APPEAL NO. 980255
FILED MARCH 17, 1998

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) on remand was held on January 2, 1998, in (City 1) Texas, with (hearing officer) presiding again as hearing officer. In Texas Workers' Compensation Appeal No. 972134, decided December 4, 1997, the Appeals Panel remanded the case for the hearing officer to make further determinations regarding whether any of Dr. C reports, notes and an MRI generated in February/March 1995 had been received by the appellant (carrier) and, if so, whether that documentation constituted written notice pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(3) (Rule 124.1(a)(3)) of a claimed extension of a compensable low back injury to include a herniated disc. The Appeals Panel directed that after making factual determinations regarding those matters the hearing officer should then make determinations on whether respondent (claimant) sustained a compensable injury. We commented that it does not appear further evidence would be required in order that neither party be given a "second bite of the apple." The hearing officer did precisely as directed and determined that an MRI of February 1995, showing a 2 mm disc herniation at L5-S1 (where a prior 1993 MRI showed no herniation), was received by carrier on March 9, 1995, that the MRI was sufficient to give notice to the carrier of an exacerbation of the compensable injury and that carrier had not timely contested compensability of the extension of the compensable injury. The hearing officer concluded that because carrier "did not dispute the subsequent 2 mm disc herniation within 60 days, Claimant's current condition is a result of the compensable injury . . . ." The hearing officer in other determinations reversed her prior conclusion that claimant's "subsequent injuries are the sole cause of the claimant's current condition" and determined, on remand that subsequent injuries were not the sole cause of claimant's current condition (a herniated L5-S1 disc).

Carrier appealed the decision on remand, arguing that the hearing officer had "failed to specifically and distinctly support her sudden change in position" given that no new evidence was admitted. Carrier contends that subsequent injuries sustained by the claimant were the sole cause of claimant's current condition, that the current herniated disc was not sustained in the compensable _____, injury and that carrier did not waive the right to contest compensability, "that is, the relatedness of current medical treatment and/or herniation at L5-S1." Carrier argues it "was incapable to disputing the Claimant's 5-6 mm disc herniation or the fact that it resulted as an aggravation of a subsequent intervening injury until late December 1996 . . . ." Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging affirmance.

DECISION

Affirmed.

As noted in Appeal No. 972134, *supra*, the facts are complex and convoluted. In that those facts were set out in Appeal No. 972134, the hearing officer's original decision and the decision on remand they will not be repeated here except to establish the time line and basis for this decision. It was stipulated that claimant sustained a compensable low back lifting injury on _____. An MRI of February 25, 1993, showed disc degeneration but no herniation. In May 1993, after conservative treatment, claimant was assessed as being at maximum medical improvement with a zero percent impairment rating.

Claimant testified that in early February 1995 claimant experienced back pain in a non-work-related incident and returned to see Dr. C, the treating doctor, for his compensable injury. Dr. C ordered a second MRI, which was performed on February 16, 1995, which noted a posterior disc bulge and an impression of:

> Disc desiccation with moderate loss of discal height at L5-S1 and mild posterior spondylosis with chronic small 2 mm broad based posterocentral disc protrusion causing no significant mass effect.

Dr. C in a progress note dated February 21, 1995, commented that claimant "has been diagnosed as having disrupted disc disorder and disc herniation at L5-S1 with a recent flare-up. The patient underwent an MRI scan." The MRI scan demonstrated a "central disc herniation L5-S1 2MM . . . ." In a March 21, 1995, progress note Dr. C refers to a follow-up of "disk herniation and annular tear at L5-S1." Dr. C goes on to state that for the last "7-10 days claimant has had no back or leg pains. . . ." As we noted in Appeal No. 972134, *supra*, the hearing officer, at the original CCH, during closing argument, asked carrier point blank whether it had notice of the MRI and Dr. C's report and progress notes and the carrier's attorney's response "was equivocal that there was no evidence carrier had received the reports at that time . . . ." Argument at the hearing on remand developed that carrier's copy of the February 17, 1995, MRI report and findings which have claimant's name and an account number were stamped "Records PIF #29 Mar 09 1995." It was further developed that carrier's note of PIF meant "put in file." As we noted in Appeal No. 972134:

> (The hearing officer makes no determinations what carrier did or did not receive and whether the MRI with or without Dr. C 's report and notes would have given carrier written notice in accordance with Tex. W.C. Comm'n. 28 TEX. ADMIN. CODE § 124.1(a)(3)) of a claimed herniated disc at L5-S1.)

It was that omission that led to our remand in Appeal No. 972134.

Subsequent to the events of February/March 1995, it is undisputed that claimant was in a motor vehicle accident (MVA) on May 30, 1995, was in another MVA on June 28, 1996, and sustained an injury playing soccer in August 1996. Claimant again returned to Dr. C in December 1996 and had yet a third MRI in January 1997, which showed a 5-6 mm disc herniation. Dr. C's reports of January and February 1997 establish some evidence of causation by the compensable _____, injury.

The hearing officer in the initial decision determined that the subsequent MVAs and soccer injury were the sole cause of claimant's current condition, the 5-6 mm disc herniation, without addressing whether the February 1995 MRI and Dr. C's reports of February /March 1995 had been received by carrier and if so whether that amounted to written notice under Rule 124.1(a)(3). We reversed and remanded, noting that the hearing officer was not limited in her findings, but was required to make a determination on that issue. The hearing officer, on remand, determined that the February 1995 MRI showed a 2 mm disc herniation at L5-S1 which had not been present on the 1993 MRI, that carrier received notice of the MRI results showing a disc herniation on March 9, 1995, and that the MRI "was sufficient to give notice to the carrier on March 9, 1995, of the exacerbation of the compensable injury to a 2 mm disc herniation." The hearing officer also determined that carrier had not timely disputed that assertion within 60 days of March 9, 1995. The hearing officer consequently went on to find that the subsequent MVA and soccer injury were then <u>not</u> the sole cause of claimant's present 5-6 mm disc herniation.

Carrier contends that it did not receive notice of the 5-6 mm disc herniation "until late December 1996, when it first received notice." Carrier, by its own exhibit demonstrated that the February MRI report was placed in claimant's file on March 9, 1995. The hearing officer's determinations on this point are sufficiently supported by the evidence and are affirmed.

Carrier goes on to argue that even if the hearing officer had sufficient evidence to determine that carrier had not timely contested the 2 mm disc herniation as part of the original compensable injury "it cannot be said that the Claimant [sic means carrier] also waived its right to contest an exacerbation or aggravation sustained by the claimant as a result of subsequent intervening injuries." That may or may not be so; however, the hearing officer determined, and is supported by the evidence, that claimant's compensable injury extended to and included a herniated disc at L5-S1. The fact that subsequent MVAs and a soccer injury may have further aggravated the 2 mm disc herniation into a 5-6 mm disc herniation does not, under these circumstances, relieve carrier of liability for spinal surgery for a herniated disc at L5-S1. The hearing officer quite cogently explained:

> However, as the original compensable injury was to the lumbar area, and the MRI of February, 1995 showed evidence of a 2mm disc herniation - which was not disputed by the Carrier at that time - The Carrier waived the right to dispute the compensable injury included a disc herniation. The treating doctor linked the subsequent enlargement of the herniation to the compensable injury. Because the Carrier waived the right to dispute the Claimant's disc herniations, the Claimant established that his current condition is a result of the compensable injury. The Carrier did not establish that the sole cause of the current complaints were from subsequent injuries.

Whether the 5-6 mm herniated disc is a "different condition" than a 2 mm herniated disc at the same level is a factual determination for the hearing officer to resolve. Obviously the hearing officer thought not and that determination is sufficiently supported by the evidence.

Carrier also contended that the hearing officer abused her discretion in failing to allow carier to present additional evidence. Carrier argues that the Appeals Panel said "that although it did not appear additional evidence would be required . . . additional evidence could be considered. " That interpretation is incorrect. We said that it does not appear additional evidence would be required but that the hearing officer could "allow further written and/or oral argument . . . ." Argument is not evidence. The hearing officer did exactly as we directed and her decision not to allow additional evidence, as opposed to argument, was not an abuse of discretion. In determining whether there was an abuse of discretion we look to see if the hearing officer acted without reference to any guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

As directed in Appeal No. 972134, *supra*, the hearing officer considered the February 1995 MRI, found that it gave carrier written notice pursuant to Rule 124.1(a)(3) and that the carrier had not timely contested compensability of a herniated disc. As noted in Appeal No. 972134, after making determinations on that issue, the hearing officer should, and did, make determinations on the other issues before her. That another fact finder could have reached another conclusion on the same facts does not mandate a reversal. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Texas Workers' Compensation Appeal No. 950456, decided May 9, 1995. We do not so find and accordingly the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge