentially a defensive issue) it should have requested such an issue by response to the report of the BRC report pursuant to Rule 142.7(e).[1] Without an issue on sole cause, the claimant's prior injury or

[1] The hearing officer cannot require the carrier to try the issue of sole cause. *See* Texas Workers' Compensation Commission Appeal No. 93143, decided April 19, 1993. But neither can the carrier try the sole

any subsequent injury (and certainly the mere possibility of subsequent injury through subsequent employment) only one of the factors that may be weighed and considered in the determination of whether an injury has been sustained.[2] There was no objection to the carrier's evidence or argument concerning these matters as to relevancy, but we presume that the hearing officer did not give them a great deal of weight in reaching his decision,[3] and will we give them little weight in reviewing his decision.

The claimant essentially argues that intervening cause was not only an issue before the hearing officer, but in fact the only issue. The claimant's logic is that the TWCC-21 only raised an issue of intervening cause, but the carrier failed to prove an intervening cause, so the hearing officer erroneously found against the claimant. The carrier's TWCC-21 certainly does mention intervening injury, but also says, "Evidence of investigation does not support an on-the-job injury." This is sufficient to raise the issue of injury. This is in fact the only issue listed in the BRC report to which neither party responded. This is the issue listed by the hearing officer to which the claimant did not object. Clearly it was proper for the hearing officer to determine this issue.

The question then becomes whether the determinations of the hearing officer on this issue are legally correct. The relevant determinations are as follows:

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cause defense if it is not an issue.

[2]This is to say that generally whether or not a person had a prior injury or a subsequent injury has little probative value in determining the validity a person's alleged compensable injury, unless the carrier undertakes the burden of establishing that the prior or subsequent injury is the sole cause of the person's condition. *See* Appeal No. 92226, *supra*; Appeal No. 93864, *supra*. This is essentially because injury includes the aggravation of a previous or subsequent condition. Of course, there may be a case where such evidence may be relevant to another issue.

[3]The hearing officer mentions this evidence and argument in his discussion of the evidence, but nothing in his decision and order indicates that he relied upon either in making his findings of fact or reaching his conclusion of law.

## FINDINGS OF FACT

11.Although Claimant fell at work on (date of injury), she did not injure her back on that date causing the large herniated disc with related pain and numbness.

## CONCLUSIONS OF LAW

3.Claimant did not sustain a compensable injury while in the course and scope of her employment on (date of injury).

The claimant's evidence that she was injured in her fall causing her herniated disc was twofold. First she testified that between the date of her fall ((date of injury)) and the date her disc was diagnosed (August 5, 1993), she had no other trauma severe enough to cause the herniated disc. Her testimony is really primarily based upon the opinion of Dr. C that it would require a severe trauma to cause herniation of this size. Dr. C's opinion which is quoted at length above is, to say the least, equivocal. Determining the weight to give this evidence was the province of the hearing officer. Section 410.165(a). We will only reverse his determination if we find it is so contrary to the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We cannot say that the hearing officer's determination here was against the great weight and preponderance of the evidence. This is not to say that this same type of evidence might not support a determination that the injury was compensable, particularly had the medical evidence been stronger, but that here the evidence falls short of connecting the claimant's herniated disc to her fall.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge