APPEAL NO. 980192
FILED MARCH 18, 1998

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 2, 1998, a contested case hearing (CCH) was held with hearing officer. The issues were whether the appellant, who is the claimant, sustained a compensable injury on or about _____, and whether he had the inability to obtain and retain employment equivalent to his preinjury wage as a result of this injury. At the heart of the injury issue was whether claimant sustained an injury by way of aggravation or exacerbation of a previous compensable injury.

The hearing officer held that the claimant did not sustain a new injury on _____, and that he did not have an inability to work due to this asserted injury.

The claimant has appealed, arguing that the medical evidence does not support the hearing officer's inference that his back was the same before and after a work-related incident of _____; he argues that his doctors have opined that he had a new injury on the date in question. The claimant points out that it was only after the _____ incident that he had an inability to keep working. The carrier responds that the claimant had a severe back injury predating (injury date 1), and he continued to receive active treatment for this up to a month prior to _____. The carrier argues that back surgery the claimant had on October 1, 1997, was the inevitable result of his 1994 injury, and asks that the decision be affirmed.

DECISION

Affirmed as not being against the great weight and preponderance of the evidence.

Claimant said he was hired by (company 1) (employer) as a backhoe operator. The safety director for the employer, (Mr. S), testified that regardless of job title, persons working in the field were expected to do a little of everything going on. Claimant testified that on _____, he was working down in a ditch with two other workers when a generator caught fire. Claimant scrambled out of the ditch and ran with other workers who had been there. He said he grabbed a fire extinguisher from a truck and ran back to help put out the fire, then tended to workers who had been burned. Although claimant could not pinpoint a specific incident, he said that his legs began to get numb and he had low back pain as the adrenaline from the incident wore off. He said he laid down for the rest of that afternoon.

Claimant agreed that he had been injured earlier on (injury date 1), in another work-related injury. As a result, he had surgery on his neck in December 1994, but although his low back was also injured, he did not have any surgery. Claimant was treated by (Dr. W), and said that he took injections for pain relief every two or three months. Claimant said he had been to get an injection from Dr. W at the end of June 1997. At that time, he made an appointment for follow-up on August 11, 1997.

Claimant said he did not work after _____ for the employer. However, claimant testified, as did Mr. S, that he had given notice to the employer that he was leaving to take another job with (B Company) for a better job. Although this job did not pay a greater hourly wage, he had insurance benefits which Mr. S said were not available with the employer. Claimant began working for B Company on August 4, 1997. According to claimant, he was hired by B Company to work as a crane operator, which meant he moved heavy items from a cab of the crane, which he said was under constant vibration due to the lifting. He also had to climb stairs to get to the cab. He stopped working for B Company on September 4, 1997, and said he quit due to his continuing pain. Claimant said that an injection he had on August 27th or 28th had not worked to afford any relief. Claimant said that this injection was scheduled after he discussed his _____ injury with Dr. W at his already-scheduled appointment on August 11th.

Claimant agreed that it would be fair to say that, before _____, he was bothered on and off with severe pain. He said, however, that his low back pain became worse, with leg numbness he had not had before, after the _____ incident.

Mr. S testified that the employer accommodated the claimant prior to _____ when he was having pain. Mr. S said that the day of the _____ fire, he talked twice to claimant, and agreed that claimant told him he was having pain when asked how he was by Mr. S.

A report from Dr. W dated August 16, 1996, reported that claimant had an MRI the year before which showed herniated discs at L4-5 and L3-4 (to a lesser extent than the other level). Dr. W also reported that claimant was having progressive pain and tingling into his lower extremities. Dr. W's plan for treatment included lumbar injections by catheterization. This report noted that surgery could be an option down the road if claimant could not live with his pain.

An MRI report dated August 27, 1997, reported that claimant had a moderate herniation at L4-5 and a smaller one at L3-4. He had lumbar surgery on October 1, 1997.

The doctor who referred claimant to Dr. W was (Dr. G), who reported on September 25, 1997, that claimant had been getting better until the _____ incident, and that claimant's lumbar herniations "must have been aggravated" by his recent injury. A doctor for the carrier who reviewed claimant's medical records, (Dr. Wn), opined that claimant did not have a new injury but an exacerbation of his previous symptoms.

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 Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.- Beaumont 1993, no writ).

As we have stated many times, an aggravation of a preexisting condition is an injury in it's own right. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ). A carrier that wishes to assert that a preexisting condition is the sole cause of an incapacity has the burden of proving this. Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992.

In Texas Workers' Compensation Commission Appeal No. 93866, decided November 8, 1993, we stated that "aggravation" has a somewhat technical meaning, and that to be compensable, an aggravation "must be a new and distinct injury in its own right with a reasonably identifiable cause. . . ." The mere recurrence or manifestation of symptoms of the original injury does not equate to a compensable new aggravation injury. Rather, as we discussed in Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, a compensable aggravation injury must be proven by evidence of "some enhancement, acceleration, or worsening of the underlying condition. . . ." It is the responsibility of the hearing officer to determine if a condition represents the continuation of the effects of an older injury, or worsening of that injury.

We would observe that the decision herein should not affect the right to necessary and reasonable medical treatment and income benefits, if any, for the effects of the claimant's (injury date 1) injury.

We affirm the hearing officer's decision that the claimant did not have a new compensable injury which occurred from a _____, injury, and therefore did not have disability attributable to the asserted injury, and the order that benefits are not payable due to this.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge