

APPEAL NO. 990129

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 29, 1998, a contested case hearing was held. With regard to the issues before him, the hearing officer determined that the appellant (claimant) had not sustained a new compensable injury on Injury 2, that claimant did not have disability and that respondent (carrier) had timely contested compensability of the alleged injury.

Claimant appealed, contending that she had sustained an injury driving a forklift, which had aggravated a prior injury 1 back injury, that she was assigned "modified work" after her injury 3 injury and that she has had disability from November 4, 1997, and continuing. Claimant also contends that carrier "never disputed [her] claim" and did not file with the Texas Workers' Compensation Commission (Commission). Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Carrier responds, urging affirmance.

DECISION

Affirmed.

The injury at issue allegedly occurred on Injury 2. It is undisputed that claimant sustained a compensable low back injury in Injury 1, while working for the same employer. Claimant testified that she returned to work in April 1997 at "her regular job duties" but with a lifting restriction as established by Dr. M, her then treating doctor, in a report dated April 16, 1997. It is undisputed that claimant continued to receive regular chiropractic manipulations "2 - 3 x wk for pain control" during the period of April through October 1997 from Dr. M. Claimant was evaluated by Dr. D, an IME doctor, who in a report dated August 25, 1997, appeared to refer to a date of injury of August 12, 1997. Dr. D referred to Dr. M's "continuing adjustments three times a week," noted that claimant had "a left bulge with no impingement of the L5 roots" and further noted that an MRI of the lumbar spine "revealed bulging degenerative disc at L4-5" with no impingement of the thecal sac. The hearing officer, in his Statement of the Evidence, commented about this report, stating:

Whether the above report related to an injury of August 12, 1997, as shown by the doctor's report, or some other occurrence, it is clear that the Claimant was experiencing chronic and severe lower back symptoms two months before the incident made the basis of this claim.

Claimant testified that on Injury 2, she was driving a forklift unloading pipe, and in backing up, hit a pothole which threw her sideways and jarred her. Claimant said that she reported the incident, that apparently either ice or heat or both were applied at the nurse's station and that after resting about 45 minutes claimant continued working her shift. It is not exactly clear who claimant next saw for the _____ incident but claimant was released back to light duty on November 4, 1997. Dr. M, in a report dated November 18, 1997,

recited the forklift driving incident and noted that claimant "is having left leg symptoms." When claimant was specifically asked by the hearing officer to point to medical evidence which would support a new injury on Injury 2, claimant cited Dr. M's November 18, 1997, report which says "[claimant] continues to have low back and right leg pain, and also left leg pain with the new injury." Claimant attempts to distinguish the injury 1 low back injury by saying that injury affected her right leg and the October 1997 injury affected the left leg or both legs. Claimant's diagnosis and treatment remained essentially unchanged from before Injury 2. Claimant testified and is supported by the medical records, that she continued to receive chiropractic adjustments two or three times a week.

Claimant changed treating doctors to Dr. H, D.C., in February 1998. In a report dated August 26, 1998, Dr. H referred to an injury to claimant's "low back at work originally on injury 1 and her most recent injury from 10-28-97." In another report dated December 2, 1998, Dr. H referred to the October 1997 forklift incident and wrote:

It would appear that as the result of the later incident in October there has not been a great amount of change as far as her x-ray or MRI however there has been a significant change in her symptomatology [sic] she is no longer able to get any appreciable relief with chiropractic care even though it does at least allow her to sometimes sleep as she now has constant low back and leg pain.

Claimant continued working modified duty from November 4, 1997, through August 6, 1998, apparently at the same wage rate but fewer hours. The parties dispute whether claimant's reduced hours were due to claimant's injury or to the declining job requirements. The hearing officer found the "evidence is insufficient to establish that the reduced hours were the result of a compensable injury."

The parties agree that carrier received written notice of claimant's Injury 2, claimed injury on November 6, 1997. Carrier contends that it timely filed a Payment of Compensation or Notice of Refused or Disputed Claim Interim (TWCC-21) dated November 10, 1997, disputing the _____ injury on November 12, 1997. In evidence is a TWCC-21 with a very faint date file stamp of the Commission's Tyler field office with a date of November 12, 1997. The hearing officer notes that the date file stamp "is almost illegible." Claimant represents that the Commission's records and claim file do not have that document or record of its receipt. Carrier responds that it is not unheard of for the Commission to lose or misplace a document. The hearing officer found that carrier had timely disputed contested compensability by the TWCC-21 with the faint date time stamp as filed on November 12, 1997.

At the heart of this case is whether claimant sustained a new injury on Injury 2, or whether the symptoms were a continuation of the injury 1 injury. Whether an injury is a new injury or only the continuation of the injury 1 injury. Whether an injury is a new injury or a continuation of a prior injury is a factual determination for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94541, decided June 10, 1994;

Texas Workers' Compensation Commission Appeal No. 952142, decided February 1, 1996. An employee has the burden of proving by a preponderance of the evidence that she sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. In this case, the hearing officer found that claimant's testimony "coupled with the medical evidence is not persuasive and does not support the occurrence of a new injury on Injury 2." The hearing officer found that the work-related forklift incident "did not cause damage or harm to the physical structure of the Claimant's body." The hearing officer could consider that claimant was continuing to receive chiropractic treatment until just before the Injury 2, forklift incident, that claimant's diagnosis and treatment plan did not change and that there was no change in claimant's condition. The hearing officer's findings are supported by the evidence.

On the issue of disability, in that we are affirming the hearing officer's determination that claimant did not have a compensable injury, claimant cannot by definition in Section 401.011(16), have disability. The hearing officer also found that carrier had timely filed its TWCC-21 disputing compensability on November 12, 1997. That finding is supported by the evidence, namely the TWCC-21 in evidence, bearing the faint date time receipt stamp.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge