APPEAL NO. 990190

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 6, 1999. All parties were present at that hearing. Although written as two decisions under two different docket numbers, the issues were integrally related to each other, with both carriers necessary parties to the determinations on these issues.

Involved in the case was whether the respondent, who is the claimant, sustained a new injury on (date of injury no. 2), while working for (employer), who was insured on that date by the appellant, (Carrier 2), or whether her earlier injury of (date of injury no. 1), sustained when the employer was insured by respondent Insurance (Carrier 1), included her cervical disc syndrome. It was the claimant's position (along with Carrier 1) that she sustained a new neck injury on (date of injury no. 2), for which Carrier 2 was liable. Also involved in the case was whether the claimant had disability due to her neck injury, and whether she timely informed her employer of that injury, or had good cause for any failure to do so.

The hearing officer did not write a single decision, but wrote a separate decision under each docket number for each carrier and for each issue. There is no explanation in either decision for this. However, it appears that both carriers and the claimant were served with copies of both decisions issued in the case.

The hearing officer found that Carrier 1 was liable for the continuing effects of the shoulder injury sustained on (date of injury no. 1), but that the cervical injury was not part of that injury. The hearing officer further found that claimant sustained a new compensable injury on (date of injury no. 2); that she timely informed her employer of that injury; and that she had disability as a result, for which Carrier 1 was ordered to pay temporary income benefits.

Carrier 2 has filed an appeal. It argues that the hearing officer erred by determining that there was an injury on (date of injury no. 2), for which it is liable. Carrier 2 argues that there were a number of inconsistencies in the record which undermine the claimant's credibility. Carrier 2 also argues that claimant never informed her employer of a new injury, but only a "re-injury" to her shoulder. Carrier 2 disputes that an injury to the neck has been proven. Because claimant did not sustain a compensable injury, Carrier 2 argues, she could not have disability. There is no response from Carrier 1, who did not appeal the decision issued to it. Claimant responds that the appellant is essentially arguing conflicts of evidence that were the hearing officer's responsibility to reconcile, and that these determinations should not be overturned by the Appeals Panel.

DECISION

Affirmed.

Initially, we observe that Section 410.168(a) provides that after a CCH, the hearing officer shall issue a written decision. The only provision for a separate decision is set forth in Section 410.168(b), and then that decision must involve attorney's fees. Section 410.168(d) states that the Texas Workers' Compensation Commission's Division of Hearings shall send a copy of the decision to each party. Where there are two decisions issued from one CCH in which the liability of the carriers for a subsequent claimed injury is the heart of the issues, we are concerned that findings made in one "unappealed" decision could become *res judicata* against a properly appealed decision naming the second carrier, were the isolation between the docket numbers maintained. In this case, both decisions were mailed to all necessary parties and thus all parties had the opportunity to respond. We will regard both decisions in this case as "the" decision which has been appealed by Carrier 2 in this case, to the extent that findings in either decision bear on its liability for the injury. We affirm this two-part decision in its entirety.

The claimant was employed for 16 years by the employer at a job she characterized as heavy work. She said that she was a "materials floater," whose duty it was to carry supplies and materials between departments as needed. This entailed lifting and carrying heavy objects and boxes. On (date of injury no. 1), claimant fell as she was hauling an 80-pound bale of rubber. She first struck her right shoulder on a pole, and then fell to the ground. Claimant said she fractured her shoulder and was off work for 14 months. She was treated by Dr. H, with such treatment continuing after she returned to work in June 1997. Claimant had some numbness in her fingers, and was tested by an EMG. She continued to work, and did not have restrictions.

The claimant said that near the end of her day on (date of injury no. 2), as she was carrying a box of rags, her neck began to hurt. Much testimony was developed over whether the claimant did, or did not, state that she thought she "re-injured" herself. The claimant agreed that she initially thought she had reinjured her shoulder area. In any case, she said she went to her foreman, Mr. M, and obtained a pass to allow her to go to the dispensary, contending to him that her neck hurt and she required treatment. Claimant said when she went to Dr. H subsequently, she discovered she had a new injury. She was released, she said, to light-duty work but none was available at her employer. She said she was paid at union wages, which was $17.10 per hour.

Claimant had been involved in a motor vehicle accident on October 30, 1998, but said that this did not cause physical harm to her, only some damage to her car. Carrier 2 also questioned her at some length as to any injuries she sustained prior to (date of injury no. 1), and there were a few such injuries.

Dr. H wrote in October 1998 (two letters) that claimant had two separate injuries. Her (date of injury no. 1) injury was a fractured right humerus. Her second injury was a "mild cervical disc syndrome," occurring on (date of injury no. 2). He said that her first injury had healed excellently, with some residual stiffness. He stated his belief that the claimant could do light or medium level work. Dr. H's records reflect that claimant was receiving treatment for her shoulder and numbness in early 1998 up to the time she was

injured. It appears that Dr. H kept recommending an EMG, but it appears that the first EMG conducted occurred on August 3, 1998.

Claimant was certified at maximum medical improvement effective February 10, 1997, with a seven percent impairment rating (IR). The IR was based on her shoulder, primarily for range of motion deficiencies. The 1998 EMG was reported as abnormal, with moderate to severe right carpal tunnel syndrome, and mild cubital tunnel and ulnar nerve entrapment involving the right elbow. Dr. H wrote on August 11, 1998, that her EMG results were not consistent with a history of neck and shoulder pain. He said that the EMG did not report radicular nerve damage emanating from the neck. A week later, Dr. H wrote that he felt claimant was not motivated to go to work, and that her physical examination was close to normal.

It is axiomatic in case law having to do with aggravation that the employer accepts the employee as he is when he enters employment. Gill v. Transamerica Insurance Company, 417 S.W.2d 720, 723 (Tex. Civ. App.-Dallas 1967, no writ). An incident may indeed cause injury where there is preexisting infirmity where no injury might result in a sound employee, and a predisposing bodily infirmity will not preclude compensation. Sowell v. Travelers Insurance Company, 374 S.W.2d 412 (Tex. 1963). However, the compensable injury includes these enhanced effects and, unless a first condition is one for which compensation is payable under the 1989 Act, a subsequent carrier's liability is not reduced by reason of the prior condition. St. Paul Fire & Marine Insurance Company v. Murphree, 357 S.W.2d 744 (Tex. 1962). If the prior condition is compensable, the appropriate reduction for a prior compensable injury must be allowed through contribution determined in accordance with Section 408.084. We also note that a claimant must show that his injury is a cause of his inability to work, and the carrier then bears the burden of proving that a nonwork-related injury or preexisting condition is in fact the sole cause of the inability to work. *See* National Farmers Union Property & Casualty Co. v. Degollado, 844 S.W.2d 892, 896 (Tex. App.-Austin 1992, writ denied.)

A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). The hearing officer may also choose to believe that a timely report of injury was made. Section 409.001(a)(1) and (b) requires that the injured employee give notice of an accidental injury to a person in a supervisory or management capacity within 30 days. The notice given, while it need not be fully detailed, should at a minimum apprise the employer of the fact that an injury occurred and the general area of the body affected. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied). As the response points out, the hearing officer is the sole judge of the relevance, 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). While there are other inferences that could be drawn, the decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's

determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). That is not the case here, and we affirm the decision and order. In doing so, we note that the sole basis upon which Carrier 2 appealed the disability finding was that there was no compensable injury. Because we affirm the hearing officer's determination that a compensable injury occurred on (date of injury no. 2), and that it was timely reported, we also affirm the disability determination.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge