APPEAL NO. 991577

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 17, 1999, a contested case hearing (CCH) was held, with the record closing on June 24, 1999. The issues disputed at the CCH were whether the respondent, who is the claimant, sustained an injury in the course and scope of his employment on or about Injury 2; whether that injury was the "producing cause" of his current back problems; whether he had disability as a result of such injury; and whether he gave timely notice of injury to his employer in accordance with Section 409.001.

The hearing officer determined that the claimant injured his back at work on Injury 2, and had disability from that injury beginning on March 17, 1999, and continuing through the date of the CCH. He held that although the claimant did not report his injury within 30 days, he had good cause for not timely reporting. He held that claimant's prior back problems were not a producing cause of his current back problems.

The appellant (carrier) has appealed. The carrier argues that the claimant should have brought forward expert medical evidence to prove that his Injury 1 back injury diagnosis was related to a Injury 2, incident, but on the other hand contends that a 1991 back injury was not too remote to have been considered by the hearing officer to be the cause of current problems. The carrier argues that the finding of good cause for failure to report the injury within 30 days of Injury 2, was error. The claimant argues facts supporting an affirmance.

DECISION

We affirm.

The claimant was employed since 1993 by (employer) which produced chemicals for use in oil drilling and exploration. The claimant said that he had hurt his back in 1991, but this was diagnosed merely as a muscle strain. The claimant said he never had diagnostic tests at this time other than x-rays. Although he was off work for 11 months, the claimant said that much of this was due to the fact that his previous employer closed down operations and an amount of time passed until he could get another job.

Earlier in 1989, he also had a right knee injury, and stated that from time to time it would flare up, causing him to limp. A supervisor for the employer, Mr. S, agreed that he intermittently noticed claimant limping, but that it would go away. He said that claimant told him his foot hurt when he would inquire about the limping. Mr. S said that claimant was a good and reliable worker, who did heavy lifting in the course of his job without noticeable inability. The claimant worked an average of 54 hours a week, six days a week. Mr. S said he noticed claimant walking with a more noticeable limp than usual the first week of March 1999.

The claimant said that beginning in the first week of March 1999, he developed right hip pain and shooting pains in his leg, and then developed numbness in his foot. He realized then that the condition was growing more serious and made an appointment with his doctor, Dr. R, for March 17, 1999, after informing Mr. S that he was going to do this. Claimant said that Dr. R, to his surprise, told him he had the classic signs of a herniated disc, and that an MRI ordered by Dr. R confirmed this. Claimant was surprised by this, because he had not been troubled with back pain as opposed to hip and leg pain. Claimant said when he thought back as to when he might have hurt his back, he could only recall a Injury 2, incident in which a special batch of chemicals was being mixed. Claimant said that on this day he was hoisting boxes of dry chemicals, and pouring them from a pallet into a vat, when he felt a shooting pain in his back. He estimated that the box weighed 150 pounds or more. It resolved and he worked the rest of the day, feeling only soreness in the days to follow. The claimant said that such minor aches and pains were not unusual although he mentioned this back pain to a coworker.

The claimant said he could recall nothing that occurred off the job between January 15th and the first week in March that would have caused his back to be injured. Mr. S testified that claimant gave notice of a back injury on Injury 1 or next day. It was after returning from a visit with Dr. R that the claimant specified his injury and asked about filing workers' compensation. Asked to supply a specific date of injury, claimant identified the January 15th blending incident. Dr. R's note of March 17, 1999, records a Injury 2, heavy lifting incident. An MRI dated March 22, 1999, reported that the claimant had a herniated disc at L4-5. There is no evidence of this following the injury 1 injury.

The evidence in the record from claimant's injury 1 back injury shows that he received an eight percent impairment rating (IR) in August 1992, based upon not just lumbar injury but thoracic injury as well. The narrative report for this IR indicates that the claimant had an MRI which was negative. The diagnosis-based thoracic lumbar syndrome IR was higher than a lumbar IR would have been alone, according to the certifying doctor. Moreover, claimant was awarded two percent IR for thoracic range of motion deficits. Finally, an additional two percent was awarded for lumbar range of motion deficits. Neurological impairment was assessed at zero.

Obviously, the evidence produced herein had conflicts that are the responsibility of the trier of fact to resolve. The Appeals Panel will not disturb these fact findings absent a great weight and preponderance of the evidence to the contrary. We cannot agree that that is the situation here. There is evidence to support a finding that claimant injured his back on Injury 2, and the hearing officer could draw a causal influence from his testimony alone.

The "producing cause" issue concerning the injury 1 back injury is perplexing. In this case, the carrier had the obligation to prove that any disability after March 17, 1999, was solely caused by the injury 1 injury, not just that it was a "producing cause." Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992. The fact that a back injury that occurred in injury 1 may have produced a weakened condition

leading to further injury would not preclude the hearing officer's finding of a compensable injury. As we have stated many times, an aggravation of a preexisting condition is an injury in its own right. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ). It is axiomatic, in case law having to do with aggravation, that the employer accept 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. Although the hearing officer, with considerable support, found that the injury 1 back injury was not the producing cause of the herniated disc, it is not clear that a different result in this case would have been compelled if he had. We affirm the determinations as to producing cause, occurrence of an injury on Injury 2, and resulting disability.

We likewise cannot agree that the hearing officer erred by finding good cause for the untimely notice through a trivialization of the injury. 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 carrier is discharged from liability for the claim if such notice is not given, unless there is a finding of good cause for the failure to give such notice. Section 409.002.

Belief that an injury is trivial can constitute good cause for failure to give timely notice. Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ). Good cause must continue up to the time that notice was actually given. Texas Workers' Compensation Commission Appeal No. 94975, decided September 2, 1994. The claimant in this case notified his employer the day or day after his doctor told him that the cause of his foot pain was in fact a back injury, and the claimant thought back and attributed it to the Injury 2, blending incident.

For these reasons, the decision and order of the hearing officer are affirmed in all respects.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Tommy W. Lueders
Appeals Judge