

APPEAL NO. 991116

On April 28, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether the compensable injury of (date of injury of 1995), is a producing cause of respondent's (claimant) L5-S1 disc herniation after January 18, 1999; and (2) whether claimant has had disability resulting from the injury sustained on (date of injury of 1995), and if so, for what periods. Appellant (carrier) requests reversal of the hearing officer's decision that: (1) the compensable injury of (date of injury of 1995), is a producing cause of claimant's L5-S1 disc herniation after January 18, 1999; and (2) claimant had disability resulting from the injury sustained on (date of injury of 1995), for the periods of March 10, 1995, to March 13, 1995, and January 18, 1999, to February 10, 1999. Carrier requests that a decision be rendered in its favor on both issues. No response was received from claimant.

DECISION

Affirmed.

Claimant has worked for the employer as a fabricator/welder since 1987. Around 1989 he had a work-related back injury and in June 1989 he had surgery performed by Dr. W consisting of a laminectomy for a herniated disc at L5-S1 on the right side. Claimant said he was off work for three months following his surgery and then Dr. W released him to return to work and he returned to work without missing more time from work from that injury.

Claimant said that on (date of injury of 1995), he was bent over looking at a piece of pipe at work when his back went out and he felt sharp back pain that radiated down his right leg. The parties stipulated that claimant sustained a compensable low back injury on (date of injury of 1995). Claimant was seen at a hospital emergency room on (date of injury of 1995), and then went to Dr. W, who noted on March 27, 1995, that claimant may have a "recurrent disc." Claimant said that he missed four days of work immediately following his injury, that he returned to work with restrictions, that Dr. W put him on light duty for awhile, and that after three or four months he went back to regular duty.

An MRI of claimant's lumbar spine was done on March 31, 1995, and the radiologist reported that the MRI showed a disc herniation at L5-S1 compressing the right S1 nerve root. Claimant said that prior to January 1999, he last saw Dr. W for his back in March 1995. In a chart note dated April 3, 1995, Dr. W noted that on that day he had a telephone conversation with claimant, that claimant had a large paracentral disc at L5-S1 on the right side that was compatible with his symptoms, that claimant's symptoms had improved markedly, that claimant was wearing a lumbar support, and that claimant was not to do any repetitive bending or lifting. Dr. W reported on June 30, 1995, that claimant reached maximum medical improvement on April 3, 1995, with a zero percent impairment rating for

his injury of (date of injury of 1995). Claimant said that he has just recently seen that report and has disputed it.

Claimant said that following his (date of injury of 1995) injury, Dr. W told him that he could undergo another back surgery or he could see how things worked out without another surgery. Claimant said that he opted to see how things would work out without another surgery. Claimant said that from the time of his (date of injury of 1995) injury to 1999 he continued to have problems with his back and leg but that he worked through those problems. He said he would sometimes have back pain and problems with walking and sitting and that he would sometimes take a vacation day when he had back problems. Several of claimant's coworkers stated in written statements that while claimant was able to perform his work after his (date of injury of 1995) injury, claimant continued to have back and leg problems after that injury and wore a back brace during his more difficult times.

Claimant said that on January 18, 1999, he was either tying his shoes or putting on his pants when he felt back pain that was more severe than the intermittent pain he had been having following his (date of injury of 1995) injury and that he was off work from January 18 to February 10, 1999, because of back pain. Claimant went to Dr. W on January 20, 1999, and Dr. W wrote that he last saw claimant in 1995, that at that time claimant had a recurrent disc at L5-S1, that claimant got better, that over the past four years claimant had done fairly well but had had some intermittent stiffness in his back, and that claimant is presently having a lot of pain in his back that radiates down his right leg. Dr. W's impression was that claimant has a recurrent herniated nucleus pulposus (HNP) at L5-S1 and wrote that claimant is unable to work.

Claimant said that he was taken by ambulance to a hospital emergency room on January 26, 1999, and when asked what happened on that date, said that he was putting on his pants when he felt his back pop and that he went to the floor and could not stand up. A lumbar MRI was done on January 26, 1999, and the radiologist reported that claimant has a large disc protrusion with an extruded fragment at L5-S1 which is displacing the right S1 nerve root. Claimant said that his pain was greater than he had had between 1995 and that time. Dr. W saw claimant on January 27, 1999, and wrote that on January 26th claimant was putting on his pants when he felt a pop in his back and had recurrent pain which was severe. Dr. W wrote that the MRI done on January 26th confirmed a recurrent disc at L5-S1, that claimant is going to need surgery, and that claimant wants to have surgery.

Dr. W wrote on February 11, 1999, that in 1995 claimant had a large right paracentral disc on the right side that was treated conservatively and improved; that over the past four years claimant had done well with some intermittent pain in his back, but nothing real severe; that recently claimant had a flare-up of symptoms compatible with a disc herniation at L5-S1 on the right side; and that "I think this is a re-exacerbation of an injury which occurred in 1995." Dr. W released claimant to return to work on February 11, 1999. Dr. Raabe (Dr. R) saw claimant on February 26, 1999, for a second opinion on

spinal surgery and he wrote that he agreed with Dr. W's recommendation for surgery. Dr. W wrote on March 3, 1999, that "I think the source of his [claimant] pain is the disc at L5-S1 which has been present since 1995." Claimant said that he is awaiting the outcome of the present proceeding before having surgery.

Claimant's position at the CCH was that his (date of injury of 1995) compensable injury is a producing cause of his L5-S1 disc herniation after January 18, 1999, and that he has sustained disability as a result of his 1995 injury. Carrier's position was that claimant had a new injury in January 1999; that the 1995 injury was not a producing cause of claimant's L5-S1 disc herniation after January 18, 1999; and that the 1995 and 1999 injuries were exacerbations of the 1989 injury. Carrier appeals the hearing officer's findings that on January 18, 1999, claimant suffered a flare-up of the symptoms related to the (date of injury of 1995) injury and that as a result of the (date of injury of 1995) injury, claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage from March 10, 1995, through March 13, 1995, and from January 18, 1999, through February 10, 1999. Carrier also appeals the hearing officer's conclusions that the compensable injury of (date of injury of 1995), is a producing cause of claimant's L5-S1 disc herniation after January 18, 1999, and that claimant had disability resulting from the injury sustained on (date of injury of 1995), for the periods of March 10, 1995, through March 13, 1995, and from January 18, 1999, through February 10, 1999.

Carrier contends there is insufficient evidence to support the appealed findings and conclusions. Carrier also questions the hearing officer's finding that there was insufficient evidence to establish the 1989 injury as the sole cause of the claimant's herniated disc condition that was present as of January 18, 1999. Carrier contends that the hearing officer failed to place the burden of proof on claimant to prove that his 1995 injury was a producing cause of his condition in 1999, that the hearing officer misplaced the burden of proof on carrier, and that carrier was not required to prove that some other incident was the sole cause of claimant's condition when claimant has failed to establish that the compensable injury is a producing cause of the condition.

At the outset of the CCH the hearing officer placed the burden of proof on both disputed issues on claimant and his decision reflects that he considered that the evidence established that claimant had a mere "flare-up" of symptoms in 1999 and that the 1995 injury was a producing cause of that flare-up. Whether claimant sustained a new injury in 1999 or had a continuation of symptoms from his 1995 injury was a fact question for the hearing officer to determine from the evidence presented.

The hearing officer's decision also reflects that he did not consider carrier's evidence sufficient to establish that the 1989 injury is the sole cause of claimant's condition in January 1999. Carrier was pointing to the 1989 injury and to an asserted new injury in 1999 to defeat claimant's claim for compensation for his undisputed 1995 injury. In Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977), the court held that to defeat a claimant's claim for compensation because of a preexisting injury, carrier must

show that the prior injury is the sole cause of claimant's present incapacity, and in American Surety Company of New York v. Rushing, 356 S.W.2d 817 (Tex. Civ. App.-Texarkana 1962, writ ref'd n.r.e.), the court stated that there are many cases that hold that where a subsequent injury is alleged, such must be proved, and that a subsequent injury must be the sole producing cause of a claimant's disability. In Texas Workers' Compensation Commission Appeal No. 971727, decided October 17, 1997, an Appeals Panel stated that, once a claimant has made out a *prima facie* case that the current condition is a result of the original compensable injury, the burden to prove that a preexisting condition or unrelated injury was the sole cause of the current condition falls on the carrier. See also Texas Workers' Compensation Commission Appeal No. 971134, decided July 31, 1997. Carrier has not shown error in the placement of the burden of proof.

Claimant's testimony that, although he could work following his 1995 injury, he still had ongoing back problems, the written statements of claimant's coworkers, and Dr. W's opinion that relates the L5-S1 HNP to the 1995 injury, provide sufficient evidence to support the hearing officer's decision. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. We conclude that the hearing officer's decision on both disputed issues is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge