APPEAL NO. 990024

Following a contested case hearing (CCH) held on December 15, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by concluding that the appellant (claimant) did not sustain a compensable injury on Injury 3, or at any relevant time and that claimant has not had disability resulting from an injury sustained on Injury 3, or at any relevant time. Claimant appeals these conclusions as well as findings that he did not sustain a new injury to his back and legs on Injury 3, or at any relevant time, and that he has not been unable to obtain and retain employment at his preinjury wage due to an injury occurring on Injury 3, or at any relevant time. Claimant contends that the hearing officer erred in rejecting the opinion of Dr. R, claimant's treating doctor, that claimant did sustain a new injury. The respondent (self-insured) asserts in reply that the evidence is sufficient to support the challenged findings since at least two doctors opined that claimant did not sustain a new injury but rather that his condition is a continuation of his prior injury.

DECISION

Affirmed.

Claimant testified that he has worked for the self-insured as a general machinist since 1965; that he filed claims for lumbar spine injuries in injury 1 and injury 2; that the injury 2 injury was determined in a CCH to be a new injury and that Dr. R had supported his position that he had a new aggravation injury; that following the injury 2 injury, he underwent fusion surgery by Dr. R; and that he returned to work in December 1997 with a lifting restriction which was not exceeded by his job. He said that on Injury 3, he reinjured his back while "tapping" threads into a one-inch hole in a piece of steel. He explained that the tapping process involved inserting a steel rod with threads on it and a handle into the hole and bending over and twisting the approximately three-foot long handle to cut the threads in the hole, backing the tap out to clear the debris, then twisting down again, over and over. He said that about six hours into his eight-hour shift, his back hurt so bad he had to stop the tapping and that he reported the pain to his supervisor and finished the shift.

Claimant further stated that he continued to work until Dr. R took him off work on April 21, 1998. He maintained that his pain and leg numbness symptoms increased after the Injury 3, incident and that he thereafter had problems controlling his legs and with his legs giving way, that he had to have his wife do the driving because he had problems braking the car, and that he had to use a cane to avoid falling. A November 12, 1998, record of Dr. R states that claimant is under his care for lumbar pseudoarthrosis, that claimant was given a prescription for a cane to aid in walking, and that his injury date is Injury 1.

According to Dr. R's records, on June 10, 1997, claimant's diagnosis was prior fusion with pseudoarthrosis at L3-4 and on that date he underwent a "complex re-do" decompressive laminectomy, discectomy, and fusion at that level. Dr. R's November 13,

1997, report states that claimant reported developing increasing pain in the lower back, that claimant gets increased pain after bending over a few minutes, that he can only stand and walk on concrete for about an hour before his low back begins hurting, and that claimant's pain seems to be approaching his pre-op level. On January 22, 1998, Dr. R reported that claimant said he cannot tell much difference after having three weeks of therapy, and that he has pain with prolonged standing or bending over but is having no leg symptoms. Claimant reported on March 26, 1998, that he still has pain, particularly on becoming erect after bending and after standing 15 minutes or more, and that he has no leg pain but does have some numbness and tingling in his anterior thighs.

In a March 30, 1998, report, Dr. R stated that claimant came in "just to discuss and ask a question"; that he said while at work on Injury 3, he as pulling on a tapping machine and felt some pain in his lower back and his question was "whether the injury on the injury 3 pulled the fusion apart and caused a new injury." Dr. R then stated the following: "It is my opinion that the fusion was never solid since we fused in two areas; one is the fusion cage and the other is in the lateral gutter, and apparently neither one of them did take. Therefore, it is my opinion that he simply aggravated the pre-existing condition and did not cause a new injury or cause the fusion to pull apart since it was never fused."

Dr. R reported on April 21, 1998, that claimant states that his current symptoms are worse than before the surgery, that his legs frequently feel numb and he often has a sticking pain in his low back with walking and has difficulty getting erect after bending, and that on Injury 3, he was bent over doing the tapping and developed low back pain which became progressively worse. Dr. R further stated as follows: "Prior to this, we could see no motion on the X-RAYS but afterwards we did see movement with bending films. Therefore, I feel that in all probability, this represents a new injury, as I can see a structural change." Dr. R further reported that he did not think claimant could continue working and that he was taking claimant off work for an undetermined period.

In evidence is a June 13, 1998, report to the self-insured from Dr. S, a specialist in diagnostic radiology, stating that he reviewed various films including a lateral film of December 18, 1997, flexion-extension films of March 26, 1998, and lateral films of May 19, 1998; that on the March 26, 1998, film there is a solid-appearing bilateral posterolateral L4-5 and L5-S1 fusion with no motion demonstrated; that motion is demonstrated at L3-4, the level of the cage fusion; and that there is no morphological change at L3-4 from December 18, 1997, to March 26, 1998. Dr. S concluded that by March 26, 1998, the interbody fusion at L3-4 is not solid and that he has no evidence that it was ever solid. Dr. S further stated that Dr. R's April 21, 1998, note stating that "[p]rior to this [3-16-98], we could see no motion on the X-RAYS" should imply that Dr. R "was making reference to a flexion-extension lateral x-ray examination done after the cage interbody fusion operation and before 3-16-98, but I do not have any such examination or evidence that any such examination was ever performed."

Dr. R wrote on June 23, 1998, that his report of March 30, 1998, concerning an aggravation of claimant's preexisting injury regrettably created some confusion; that at

claimant's April 1998 visit he reviewed the December x-rays and saw no motion occurring then; that on the March 26, 1998, visit, the bending flexion x-rays did show movement at L3-4; that based on these two x-rays, he believes the fusion was solid in December; that the injury of Injury 3, the pulling that claimant did, apparently broke the fusion; and therefore it is his opinion that claimant has a new injury. Claimant indicated that he discussed with Dr. R the possibility of having a new injury. He was also asked about the whereabouts of the x-rays that led Dr. R to change his mind about his having a new injury. Claimant said that he has some x-rays, apparently at home, and that he took three x-rays from Dr. R's office to Dr. V office.

The December 7, 1998, report of Dr. V states that he examined claimant and his medical records; that Dr. R's November and December 1997 records reflect that claimant was having continued symptoms, and that to a reasonable medical probability, this appeared to be nothing more than a continuation of the same problem; and that in his opinion, the fusion at L3-4 after the spinal cages were implanted never completely consolidated. Dr. V further states that he reviewed the December 1997 films as well as films he took, that minimal motion was detected, that some of this is technique-oriented, that he cannot say that the spine is fused or was ever fused, and that he considers this to be a continuation of claimant's previous work injury for which he was treated with surgery in 1997.

Whether claimant sustained a new injury on Injury 3, or simply had a recurrence or continuation of symptoms from his previous injury was a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 93515, decided July 26, 1993. We have also held that an aggravation of a previous condition can be an injury in its own right. Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991. However, the new injury must produce more than a mere recurrence of symptoms inherent in the etiology of the preexisting condition that has not been completely resolved, and there must be some enhancement, acceleration, or worsening of the underlying condition from the second injury. Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994.

Claimant had the burden of proof on the issue by a preponderance of the evidence. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing body, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. 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). The hearing officer could credit the opinion of Dr. S that there was no evidence that the June 1997 fusion ever solidified and the opinion of Dr. V, who both examined claimant and the records, that claimant did not sustain a new injury as he claimed. The hearing officer could also consider the evidence in Dr. R's records of

claimant's continued symptoms following his June 1997 surgery and whether the underlying bending flexion x-ray evidence that Dr. R referred to on April 21, 1998, when he saw a structural change and changed his opinion of March 30, 1998, were ever provided to Dr. S and Dr. V.

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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Susan M. Kelley
Appeals Judge

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Thomas A. Knapp
Appeals Judge