

APPEAL NOS. 992953
AND 000079

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 17, 1999. The hearing officer held a consolidated hearing on claims made by appellant 1 (claimant) for a date of injury of _____, and _____. In regard to the _____, injury, the sole issue was whether the claimant's present back condition is a result of the _____, compensable injury after _____. The hearing officer determined that the claimant's present back condition is a result of the _____, compensable injury after _____. In regard to the alleged injury of _____, the issues were whether the claimant sustained an injury in the course and scope of employment on _____, and whether the claimant had disability. The hearing officer determined that the claimant did not sustain an injury in the course and scope of employment on _____, and did not have disability. The claimant appeals the decision of the hearing officer, urging that he sustained an injury in the course and scope of his employment on _____; that he had disability; and that the hearing officer's decision should be reversed because it contradicts all of the medical evidence and opinions in the case. The claimant also asserts that the hearing officer erred in refusing to reopen the record to consider a medical report issued by Dr. S on December 8, 1999. Appellant 2, (carrier 1), appeals, asserting that the claimant sustained an injury in the course and scope of employment on _____, and it should be relieved of liability for both medical and income benefits for an _____, injury. The appeals file does not contain a response from respondent, (carrier 2).

DECISION

Affirmed.

The claimant sustained a compensable lower back injury while working as a manual laborer on _____. The injury resulted in a lumbar laminectomy at L4-5 on December 6, 1994, and a lumbar laminectomy at L5-S1 on October 24, 1995. The claimant reached statutory maximum medical improvement on May 21, 1996, and was given a 24% impairment rating. The claimant received supplemental income benefits and was released to return to work by his treating doctor, Dr. N, on July 28, 1998, with restrictions of no lifting greater than 10 pounds. The claimant testified that he obtained a job at (employer 1) in September 1998 and worked there until November 1998, when the company went out of business. On December 21, 1998, the claimant obtained a job with (employer 2) and disclosed to his employer that he had two prior back surgeries. The claimant said that he was able to perform his job operating a trackhoe because the equipment was stationary and did not jerk. The claimant testified that in February 1999, he was assigned to use the trackhoe to break up a concrete slab containing rebar and that every time he grabbed the steel with his bucket, the tractor would raise in the air and then slam down on the concrete, causing his back to hurt. The claimant said that he performed this job for two days and on the third day, _____, the pain in his back was so excruciating that he had to leave

work. The claimant testified that he did not immediately seek medical treatment because he was in pain and Dr. N's office is approximately one hour from his residence. The claimant sought medical treatment with Dr. N on February 15, 1999.

The claimant asserts that he sustained a new injury, or aggravation, on _____. According to the claimant, he had pain radiating down his left leg and only occasionally down his right leg before _____, but after _____, the pain has radiated down both legs. The claimant testified that the _____, injury has caused him to be completely unable to work and that his condition is worse. The claimant relies on the opinions of Dr. N and Dr. S to establish that he sustained a new injury, or aggravation, on _____.

There is voluminous medical evidence in the record which includes medical records from the claimant's prior compensable injuries of _____; _____; _____; _____; _____; _____; and _____. As correctly noted by the hearing officer, the medical reports prior to October 24, 1995 (the date of claimant's second surgery), are of limited use in resolving the disputed issues. Dr. N's medical records show that in 1996 the claimant had complaints of low back and left leg pain; however, beginning in late 1998, the claimant saw Dr. N on a more frequent basis and complained of right leg pain and numbness. On October 14, 1998, Dr. N's records indicate that the claimant complained of increased low back pain and was unable to work, and the pain radiated down both legs with numbness. Dr. N states: "[h]e cannot return to work at present." From October 1998 through January 1999, Dr. N's records indicate that the claimant complained of pain radiating down both legs. On January 13, 1999, Dr. N states that the claimant came in earlier than scheduled because his low back pain is getting worse, medication is not helping, the claimant feels numb constantly in the left leg, and straight leg raising is positive at 40E on the right and 35E on the left. On February 15, 1999, Dr. N states that according to the claimant, "[h]is low back pain has been getting worse since last week after working with a truck hoe all day" and he has pain radiating down both legs at times with constant numbness in the left leg. Dr. N states that the claimant's neurological evaluation remains unchanged.

The Texas Workers' Compensation Commission (Commission) appointed Dr. S to render an opinion on whether the claimant's back pain was a continuation of his 1994 injury or whether it was a new or aggravated condition. On June 21, 1999, without reviewing any medical records, Dr. S stated that the claimant's symptoms were related to the _____, incident because of increased pain in the left lower extremity and pain down to the foot on the right lower extremity which was not previously affected. On August 17, 1999, Dr. S wrote the Commission stating that he had reviewed the MRI and EMG/NCV performed on August 3, 1999; that the studies reflected slight abnormalities at the L4-5 and L5-S1 levels; and that the abnormalities "are a result of a pre-existing condition, that being post laminectomy/discectomy at L4-5, L5-S1 which were aggravated by his _____ [sic], ____ accident." On October 6, 1999, carrier 2 wrote Dr. S and provided medical records prior to _____. On October 13, 1999, Dr. S responded that he had reviewed the medical records; that there were numerous entries indicating symptoms on the right;

and that, on several occasions, Dr. N's records stated the claimant had positive straight leg raising on both sides at about 35-40 degrees, indicating an abnormal process on the right side as well as the left. Dr. S opined that the claimant's symptoms appear to be "virtually the same as on previous records prior to the _____ accident" and that the claimant did not sustain any additional damage to the physical structure of his body, but "did have some significant change in symptoms which could be considered an aggravation of the postoperative structures in his body."

The claimant attaches to his appeal a Motion to Re-Open Hearing dated December 13, 1999, and a report from Dr. S dated December 8, 1999. The claimant argues that the hearing officer erred in refusing to reopen the record to consider Dr. S's report. Dr. S's report is addressed to the claimant's representative and states that it was sent in reply to his November 4, 1999, correspondence. We note that the CCH was held on November 17, 1999; the record was closed on that date; and claimant did not make a motion for the record to be held open or indicate that a letter of clarification had been sent to Dr. S. The Commission's records indicate that the hearing officer's decision was transmitted to the Commission's central office on December 8, 1999, and distributed to the parties on December 14, 1999. The claimant argues that there was good cause for the granting of such motion because Dr. S was appointed by the Commission, that the late filing of Dr. S's report was not due to any action or inaction on the part of the claimant, and that Dr. S's opinion is pivotal to the resolution of this matter.

The Commission's appeals file contains a copy of the claimant's Motion to Re-Open Hearing which is date stamped as received by the Commission on December 15, 1999. On December 14, 1999, the hearing officer no longer had jurisdiction over the matter because her decision had already been distributed. Although the claimant's appeal does not request that we consider Dr. S's report because it constitutes newly discovered evidence, we observe that the report of Dr. S which is attached to the appeal and was not offered at the hearing does not meet the criteria for newly discovered evidence. Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. To constitute "newly discovered evidence," the evidence would need to have come to appellant's knowledge since the hearing; it must not have been due to lack of diligence that it came to his knowledge no sooner; it must not be cumulative; and it must be so material it would probably produce a different result upon a new hearing. See Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). While Dr. S's report did come to the claimant's knowledge since the CCH, there was no showing that the claimant exercised due diligence in obtaining such information. Dr. S's report is cumulative of other reports which state that the claimant sustained an injury on _____, because he had a change in symptoms. Even if the hearing officer had considered Dr. S's report, it would not have produced a different result upon a new hearing because the hearing officer did not find the claimant credible in setting forth a mechanism of injury.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d

936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). The aggravation of a prior injury may be a compensable injury in its own right if the aggravation occurred in the course and scope of employment. See Texas Workers' Compensation Commission Appeal No. 941577, decided January 9, 1995. However, "there must be an active incident or sequence of incidents which are alleged to have resulted in the enhancement, acceleration or worsening of the pre-existing condition," as distinguished from a "mere recurrence of symptoms inherent in the etiology of the preexisting condition that has not resolved." Texas Workers' Compensation Commission Appeal No. 94168, decided March 25, 1994; Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994. Whether the claimant sustained a new injury on _____, or merely suffered a continuation of the _____, injury was a question of fact for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 950125, decided March 10, 1995.

The hearing officer is the sole judge of the weight and credibility to be given 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 overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

After considering the inconsistencies in the medical records and conflicting evidence, the hearing officer found that the claimant was not credible in setting forth a mechanism of injury from using a trackhoe and lifting rebar at work on _____; that the claimant did not establish that he sustained an injury or that he aggravated his preexisting back injury in the course and scope of employment on _____; and that the claimant's compensable injury of _____, was a producing cause of the claimant's current back condition. The hearing officer states that Dr. S's reports were conflicting and Dr. N did not provide any explanation to support his conclusion that the claimant had sustained a new injury. The hearing officer found credible the statements of the claimant's coworkers which indicate that the trackhoe would not have jarred the claimant. As noted by the hearing officer, the claimant testified that he left work on _____, because of back pain; could not drive to his doctor an hour away; but could drive several hours to get his wife out of jail. The medical records indicate that the claimant had increasing complaints of right leg pain in 1998 and early 1999, and continued to suffer effects from the _____, injury. We find there was sufficient evidence to support the determinations of the hearing officer that the claimant's present back condition is a result of the _____, compensable injury after _____, and that the claimant did not sustain an injury in the course and scope of employment on _____.

The claimant appealed the hearing officer's finding of no disability. "Disability" is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since we find the

evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain a compensable injury on _____, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993. After reviewing the record, we conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge