APPEAL NO. 94280

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 February 3, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The issue at the CCH was whether the respondent (claimant herein) continued to suffer effects from the injury of (date of injury), entitling him to benefits. The issue actually litigated by the parties was whether the respondent's (claimant herein) current condition was a continuation of his injury of (date of injury), or the result of an intervening injury. The hearing officer ruled that the claimant continued to suffer from the effects of the compensable injury and was entitled to benefits. The appellant (carrier herein) files a request for review arguing that the decision of the hearing officer was insufficiently supported by the evidence. The claimant does not file a response.

DECISION

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

In (month year) the claimant suffered a noncompensable injury when he was kicked by a horse. As a result of that injury, his spleen had to be surgically removed. On (date of injury), the claimant suffered a compensable incisional hernia at the site of the splenectomy due to lifting patients while working as a home health care worker for (employer). (Dr. L) surgically repaired the hernia on November 30, 1992. The claimant testified that he returned to work for the employer in May 1993. The claimant testified that after he returned to work the employer reduced his caseload to one patient from the seven to nine patients he had been seeing prior to the accident. The claimant stated that this greatly reduced his wages since he was paid by patient visit, but was still required to commute more than an hour a day.

The claimant testified that after the surgery he continued to have pain and was unable to do heavy lifting. The claimant testified that beginning at least in July 1993 he noticed an area around his solar plexus was beginning to bulge. The claimant stated that this bulge continued to increase in size.

The medical evidence as to whether the claimant's present condition (recurrent hernia) resulted from his initial compensable injury (claimant's position) or from a new injury after return to work (carrier's position) was somewhat conflicting. (Dr. P), a doctor selected by the carrier to conduct an independent medical examination, stated in a report dated February 1, 1994, "the problem he has now [the pain and the bulge] is directly related to the hernia repair of (date of injury)." (Dr. F), the claimant's family doctor, stated in response to a questionnaire that "[it] is very likely" that the claimant's complaints arise from the (date of injury) hernia surgery's failure to heal properly, but also stated when queried if the claimant had a new injury, "probably the result of continued lifting of patients against a possibly weak hernia repair." (Dr. B), a physician who treated the claimant, when asked if the claimant's current complaints arise from the initial November hernia surgery's failure to heal properly,

he answered "likely," yet when queried if the claimant's current condition was the result of new injury, he responded "possibly."

Whether a claimant sustained a new injury or merely suffered a continuation of an original injury is a question of fact to be determined by the fact finder. Texas Workers' Compensation Commission Appeal No. 93515, decided July 26, 1993; Texas Workers' Compensation Commission Appeal No. 92681, decided February 3, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In the present case the claimant did return to work after his injury, but testified that he was still having symptoms and limitations. A return to work does not automatically transform an original injury into a new injury when symptoms recur. Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. This is particularly true where a claimant returns to work and is not 100% over the effects of an injury and experiences subsequent pain or medical problems related to an original injury. Appeal No. 93515, *supra*. *See also* Texas Workers' Compensation Commission Appeal No. 92518, decided November 16, 1992. Further while the carrier argues that the medical evidence in this case constitutes the great weight and preponderance of the evidence against the finding of the hearing officer that the claimant's present condition is a continuation of the claimant's (date of injury) injury, we think that, at best, the evidence is contradictory. Clearly there is sufficient medical evidence to support the finding of the hearing officer, particularly when he bases his decision primarily on the opinion of a doctor selected by the carrier itself.

Once a claimant has established by a preponderance of the evidence that a prior injury caused the present condition, the burden of proof shifts to the carrier to prove that the prior injury was the sole cause of claimant's present disability. *See* Texas Workers' Compensation Commission Appeal No. 93226, decided May 13, 1993; Texas Workers'

Compensation Commission Appeal No. 93864, decided November 10, 1993. To prove that the present condition is a continuation of a compensable injury, and not a new injury, a claimant must prove that a compensable injury aggravates (or is a contributing factor to) the present condition. This is because an injury is compensable even though aggravated by an existing injury or condition, or by a subsequently occurring injury or condition. *See* Guzman v. Maryland Casualty Co., 130 Tex. 62, 107 S.W.2d 356 (1937); Hardware Mutual Casualty Co, v. Wesbrooks, 511 S.W.2d 406 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991; Texas Workers' Compensation Commission Appeal No. 91085A, decided January 3, 1992; Texas Workers' Compensation Commission Appeal No. 92018, decided March 5, 1992; Texas Workers' Compensation Commission Appeal No. 92692, decided February 12, 1993. On the other hand, to prove that a claimant's current condition is the result of a new (intervening) injury, and not a continuation of a prior compensable injury, the burden is on the carrier to prove that an intervening injury is the sole cause (or the only contributing factor) to a claimant's current condition. This is because the legal standard to determine causality, when the carrier argues a subsequent injury is the cause of the claimant's current condition, is sole cause. *See* Texas Appeal No. 93864, *supra*, and decisions and cases cited therein. This means that in a case, such as the present case, where there is evidence that a claimant's present condition may be caused partly by a prior compensable injury and partly by an intervening injury (which is what Dr. F and Dr. B appear to say), such evidence supports a finding that the present condition is a continuation of the prior injury but would not support a finding that the intervening cause is the sole cause of the injury.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge