APPEAL NO. 990191

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 5, 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 his earlier injury of (date of injury no. 1), sustained when the employer was insured by respondent, (Carrier 1), was a producing cause of his condition after (date of injury no. 2). It was the claimant's position that he sustained a new injury on (date of injury no. 2), for which Carrier 2 was liable.

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 in the decision involving Carrier 1 that the claimant's first injury was not a producing cause of his condition after (date of injury no. 2), and that there had been an intervening injury on that date. However, Carrier 1 was liable for a certain period of disability prior to that date. This decision necessarily makes some fact findings regarding the nature and severity of the second injury. In the second hearing decision, the hearing officer found that there was a new injury by way of aggravation. Carrier 2 was ordered to pay income and medical benefits beginning (date of injury no. 2).

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, and that the great weight of the evidence showed that claimant merely had a continuation of his first injury for which Carrier 1 remains liable. Carrier 2 recites evidence in favor of the decision, although it states that it is undisputed that claimant fell on (date of injury no. 2). Carrier 2 argues that the employer kept information regarding existence of coverage for the (date of injury no. 1) injury from claimant so that he continued to work and his condition deteriorated. Carrier 2 argues that claimant's claim of a new injury was in retaliation for unrealistic work expectations imposed by the employer. The claimant and Carrier 1 respond that the decision should be affirmed. Carrier 2 did not appeal the disability determination (except as it would be related to the finding on occurrence of an injury).

DECISION

Affirmed as a unified decision.

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 (Commission) Division of Hearings shall send a copy of the decision to each party. We find no provision in the statute or rules for the issuance of separate decisions on each issue or under each docket number which arise from a single contested case proceeding where there are two carriers litigating their respective liabilities for an injury or injuries. The potential detriment to the rights of all parties is considerable. 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. An injured worker could find him or herself without any benefits should one "decision" be reversed while another holding no injury or continuation was allowed to stand.

In this case, both decisions were mailed to all necessary parties and Carrier 1 and claimant have responded. We will not therefore remand for issuance of a single decision document, but will regard both decisions in this case as "the" decision which has been appealed by Carrier 2 in this case and thereby "cure" the error occasioned by separation of the decision into two documents involving each carrier. We affirm this two-part decision.

The claimant was employed by the employer at a job he characterized as heavy work. He assisted in removal and installation of industrial cooking appliances from area schools and businesses. For purposes of this CCH and the defenses raised by Carrier 2, claimant injured his right knee (tibia) and had surgery in 1994 and he again injured his knee and back on (date of injury no. 1), while employed by the employer. (He had an earlier injury also in 1994.) The claimant said he was going to pain management therapy at the (medical branch) at (city) after (date of injury no. 1). The claimant said he missed about a month's worth of time due to medical treatment for his knee between (date of injury no. 1) and his new injury on (date of injury no. 2), but that he was not paid and was never informed by the employer that they had workers' compensation coverage. The claimant said as far as he knew, the employer paid his medical bills.

On (date of injury no. 2), the claimant was helping to load a pizza oven into the back of a low bed truck when his knee gave away. His foot was caught between two of the wheels. As he fell, he twisted his knee and back. It was not disputed that the claimant, in fact, fell on that date. Claimant said he went to the emergency room of (S Hospital) the next day; records in evidence show he went there _____ and (date of injury no. 1) and was only briefly taken off work before being released with no restrictions. He worked the next few days. However, he was taken off work on March 9, 1998, by a doctor at a county health program clinic. Claimant's treating doctor was subsequently Dr. S, his regular doctor, who referred him to Dr. G. Claimant said Dr. G told him he would eventually need a total knee replacement. This is reiterated in Dr. G's May 7, 1998, letter.

Claimant was formally requested on February 26th to begin bringing written doctor's excuses for his absences or tardiness, and he quit on March 2, 1998. Claimant said he applied for, and drew, unemployment compensation for the maximum number of months

allowed. He said he informed the Texas Workforce Commission (TWC) that he had a work-related injury but would try to find work. Paperwork from TWC indicates that they were informed he had a work-related injury but determined to pay him because he was not actually drawing income benefits and was able to work.

A CT scan of the right knee done on April 8, 1998, showed that claimant had chronic complex comminuted fractures in the right tibial area. There was evidence of necrosis involving some of the fragments. An old healed fracture around the tibial head was noted. An August 7, 1998, MRI showed that claimant had mild to moderate stenosis involving all lumbar levels and a herniation at L3-4 producing encroachment on the neural foramen. Claimant was treated for pain at (medical branch) in January 1998. Dr. G wrote in an August 13, 1998, letter that he believed that claimant's (date of injury no. 2), fall led to a new injury. He said that he could no longer do heavy work but was willing to try working at a lighter level. Claimant said he applied for a number of jobs like this but was not offered any positions.

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.)

We would note that Carrier 1's concerns about the extent to which the employer's business practices contributed to the claim of injury may be addressed through its obligation to provide accident prevention services under Section 411.061 *et seq*. That an employer's practices contributed in some fashion to an injury does not itself determine whether an injury occurred in the course and scope of employment and is just another fact for the hearing officer to weigh. She evidently determined from her review of the evidence and claimant's testimony that an aggravation injury on (date of injury no. 2) was credible, and that it was such that it overcame the earlier injuries as causes of the resulting disability.

We cannot agree that this determination, and the counterpart determination that claimant had disability after his (date of injury no. 2), is so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust. Her determination that the second injury overcame the first injury, *vis-a-vis* benefits, is also sufficiently supported by the evidence here. We accordingly affirm the decision and order issued under both docket numbers.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge