APPEAL NO. 991817

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 26, 1999, a contested case hearing (CCH) was held. The issues concerned whether the respondent, who is the claimant, sustained a repetitive trauma/occupational disease injury, the date of his injury, whether the claimant reported his injury within 30 days from the date he knew or should have known that he may have an occupational disease, whether he had disability from his disease, and whether he sustained a cervical injury to his spine on or about _____. The latter issue was directed more at the scope of the occupational disease rather than the occurrence of a second injury.

The hearing officer held that the claimant injured his cervical spine through a repetitious aggravation of a preexisting condition in his neck (degenerative disc disease). The hearing officer found the date of injury to be (Subsequent injury), and that timely notice was given on February 2, 1999. The hearing officer finally held that the claimant had disability resulting from his injury and continuing to the date of the CCH.

The appellant (carrier) has appealed, arguing there was a failure of any evidence to prove that injury was present. The carrier argues that the hearing officer unfairly shifted the burden of proof to it. The carrier argues that claimant actually knew he had a work-related injury in December 1998 and his notice was therefore untimely. Finally, the carrier argues that because claimant was out of a job due to his termination, there being sufficient light-duty work otherwise available, the finding of disability was in error. The claimant responds that the decision of the hearing officer is based on the evidence presented.

DECISION

We affirm.

The claimant was employed by (employer), and assigned to drive a forklift for (client company). He said that around December 1, 1998, he felt a "knot" in his back between his shoulder blades, and it occurred to him at the time it was related to his work driving the forklift and turning his head, but the problem resolved itself. The claimant said he drove the forklift eight hours a day, five days a week, and had to turn his head and look up to perform the various maneuvers. He also worked three levers with his right hand. The claimant said that on _____, he felt tingling and pain in his right hand, especially to his last two fingers, which on occasion radiated into his forearm. Claimant said he thought it would go away but it got worse and he finally determined that this related to his job of driving the forklift on Subsequent injury, and he verbally reported this that day to the employer. He reported his injury in writing to his employer as hand and arm pain on February 2, 1999. He stated that the report's reference to having had the arm problem for two months was a confused reference to thinking back when he had first felt pain, i.e., the knot in his shoulder blades.

Claimant was sent to the doctor for the employer, (a medical clinic). Part of his physical included a drug screen. Claimant said he also reported to the medical clinic the fact that he also experienced a "knot" in December 1998. The medical clinic put claimant on duty with restrictions on February 2, 1999, limiting use of the right arm and lifting over 30 pounds. On or about February 4, 1999, it was reported to the employer that claimant testified positive for marijuana (50 nanograms per milliliter); Ms. M, on behalf of the employer, called claimant and terminated his services when the report was received. The claimant denied that he had ever heard through anyone but the grapevine that he was "history" as far as the client company was concerned.

The medical clinic told him that the employer would no longer pay for treatment and the claimant then sought medical treatment from Dr. A through his wife's medical insurance. The claimant said both the medical clinic doctors and Dr. A were concentrating on his pains as originating in his neck, although he said he had no neck pain. The claimant agreed he had a bad lower back and had requested the employer not to assign him to lifting as a result. Claimant agreed that a supervisor for the client company had discussed with him the fact that there would be less reliance on the forklift and more on manual labor in the days to come and that claimant then said he would likely seek a reassignment to another company. The claimant said he had smoked marijuana over Super Bowl weekend prior to being tested. The carrier did not raise the defense of intoxication.

Dr. A wrote on March 29, 1999, that he believed the claimant had C6 pattern weakness. He recommended a cervical MRI. This showed multilevel degenerative disease with marked changes at C6-7. Claimant was also seen on referral on May 26, 1999, by (Dr. SW), who told him he should avoid overhead work heavy lifting and various other activities that Dr. SW said he discussed with the claimant.

The claimant was examined in a required medical examination on July 14, 1999, as ordered by the Texas Workers' Compensation Commission by Dr. SN, a neurologist. Dr. SN found no unusual or exaggerated pain responses. He found that the claimant experienced an "electrical shock" sensation in his right arm upon straight hyperextension of his neck. Dr. SN noted that claimant had symptoms consistent with cervical root irritation. He said that claimant's degenerative disease did not originate in his work, but his work, turning his head from side to side "could aggravate" his preexisting condition and cause his symptoms. Dr. SN recommended additional testing to discover the exact nature of his problem, including an EMG.

In Texas Workers' Compensation Commission Appeal No. 93866, decided November 8, 1993, we stated that "aggravation" has a somewhat technical meaning and that, to be compensable, an aggravation "must be a new and distinct injury in its own right with a reasonably identifiable cause . . . ." The mere recurrence or manifestation of symptoms of the original injury does not equate to a compensable new aggravation injury. Rather, as we discussed in Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, a compensable aggravation injury must be proven by evidence of "some enhancement, acceleration, or worsening of the underlying condition . . . ." It is

axiomatic, in case law having to do with aggravation, that the employer accepts 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. There is sufficient evidence in this record for the hearing officer to base on it a decision that claimant's driving of the forklift led to aggravation of his disc disease. The evidence is conflicting on various points, but the weigh and credibility was for the hearing officer to assess. An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). We note that although the claimant was not entirely sure of the etiology of his injury and there is no ultimate diagnosis as yet achieved, this is largely a matter of timing of the dispute in the course of treating and diagnosing the illness, rather than of whether there is an injury.

Likewise, we affirm the determination that timely notice was given and that the date of injury was Subsequent injury. Claimant fully explained the occurrence of the knot in his back and that he was not seeking compensation for that incident. His hand pain and tingling was separate and distinct as far as imposition of a "knew or should have known" standard. Although the evidence also suggested a possible _____, date, the notice given by claimant was timely as to this date as well.

The fact that a worker is released only to limited duty is evidence that disability continues, not that it has ended. The Appeals Panel early on held that where a medical release is given that is conditional, and there is not a return to full-duty status, disability by definition continues unless the claimant obtains and retains employment equivalent to his preinjury average weekly wage. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. Disability cannot be said to end when a restricted release is given. Texas Workers' Compensation Commission Appeal No. 941092, decided September 28, 1994; Texas Workers' Compensation Commission Appeal No. 941566, decided January 4, 1995. Termination from employment was a factor for the hearing officer to consider, but she evidently gave weight to the fact that claimant's restrictions preceded discovery of a positive drug test and subsequent termination.

In reviewing the record, we cannot agree that the great weight and preponderance of the evidence is against the hearing officer's decision on the matter appealed, and we affirm the decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge