

APPEAL NO. 950099  
MARCH 6, 1995

A contested case hearing was held on December 13, 1994, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), to resolve the following disputed issues stated in the benefit review conference report: (1) Is the Claimant's compensable injury a producing cause of his current back condition; and (2) Did the Claimant have disability, and if so, for what period? The hearing officer finding that the respondent (claimant) injured his back at work on \_\_\_\_\_, that his current back problems are related to that injury, and that he has been unable to work since July 1, 1994, because of that injury, concluded that the \_\_\_\_\_ injury was a producing cause of claimant's current back problems and that his disability began on July 1, 1994, and had not ended as of the hearing date. The appellant (carrier) asserts on appeal that these findings and conclusions are insufficient as a matter of law and fact while claimant contends the evidence is sufficient to support them.

DECISION

Affirmed.

Claimant, the sole witness, testified that on \_\_\_\_\_, he was lifting a heavy roll of floor covering material onto a rack and hurt his back. It was not disputed that claimant injured his back on that day while working for his employer. Claimant said that the next day he reported the injury to his supervisor, (Mr. A), and that the employer arranged that day for him to be treated by (Dr. T) whose only diagnostic test was x-rays. The medical records show that Dr. T's diagnosis was acute back sprain. When claimant saw Dr. T he provided a history of back surgery five years earlier with two discs removed, and of going to a hospital three years earlier with back pain. Claimant stated that after seeing Dr. T his back pain continued and got worse, notwithstanding that Dr. T had told him the pain would resolve; and that pursuant to Dr. T's orders he returned to light duty work on June 7th and to unrestricted work on June 13th. He stated that on June 7th he began to experience pain shooting down his left leg, that this pain got worse, and that he disagreed with Dr. T's diagnosis of only muscle strain. He said he often spoke to Mr. A about his continued pain.

Claimant further testified that in the late winter period of 1994 he undertook to install a new chain link fence for co-worker (Mr. M), that he did some work on that project in May and June 1994 and as recently as July 2nd or 3rd, that Mr. M and two of claimant's relatives helped him, and that he did not sustain any new back injury working on the fence.

Mr. M also testified that claimant gave no indication of having sustained a back injury while working on the fence. While the carrier adduced considerable evidence from claimant and from Mr. M concerning the details of the fence project and claimant's involvement, the carrier did not maintain that claimant's work on the fence on (subsequent

date of injury) or (subsequent date of injury) was the sole cause of the back injury which resulted in claimant's being hospitalized on July 4th and undergoing back surgery on July 6th.

Claimant also testified that on (subsequent date of injury) while at home and walking out to his truck to obtain cigarettes, someone yelled at him and that as he turned around he felt more pain. Claimant did not describe it as a specific twisting incident as such but said the pain was worse and that it was painful to walk when he went out to the truck for cigarettes. He said the pain was always there but it was "a sharper pain" whenever he twisted and turned. In a statement recorded by the carrier on July 21st, claimant said that on (subsequent date of injury) while at home talking with his wife and her sister, he started to walk out to get cigarettes, that someone called his name to tell him something and that "when I turned it just, you know, the pain just, it just sent me into severe pain right then and there." Claimant denied the occurrence of any particular physical act prior to the pain and said that after \_\_\_\_\_ it just got progressively worse.

Mr. A testified that after claimant returned to work on June 7th he did not recall that claimant spoke to him of his continuing pain though he did recall claimant saying he disagreed with Dr. T's diagnosis and that he was still feeling bad. Mr. A also said that claimant called him from the hospital on July 4th to advise he was scheduled for surgery and would not be coming to work. According to Mr. A, claimant also said that he had been walking down a hallway at home, that his wife said something to him, and that as he turned around he "got a screaming pain." Coworker (Mr. G) testified that claimant did not complain of pain to him upon his return to work. Mr. M testified that on June 30th, their last day of work for employer before the holiday weekend, claimant lifted a lot of extra material and that they worked faster and harder that day on a large order. He also stated that he and claimant worked on the fence project on July 2nd for about four hours and that claimant did not complain about his back or indicate that he injured his back working on the fence. Contradicting claimant's testimony about help from relatives, Mr. M said that only he and claimant worked on the fence. He also stated that claimant called him on July 4th, apparently from the hospital, relating that his back was hurting and that someone had "hollered" at him and he turned around and pulled his back.

On the morning of July 4th claimant stated that he went to an emergency room (ER) because he could not stand the pain any more and felt he needed medications, that he had used up the medications prescribed by Dr. T and had been using non-prescriptive medications, and that he intended to return to Dr. T. He said that at the ER he was told he had a serious problem and that (Dr. R) was consulted and had him admitted to the hospital that day. On July 6th Dr. R performed a bilateral L4-5 laminotomy and discectomy and his impression was L4-5 central disk herniation with sequestering fragment, severe left L5 radiculopathy, and left and right sciatica. Dr. R's July 13th report described claimant as having had "a huge L4-5 disc herniation with a severe left L5 radiculopathy." Stating that it was likely that Dr. T was seeing "an early manifestation of

this disc injury which evolved into a large sequestered disc herniation on July 4th," Dr. R wrote that "[I]t is unlikely that his early syndrome was a simple muscle strain."

The carrier adduced medical records showing that claimant had undergone spinal disc surgery in 1989 and that on October 16, 1991, he was seen in an ER, diagnosed with a sacroiliac sprain, given medications, and released. A radiology report of that date stated "degenerative disc changes suspected at L5-S1." Dr. T's records indicated he first saw claimant on \_\_\_\_\_ for back pain without complaint of radiation into the lower extremities, that on May 27th claimant described "new onset of symptoms with pain clearly radiating down his left leg," that his follow-up visit on May 31st indicated improvement in the back pain but the left leg pain was increasing with coughing or movement, and that he saw claimant for the last time on June 7th at which time claimant still had pain in his left hip and calf of leg. In a letter of October 24, 1994, to the carrier Dr. T did not mention any trauma after \_\_\_\_\_ and stated: "This individual most likely had a herniated disc on the date indicated by [Dr. R] relating to his previous problems only from the perspective that he has and had an ongoing degenerative process occurring in his spine."

The carrier also noted that Dr. R on July 25th stated that he expected claimant to be off work from July 4th "to September 15, at least." Claimant testified that he very much wants to return to work and that he is "going crazy just sitting around looking at the four walls" but that he is still in the therapy prescribed by Dr. R and in pain. The therapist's report of October 18, 1994, indicated that therapy commenced on September 12, 1994, was ongoing, that claimant "has made slow, but steady, progress," but that further therapy was indicated. The hearing officer found that Dr. R was claimant's treating doctor and there was no mention in Dr. R's records of his having released claimant to return to work.

With respect to the first issue, the carrier took the position that claimant's back injury of \_\_\_\_\_ had resolved, as evidenced by his release to return to regular duties and evidence of his working without complaint of pain, and that the twisting incident on (subsequent date of injury) was the sole cause of the back condition for which he underwent the surgery. However, as noted above, the hearing officer found that claimant's current back problems are related to his injury of \_\_\_\_\_. The carrier has challenged these findings as being both legally and factually insufficient and also challenges the legal conclusions dispositive of the disputed issues. See Texas Workers' Compensation Commission Appeal No. 92118, decided May 1, 1992, for a statement of the standards of review applicable to these challenges to the evidence.

We are satisfied that the evidence is both legally and factually sufficient to support the challenged findings and that the factual findings sufficiently support the challenged legal conclusions. The carrier had the burden of proving a sole cause defense. Texas Employers' Insurance Assoc. v. Page, 553 S.W.2d 98 (Tex. 1977). Claimant's testimony as well as the information in Dr. R's records related the undisputed and compensable back injury of \_\_\_\_\_, thought by Dr. T to be an acute strain, to the large herniated disc. Dr. R saw the herniated disc as having "evolved" from the \_\_\_\_\_ lifting incident and

even Dr. T in his October 24th report did not attribute it to some subsequent trauma. Before leaving this issue is it appropriate to note that in Texas Workers' Compensation Commission Appeal No. 941615, decided January 20, 1995, the Appeals Panel commented on the "poor wording" of an issue in using the phrase "producing cause." That decision stated: "Whether or not one injury is a 'producing cause' of another condition is not the threshold question in determining compensability; not every condition that arguably may not have occurred 'but for' an injury is compensable. [Citations omitted.] A 'condition' or 'problem' will be compensable only if it arises in the course and scope of employment and constitutes 'damage or harm to the physical structure of the body . . . ' Section 401.011(26)." As in Appeal No. 941615, neither party in this case complained of error in the wording of the issue and actually litigated the issue as one involving whether the \_\_\_\_\_ injury extended to the herniated disc.

We are also satisfied that claimant's testimony together with the records of Dr. R and the physical therapist sufficiently support the disability finding. We do not substitute our judgment for that of the hearing officer when, as here, his findings are supported by some evidence of probative value and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Susan M. Kelley  
Appeals Judge