APPEAL NO. 990457

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 26, 1999. With respect to (Docket No. 1), the issue was whether the compensable injury of (date of injury for Docket No. 1), is a producing cause of the respondent's (claimant) need for spinal surgery to remove hardware from his lumbar spine. The hearing officer determined that the 1991 compensable injury is a producing cause of the claimant's need for surgery to remove hardware from his lumbar spine. The issues presented in (Docket No. 2) were whether the compensable injury of (date of injury for Docket No. 2), is a producing cause of the claimant's current lumbar symptomology which necessitates spinal surgery to remove surgical hardware from his lumbar spine, whether the respondent ('94 carrier) waived its right to contest compensability of the claimed injury by not doing so within 60 days of the date it received written notice of the injury, and whether the claimant had disability as a result of his (date of injury for Docket No. 2), compensable injury, and if so, for what periods. With respect to those issues, the hearing officer determined that the compensable injury of (date of injury for Docket No. 2), is not a producing cause of the claimant's current symptomology which necessitates spinal surgery to remove hardware from the claimant's lumbar spine; that the '94 carrier waived its right to contest compensability of the (date of injury for Docket No. 2), injury but that in doing so it did not waive its right to dispute liability for the hardware removal or for the claimed disability period; and that the claimant did not have disability from May 5, 1998, through the date of the hearing as a result of his (date of injury for Docket No. 2), compensable injury. In its appeal, the appellant ('92 carrier) asserts error in the hearing officer's determinations that the 1994 injury is not a producing cause of the claimant's current condition, which required removal of the hardware from his lumbar spine, and that the '94 carrier did not waive its right to dispute liability for the hardware removal and the claimed disability period by failing to timely contest compensability of the (date of injury for Docket No. 2), injury. The '92 carrier also asserts error in the admission of one of the '94 carrier's exhibits. In its response, '94 carrier urges affirmance. The claimant did not respond to '92 carrier's appeal. In addition, the claimant did not appeal the hearing officer's determination that he did not have disability from May 5, 1998, through the date of the hearing as a result of his (date of injury for Docket No. 2), compensable injury.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable low back injury on (date of injury for Docket No. 1), and that he sustained a second compensable injury to his low back on (date of injury for Docket No. 2). On June 2, 1992, the claimant underwent spinal surgery to treat the 1991 injury. Specifically, he had a discectomy, laminectomy and fusion at L4-5 and L5-S1, with the placement of Knodt rods. The claimant testified that he was certified at maximum medical improvement (MMI) for the 1991 injury on May 18, 1993, and was assigned an impairment rating of 11%. He testified that he began looking for work

after he was certified at MMI but that he was not able to secure employment until (date of injury for Docket No. 2). He stated that on that date he began working for a temporary company "shoveling clay" and that after an eight-hour day, his pain level increased from the usual five on a 10-point scale to a 10. He testified that he went to the emergency room that evening and that he did not return to work for the temporary company. He noted that he initially thought that his back problems were a continuation of his 1991 injury but that when the '92 carrier denied treatment, he filed a claim for a new injury. Apparently, the claimant received treatment for the 1994 injury until February 1995 and then he went until November 1997 without medical treatment. In a report of January 21, 1998, Dr. D noted that the claimant "went without medical care for almost three years" after his 1994 injury, noting that "[claimant] tells me that after his last visit in February of 1995 he was feeling fairly good and thus did not attend the four week recheck appointment with [Dr. E]." The claimant testified that he attempted to obtain medical treatment after February 1995 but that the '94 carrier would not pay for it, so he was limited to seeking medical care at the emergency room. He testified that he attempted to obtain records of his emergency room visits but he was unable to do so. The claimant also acknowledged that in late 1994 or early 1995 he began working for his brother-in-law operating a dump truck, a bulldozer and a backhoe. He stated that the job was primarily a supervisory position and that he was permitted to take breaks as necessary when he operated the machinery. He stated that he worked an average of three to four hours per day. He testified that he continued to work until May 5, 1998, and then he had to stop working because his back pain from operating the machinery had become unbearable.

In November 1997, the claimant began treating with Dr. B because of his increased back pain. Dr. B gave him a series of epidural steroid injections and then he ordered a hardware block. Dr. D submitted a request to remove the hardware from the claimant's lumbar spine in October 1998. On December 10, 1998, Dr. D performed that surgery.

Several opinions were offered concerning the question of whether the 1991 injury or the 1994 injury was a producing cause of the claimant's condition and the removal of the hardware. In a November 10, 1997, report, Dr. B stated, "I do believe [claimant's] current complaints are directly related to his 1991 injury and subsequent surgery." Dr. B repeated that opinion in a January 12, 1998, report. However, in his July 28, 1998, report, Dr. B states:

> I would relate [claimant's] current complaints to his reinjury on (date of injury for Docket No. 2). The diagnostics, hardware block and procedures that have been performed and requested appear to be in relation to this new injury or exacerbation which promoted [claimant] to coming to our office to be seen on 05-23-94.
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> The above is somewhat complicated by the fact that [claimant] noted on 05-23-94 that he had had no real relief from his back pain as a result of his surgery in June of 1993 [sic]. If the date of injury of (date of injury for Docket

> No. 1) were not already considered to be a new date of injury, I would relate all his present symptoms to his original injury in 1991.

In a report of August 31, 1998, Dr. T, who performed the hardware block, stated that "[i]t does appear that the hardware is a substantial contributor to his ongoing back pain." Dr. M, who conducted a peer review on behalf of the '92 carrier, stated that there was a "quiescent period for approximately one year with renewed symptoms occurring in May, 1994. This would indicate that the treatments since 05/23/94 have been directed to a new injury and not the injury of (date of injury for Docket No. 2)." Dr. M opined that "the current symptoms and treatment would be related to the (date of injury for Docket No. 1) injury and not the (date of injury for Docket No. 2) injury." Dr. W, '94 carrier's required medical examination doctor, stated:

> It is hard to state whether the claimant's current medical problems are related to the . . . 1994, accident or the 1991 accident. If a lot of the pain problems are due to "painful hardware," then this relates it to the 1991 accident, as this surgery and the implants were placed for that accident. One could argue, however, that the implants only became painful after the injury of 1994, and were painful because of that accident.
>
> I know of no good way to settle this objectively, and would favor relating the hardware to the more recent "accident," as he did have a significant period of time following the surgery during which time no symptoms related to the hardware probably existed. I would think that if the hardware were to become painful after the surgery, that it would have done so prior to 1994.

As noted above, the hearing officer determined that the 1994 compensable injury was not a producing cause of the claimant's condition, which necessitated surgery to remove the hardware from his lumbar spine. The claimant had the burden to prove that his 1994 compensable injury was a producing cause of that condition. It is apparent from a review of the hearing officer's decision that he simply was not persuaded that the claimant presented sufficient evidence to satisfy his burden of proof in this regard. The hearing officer emphasized that the claimant went from February 1995 to November 1997 without medical treatment and that the hardware problems were not referenced in the records until November 1997. In addition, the hearing officer apparently discounted the severity of the 1994 injury because the claimant was able to work from late 1994 or early 1995 until May 1998 following that injury. The hearing officer was free to consider those factors in resolving this issue. As noted above, the medical evidence on causation was in conflict and it was the hearing officer's responsibility as the sole judge of the weight and credibility of the evidence under Section 410.165(a) to resolve those conflicts and inconsistencies. He was acting within his province as the fact finder in giving more weight to the evidence indicating that the 1991 injury was a producing cause of the condition that necessitated the removal of the hardware, but that the 1994 injury, which the hearing officer determined was in the nature of a temporary exacerbation that did not adversely impact the claimant's

condition in relation to the hardware, was not a producing cause of that condition. That determination is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse it on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The '92 carrier also asserts error in the hearing officer's determination that by not contesting the compensability of the 1994 injury within 60 days, the '94 carrier has also waived its right to raise subsequent disputes related to the claim. We find no merit in this assertion. While the '94 carrier has waived its right to contest compensability of the 1994 back injury, it does not follow that it is not permitted to raise any subsequent disputes in this claim. Only compensability issues are subject to waiver under Section 409.021(c) and a waiver of the right to contest does not preclude a carrier from pursuing a dispute about its subsequent liability for medical treatment or for disability. We perceive no error in the hearing officer's decision.

Finally, the '92 carrier asserts error in the hearing officer's admission of one of the '94 carrier's exhibits, the recorded statement of the claimant. The '94 carrier did not timely exchange that document with the '92 carrier. The hearing officer found good cause for the failure to timely exchange that document because the '92 carrier did not attend the final benefit review conference (BRC) prior to the hearing. Thus, the '94 carrier argued that it was unaware that the '92 carrier was a party to the hearing and that, as such, it could not have known of its duty to exchange documents with the '94 carrier. The '92 carrier asserts that it had been present at a previous BRC and that accordingly, the '94 carrier should have anticipated that the '92 carrier would appear as a party at the hearing and exchanged its documents with the '92 carrier. We review evidentiary ruling under an abuse of discretion standard. Our review of the record does not reveal that the hearing officer abused his discretion in admitting the challenged exhibit where, as here, there was confusion as to the status of the '92 carrier after it did not attend the final BRC prior to the hearing. We note additionally, that the claimant's recorded statement was cumulative of his testimony at the hearing; thus, even if the statement had been erroneously admitted, the error was harmless. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge