

APPEAL NO. 990503

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 27, 1999, a contested case hearing (CCH) was held. The hearing officer recited some prior background that an interlocutory order, involving the same parties, had been issued where the two carriers were to split benefits equally until a determination could be made on the proper award of benefits. A CCH was held on March 24, 1998 (not the case at issue here), where the hearing officer, after a restated issue, determined that the claimant's disability started on October 27, 1997, and continued to the date of that hearing, March 24, 1998. The (Carrier 1), referred to as Carrier 1 in that proceeding and referred to as Carrier 1 or Carrier F in this proceeding, appealed the finding that claimant sustained a "new fracture" on (subsequent date of injury), and that restrictions not to use his right arm due to a "refracture" were given on October 27, 1997, subsequent to claimant's termination. That case was appealed and resulted in Texas Workers' Compensation Commission Appeal No. 981478, decided August 17, 1998, where the Appeals Panel affirmed the hearing officer's decision. In evidence is a petition to the District Court of (City 1) County where (Carrier 2), referred to as Carrier 2 in the prior proceedings and referred to as Carrier P or Carrier 2 in the present proceeding appealed the decision on Appeal No. 981478.

The issues in the present case are:

1. Did Claimant suffer a compensable injury in the course and scope of his employment on (subsequent date of injury)?
2. Has Claimant suffered disability as a result of the injury of (subsequent date of injury) and if so, for what periods?
3. Does Claimant continued [sic] to suffer the effects of the acknowledged injury of _____ after (subsequent date of injury) entitling him to benefits?

The hearing officer determined that claimant sustained a compensable injury on (subsequent date of injury); that claimant had disability beginning October 27, 1997 and continuing to the date of this CCH; that claimant's disability for 12 weeks starting October 27, 1997, were the result of the injury of (subsequent date of injury); that medical expenses from (subsequent date of injury), to January 1, 1998, were a result of the injury of (subsequent date of injury); and that claimant's original injury of _____, remains the producing cause of claimant's disability after the expiration of 12 weeks from October 27, 1997, and the continuing need for medical treatment after January 1, 1998.

Both carriers appealed the hearing officer's conclusion that claimant had sustained a compensable injury on (subsequent date of injury), and Carrier P appealed certain other

findings. Both carriers argue that the other carrier has a sole cause burden which it had not sustained and cite Appeals Panel decisions which they believe support their positions. Carrier 2 filed a response to Carrier 1's appeal. The file does not contain a response from claimant.

DECISION

Affirmed.

The background facts are relatively undisputed and are set out in some detail in Appeal No. 981478, *supra*. Briefly, claimant sustained fractures to his right arm in an oil rig accident on _____. Claimant said he broke his arm in seven places and the medical evidence supports that claimant sustained fractures of the right humerus, radius, ulna and wrist. Claimant underwent surgeries and eventually returned to work in a light-duty capacity on July 22, 1997, apparently for a different employer. Claimant's duties were to "scrub and answer the phone, file papers or various tasks like that." Claimant testified that on (subsequent date of injury), the crew was short-handed and that he was asked "to run the catline so we could go in the hole with the casing." Claimant said that the "strain of pulling on the rope, . . . the catline, caused it [the right arm] to refracture," that he felt a sudden "real sharp pain" which dropped him to his knees. Claimant's father was the driller and claimant was taken to the hospital.

Claimant's treating doctor was Dr. D. Progress notes of September 11, 1997, indicate complaints of pain in claimant's "lower arm" but x-rays do not show any problems. A September 23, 1997, progress note indicates claimant had a bone scan "because he had some complaints" and Dr. D was concerned about a stress fracture. The arm was x-rayed, which only showed "further consolidation of the wound and fractures." The hospital emergency room (ER) and radiology reports of (subsequent date of injury), indicate a history of "broke right arm five months ago and its been hurting." An ER note of (subsequent date of injury), indicated that "arm has been hurting for 3 days, worse today Since working [illegible]." X-rays of the humerus and right forearm show the plates and screws were intact and alignment good. A progress note from Dr. D shows that claimant saw him and noted that "no real changes in examination" and that x-rays showed continued good healing of the forearm and also the humerus. A progress note from Dr. D dated October 16th, states that claimant is in for "followup on his humerus fracture" and that it is continuing to heal. An October 27, 1997, progress note from Dr. D states claimant "is here for followup on his humerus " and that he "had a re-fracture of his humerus and he has got the ongoing treatment of the previous humerus fracture" There is also a note dated October 27th from Dr. D indicating restricted work with the restriction of no work using the right arm. Subsequently, in a December 12, 1997, note, Dr. D is presented with the question of "did this (subsequent date of injury) incident aggravate the prior injury for which he was in treatment at time or is this considered a new injury?" Dr. D opines "it is an aggravation of the old injury prior to the incident on January [sic] when [claimant] reached

MMI [maximum medical improvement] and I would have to say that this probably added at least twelve weeks of healing time to his overall rehabilitation."

Although not entirely clear, apparently, claimant returned to light duty after the (subsequent date of injury), incident until he was terminated sometime in October 1997 (Appeal No. 981478, *supra*, indicates October 8, 1997, when claimant was terminated for a positive drug screen). Dr. D was deposed in a deposition by written questions on May 27, 1998. In response to a question Dr. D replied that, while there were "no significant anatomical changes" between the September 23, 28, and October 8, 1997, x-rays, he added "... that on those x-rays we took in that interval, it looked like he had a new fracture line, which I felt was just a refracture or extension of a old one." Dr. D stated that claimant had recounted an incident on September 28 "using a piece of apparatus that he probably should not have been using." Dr. D. continued:

He used the piece of apparatus and then he began to have, you know, pain and discomfort in his arm, and that resulted in him going to the [ER] and then being seen in our office.

And that was when – what appeared to be a new fracture line was seen. And as I've state before, like I said, I feel like it's just an extension or a refracture of one of the previous fracture lines that he had in his arm from the – from the previous injury. Like I said, I do not feel like it's a new injury so much as an exacerbation of the old one.

The appealed findings were:

FINDINGS OF FACT

3. Claimant extended an existing fracture but no new treatment or revision of his plates was required as a result of the injury of (subsequent date of injury).
4. The extension of the fracture added twelve weeks to Claimant's healing time and period of disability.

CONCLUSIONS OF LAW

3. Claimant sustained a compensable injury on (subsequent date of injury).
4. Claimant's disability started October 27, 1997 and was continuing as of the date of the [CCH].
5. Claimant's disability for twelve weeks starting October 27, 1997 was a result of the injury on (subsequent date of injury).

6. Claimant's medical expenses from (subsequent date of injury) to January 1, 1998 were a result of the injury of (subsequent date of injury).
7. Claimant's injury of _____ remains the producing cause of Claimant's disability after the expiration of twelve weeks from October 27, 1997 and the continuing need for medical treatment to the arm after January 1, 1998.

Both carriers appealed Conclusions of Law Nos. 3, 4 and 7. On the issue of whether claimant sustained a compensable injury on (subsequent date of injury), while some of the ER notes and radiological studies are subject to different interpretations, as noted by the carriers, the hearing officer could believe that something occurred on (subsequent date of injury), which led to claimant's being in the ER and subsequently being seen by Dr. D. Dr. D does note a "refracture" of the humerus and "a new fracture line," restricts claimant to no work using the right arm and in another note (December 12, 1997) states that 12 weeks of healing time would be added to claimant's overall rehabilitation. Under these circumstances we are unwilling to say there was no evidence or insufficient evidence that claimant did not sustain a new compensable injury on (subsequent date of injury).

Carrier 1 (Carrier F) states it is undisputed that claimant "suffered a new injury on September 28" and that Dr. D said that the new incident would add at least 12 weeks healing time to claimant's overall rehabilitation. Carrier F then argues that "once a new injury has been established the carrier for that date of injury is responsible for any and all disability and/or medical treatment unless it was solely caused by some other condition or preexisting injury." We disagree. Both carriers cite Texas Workers' Compensation Commission Appeal No. 94280, decided April 22, 1994. In Appeal No. 94280, the Appeals Panel explained what we believe to be the applicable standard stating:

To prove that the present condition is a continuation of a compensable injury, and not a new injury, a claimant must prove that a compensable injury aggravates (or is a contributing factor to) the present condition. This is because an injury is compensable even though aggravated by an existing injury or condition, or by a subsequently occurring injury or condition. Guzman v. Maryland Casualty Co., 130 Tex. 62, 107 S.W.2d 356 (1937); Hardware Mutual casualty Co. v. Wesbrooks, 511 S.W.2d 406 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991; Texas Workers' Compensation Commission Appeal No. 91085A, decided January 3, 1992; Texas Workers' Compensation Commission Appeal No. 92018, decided March 5, 1992; Texas Workers' Compensation Commission Appeal No. 92692, decided February 12, 1993. On the other hand, to prove that a claimant's current condition is the result of a new (intervening) injury, and not

a continuation of a prior compensable injury, the burden is on the carrier to prove that an intervening injury is the sole cause (or the only contributing factor) to a claimant's current condition. This is because the legal standard to determine causality, when the carrier argues a subsequent injury is the cause of the claimant's current condition, is sole cause. See Texas Workers' Compensation Commission Appeal No. 93864, *supra*, and cases cited therein.

That proposition was cited and followed in Texas Workers' Compensation Commission Appeal No. 970229, decided March 24, 1997. Applying that standard to the present case, the hearing officer could, and apparently did, find that claimant's present condition and disability was caused partly by the compensable injury of _____ and partly by the subsequent compensable injury of (subsequent date of injury). The evidence would certainly support a finding that claimant's present condition is a continuance of the _____ very serious injury but could not support a finding that the (subsequent date of injury) intervening incident is the sole cause of claimant's current condition.

Carrier F (Carrier 1) also contends that a consistent factor in the Appeals Panel decisions is that the "sole cause defense appears to be saddled on the Carrier opposing the Claimant's position." (Emphasis in the original.) The claimant in this case is only maintaining that he sustained a new injury on (subsequent date of injury) and he does not particularly care which carrier continues to provide benefits. Consequently, we revise Carrier F's proposition to say that the burden is on whichever carrier opposes the hearing officer's factual determinations to show that they are so against the great weight and preponderance of the evidence as to be manifestly wrong or clearly unjust. We find that the evidence certainly supports that claimant had a significant injury on _____, that he continued under treatment for that injury and that he had an exacerbation or aggravation of that injury on (subsequent date of injury) which in Dr. D's opinion extended claimant's healing time by 12 weeks. Carrier P (Carrier 2) is not required to prove that the sole cause of claimant's continuing disability was the prior _____ injury. In this case both carriers have some responsibility for claimant's benefits and the hearing officer's determination that claimant's _____ injury remains a producing cause of claimant's disability and continuing need for medical treatment after January 1, 1998, is supported by the evidence. Nor do we find error in the hearing officer's findings that Carrier P (Carrier 2) is responsible for 12 weeks of disability starting October 27, 1997, and medical benefits between (subsequent date of injury), to January 1, 1998, based on Dr. D's December 12, 1997, progress note.

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:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge