

APPEAL NO. 991818

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 27, 1999, a contested case hearing was held. He (hearing officer) determined that the respondent (claimant) sustained a new compensable injury on (Injury 2), and that his low back problems were not merely a continuation of his (injury 1), compensable injury. Appellant (carrier) appeals the hearing officer's determinations on sufficiency grounds. Claimant responds that the Appeals Panel should affirm the hearing officer's decision.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant sustained a new compensable back injury on Injury 2. It asserts that claimant's back condition is a continuation of his Injury 1, prior compensable injury. Carrier contends that: (1) the evidence from Dr. S establishes that there was no new injury; (2) the fact that claimant's disc protrusion increased in size does not show there is a new injury but shows, instead, the natural progression of claimant's prior injury; (3) Dr. G did not adequately explain why he thinks there is a new injury; (4) Dr. G had been treating claimant for flare-ups of his old injury all along, and as late as March 16, 1998; and (5) Dr. G had described claimant's symptoms as a recurrence of his prior injury all the way until the alleged new injury occurred.

A finding of a new injury or aggravation of a preexisting condition is not necessarily compelled simply because the claimant experiences pain. A claimant must do more than merely assert that there has been an aggravation to meet the burden to prove that a new injury occurred. Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994. What must be proven is not a mere recurrence of symptoms inherent in the etiology of the preexisting condition that has not completely resolved, but that there has been some enhancement, acceleration, or worsening of the underlying condition from the injury. Whether a claimant has sustained a compensable new injury, or a compensable injury by way of aggravation of a preexisting injury or condition, are ordinarily questions of fact to be determined by the hearing officer.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that he had previously sustained a compensable back injury on Injury 1. Claimant said he treated with Dr. S and then Dr. G for this injury. He said he missed a few months from work at that time. Claimant said he was eventually released to full duty and that he returned to work in May 1994. Claimant said he sustained another compensable back injury at work on Injury 2. Claimant said that at that time, he had been having no problems with his back. Claimant testified that on Injury 2, he lifted a part at work and felt pain in his back. He said his pain gradually worsened, that he had to leave work because the pain became unbearable, and that he began to have pain shooting down his leg, which he had never had before. Claimant said he is treating with Dr. G, that he is planning on having surgery, and that his case is proceeding through the spinal surgery process. Mr. Painter (Mr. P), claimant's coworker, testified that he has been working with claimant for about one and one-half years, and that he has not known claimant to complain of back pain. He said that after the Injury 2, incident, claimant began to complain of back pain.

In a narrative accompanying a December 14, 1994, Report of Medical Evaluation (TWCC-69), Dr. G stated that claimant has attempted to return to work, that he has remained asymptomatic, and that "at present [he] should not require surgical intervention." In a September 1, 1999, Specific and Subsequent Medical Report (TWCC-64), Dr. G stated that after claimant's Injury 2, incident at work, he had a steady decrease in his physical activities, an increase in his symptoms, and he was found to have "significant clinical and radiographic changes in his medical condition." Dr. G opined that this was "consistent with a new injury." In a May 3, 1999, report, Dr. G stated that he believed that claimant would "ultimately" require a laminectomy, discectomy, and fusion. In a March 22, 1999, report, Dr. H agreed that claimant would need surgery and said that claimant was assessed as having a herniated disc at L5-S1 with left sciatica. In depositions on written questions, Dr. S stated that claimant's condition is a continuation of his prior 1993 injury and Dr. G opined that it was not a continuation of the prior injury. A March 1994 MRI report states that claimant had "deseccation changes of the L5-S1 discs with a diffuse broadbased protrusion of the disc and asymmetry with greater protrusion to the left." In a December 1998 MRI report, it states under "impression," that claimant has a "prominent central disc protrusion at L5-S1 with evidence for an annular fissure as well measuring 5 mm in size." The body of the report also states that the L5-S1 disc protrusion is in contact with the ventral surface of the dural sac.

The hearing officer determined that: (1) on Injury 1, claimant had sustained a prior back injury; (2) an MRI scan dated December 31, 1998, showed that "claimant's disc protrusion had increased in comparison with the March 29, 1994, MRI scan"; and (3) claimant sustained a new back injury on Injury 2. In the decision and order, the hearing officer noted that: (1) claimant testified that he had returned to full duty after his 1993 injury; (2) Dr. S had certified a zero percent impairment rating for the prior injury; (3) Dr. S did not have the MRI films to review; and (4) Mr. P, claimant's coworker, noted that claimant had not been complaining of back pain prior to Injury 2.

Here, the hearing officer reviewed the evidence and determined that claimant sustained a new back injury on Injury 2. We have reviewed the evidence in this case and

we conclude that this determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. The hearing officer heard claimant's testimony, reviewed the MRI reports, and concluded that claimant sustained a new injury as opposed to a mere reoccurrence of symptoms from a prior injury. The fact that there could have been different inferences based on the record does not mean that there is reversible error.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge