

APPEAL NO. 991654

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 8, 1999, a contested case hearing (CCH) was held. With regard to the only issue before her, the hearing officer determined that appellant's (claimant) compensable injury of injury 1 (all dates are 1998 unless otherwise stated), was not a producing cause of claimant's back condition after December 12th and that claimant sustained a new injury on (Injury 2) which constitutes the sole cause of claimant's back condition after Injury 2.

Claimant appealed, contending that she had not sustained a new injury on Injury 2, that the grocery bags she was putting in her car that date were small and light, that "lifting the groceries only aggravated the problem and increased the pain, but there was no new injury," that the treating doctor stated there was no new injury and that respondent (carrier or the self-insured) had not met their burden of showing the sole cause of claimant's present condition was the Injury 2 incident. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The self-insured city, also referred to as carrier, responds, urging affirmance.

DECISION

Reversed and rendered.

Claimant had been employed in a clerical capacity by the self-insured city since 1990. It is undisputed that claimant sustained a low back injury on Injury 1 while lifting a box of "insurance papers." The self-insured has accepted liability for that injury. Claimant either went, or was sent, to the "company doctor" who diagnosed a "sore muscle." Subsequently, claimant began seeing Dr. D, D.C. Claimant testified that she saw Dr. D a few times and, when her condition improved, she stopped seeing Dr. D for a time. Claimant said that when her pain later recurred, apparently in July, she went back to Dr. D, who ordered an MRI (the various medical reports and diagnostic tests are discussed later in this opinion). Claimant testified that she was still in pain when on Injury 2, as she was loading what she believed were three bags of groceries in the trunk of her car, she felt pain or a "pull" in her low back on the right side. Claimant said that she returned to Dr. D for some additional treatments and was eventually taken off work and referred to Dr. G. Claimant testified that she has been seeing Dr. G since January 1999; however reports from Dr. G would indicate that he has been seeing claimant since November 19th. Additional diagnostic testing was performed on January 19, 1999.

The medical records indicate that claimant first saw Dr. D on April 24th with complaints of neck and low back pain. Dr. D prescribed treatments and adjustments three times a week. Dr. D's office notes indicate he saw claimant 13 times between April 24th and May 26th. There are no notes between May 26th and July 11th, this presumably being the period that claimant said that she got better, discontinued treatment and then got worse. Dr. D's July 11th note states that claimant reports "a slight improvement in the degree of low back pain." Based on another report, Dr. D apparently certified claimant had

reached maximum medical improvement (MMI) with a five percent impairment rating (IR) and that a Dr. E was appointed as a designated doctor and certified MMI with a zero percent IR.¹ A report dated September 29th indicates that claimant was "complaining of lower back pain with bilateral radicular symptomatology" and that Dr. D felt an MRI was necessary. An MRI was performed on October 9th and showed a 6mm disc protrusion with mild lateralization at L5-S1 and a 6mm "posterior disc protrusion versus disc herniation at T11-12" creating "mild to moderate central spinal canal stenosis." Dr. D, in a report dated October 15th, refers to the MRI results as revealing "significant disc derangement," comments that the designated doctor's "determinations" were "invalid" (without saying how and no designated doctor's report is in evidence) and that claimant has not reached MMI. There are no records of medical treatment by Dr. D after the reports of the MRI until claimant returned to Dr. D on December 18th, six days after the grocery loading incident. The December 18th note, however, says that claimant reported "a reduction in the amount of pain left in the low back." Dr. D, according to the office notes, apparently saw claimant nine times, from December 18, 1998, to January 8, 1999. Some of the reports indicate complaints of "less pain in her low back" and some more pain and some no change.

Claimant was referred to Dr. G, who in a report dated November 19th, cites the Injury 1 compensable injury and notes that claimant complains of constant pain. Dr. G diagnosed a herniated nucleus pulposus (HNP) and recommended a thoracolumbar myelogram and therapy. Dr. G apparently saw claimant again on December 17th and noted that claimant "continues to have a moderate amount of pain in her lower back . . . [and] right lower extremity pain." Dr. G diagnosed a "[HNP] at T11-12, as well as L5-S1." In a report of January 12, 1999, Dr. G notes that claimant "continues to have constant severe pain in her lower back, as well as shooting pain down her right lower extremity"

A post lumbar myelogram CT scan of the lower thoracic and lumbar spine from T11-12 to L5-S1 and a lumbar myelogram were performed on January 19, 1999. The results were summarized in Dr. G's February 4, 1999, report as:

She had a myelogram with post-myelographic CT that showed a 3-mm herniated disc at T-11 and T-12 with impingement upon the thecal sac and borderline spinal stenosis. She also had a 2- 3-mm bulging disc with impingement at L4-L5, as well as a 4-mm herniated disc at L5-S1.

In evidence are other reports from Dr. G dated February 15, March 4, April 22, and May 21, 1999, reiterating many of the previous findings and recommending nerve root injection blocks. Both parties cite a report dated March 16, 1999, from Dr. D as supporting their position. That report states:

¹The hearing officer took official notice of her prior Decision and Order in another CCH where claimant was found to be at MMI on July 11th with a five percent IR. A hearing officer's Decision and Order in another case is not the proper subject of official notice in that it is confidential and not available to the general public. The hearing officer might have made it a hearing officer's exhibit.

[Claimant] suffered an aggravation of her work-related injuries to the lumbar spine on approximately Injury 2. The patient was lifting groceries out of her car when the reinjury occurred. The patient's present complaints, objective findings, and results of previous diagnostics studies (MRI) are consistent with the work injury sustained on injury 1.

In conclusion there is no doubt that the patient's current clinical condition is the result of the occupational injury, and no new injury was sustained while she was lifting groceries on Injury 2.

Claimant contends this shows that the original Injury 1 injury is a producing cause of her present condition. The self-insured argues that Dr. D says that claimant referred to an aggravation on Injury 2 and that consequently is a new injury which cancels out claimant's original compensable injury.

The hearing officer, in her discussion, comments:

As the Appeals Panel has often stated, the line between the aggravation of an existing injury, resulting in a new injury, and a flare-up of symptoms from an existing injury is often extremely fine one, and [Dr. D's] March 16, 1999 report does nothing to elucidate the matter in this case, since this report is self-contradictory in that [Dr. D] states that "no new injury was sustained . . . on Injury 2," yet also states that Claimant "suffered an aggravation of her work-related injuries" and that Claimant sustained a "re-injury." However, reference to the diagnostic testing which Claimant underwent on October 9, 1998, roughly two months before the subsequent event in question herein, and a comparison of that test result with the results of objective testing performed on January 19, 1999, roughly one month after the mid-December event, reveals that Claimant exhibited more significant pathology after the event of Injury 2 than she did beforehand. In particular, the Hearing Officer notes that the October testing revealed only mild findings at two spinal levels, while, in contrast, the January testing not only revealed pathology at additional levels, but revealed that the pathology at the T11-12 and the L5-S1 levels had become significantly more severe since October 9, 1998 These test findings, when considered in conjunction with Claimant's testimony regarding the symptoms she experienced on Injury 2, strongly support Self-Insured's position to the effect that Claimant has sustained a new, non-compensable, injury, which injury subsumes Claimant's compensable injury of injury 1, and now constitutes the sole cause of Claimant's back condition, thereby preventing Claimant's compensable injury of injury 1 from continuing to constitute a producing cause of Claimant's back condition after Injury 2.

We agree with the hearing officer that the line between an aggravation of an existing injury, resulting in a new injury, and a flare-up of symptoms of an existing injury is often an extremely fine distinction. In this case, we are concerned in that the hearing officer largely

ignores the reports from Dr. G, particularly the report of November 19th, a month prior to the Injury 2 grocery lifting incident, and the fact that Dr. D took claimant off work for a brief period of time in September. Further, the self-insured mischaracterizes the evidence, saying that claimant "showed an abandonment of medical care for nearly five months before the second event [the Injury 2 grocery lifting] occurred." Claimant, to one extent or another, was complaining of pain during this period of time, an MRI was performed and claimant was seen by Dr. G on November 19th, clearly complaining of "constant pain in her back" (Dr. G's November 19th report). Dr. G recommended a myelogram to include the thoracic spine at T11-12 and recommended "she continue with her therapy as this does provide her with some relief." This does not sound like abandonment of treatment.

We discussed the matter of a subsequent noncompensable injury being the sole cause of claimant's present condition in Texas Workers' Compensation Commission Appeal No. 94844, decided August 15, 1994, where we stated:

To prove a subsequent noncompensable injury is the sole cause the burden is on the carrier to prove that the claimant's subsequent injury is the sole contributing factor to the claimant's current condition or disability. Texas Workers' Compensation Commission Appeal No. 94280, decided April 22, 1994; See *also* Texas Workers' Compensation Commission Appeal No. 93864, decided November 10, 1993, and decisions and cases cited therein. This is so because an injury is compensable even though aggravated by a subsequently occurring injury or condition. See Guzman v. Maryland Casualty Co., 130 Tex. 62, 107 S.W.2d 356 (1937); Hardware Mutual Casualty Co. v. Westbrooks, 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. Perhaps enlightening in how to frame the legal test of this question is the language found in the instruction in the Texas Pattern Jury Charges concerning sole cause when there is a subsequent noncompensable injury or condition, which provides as follows:

There may be more than one producing cause of incapacity,
but there can be only one sole cause of incapacity.

Nowhere, to our knowledge, have we held that a subsequent noncompensable injury can "subsume" a prior compensable injury, thereby making both injuries noncompensable and relieving a carrier, or self-insured, from payment of medical benefits for the prior compensable injury.² In this case, claimant was diagnosed as having 6mm disc bulges at T11-12 and L5-S1 by MRI on October 9th, and Dr. G's diagnosis of HNP at those levels on

²Section 408.021 provides for all lifetime health care reasonably required by the compensable injury.

November 19th. Accepting that claimant sustained an new noncompensable injury on Injury 2, that fact did not make the objectively diagnosed disc bulges or herniations go away (or be subsumed) and necessarily create the fact that the Injury 2 injury was the sole cause of claimant's present condition.

The hearing officer hinges much of her argument and decision on the fact that the January 19, 1999, testing showed HNPs at several different levels while the October 9th MRI showed only "moderate disc protrusions at the T11-12 and L5-S1 spinal levels." Claimant, in her appeal, points out that her doctor (she does not identify which one) "explained to me that a myelogram is a much more sophisticated test than an MRI" As noted above, even were that not the case, the fact that claimant now has herniated discs where before she only had "moderate disc protrusions" does not obviate the fact that the disc protrusions were there, that claimant was complaining of pain throughout the time and that the grocery lifting incident may well have further damaged the discs but clearly was not the only or sole cause of claimant's current condition.

Consequently, we reverse the hearing officer's decision that the compensable Injury 1 injury was not a producing cause of claimant's current back condition and that the Injury 2, grocery lifting incident was the sole cause of claimant's back condition as being so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We render a new decision that claimant's compensable Injury 1 low back injury was a (not necessarily the sole or only) producing cause of her back condition after Injury 2 and that the new injury of Injury 2 is not the sole cause of claimant's current back condition.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge