APPEAL NO. 000112

On November 2, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The hearing officer resolved the disputed issues by deciding that appellant/cross-respondent (claimant) did not sustain a compensable injury in the course and scope of her employment on (second date of injury); that claimant did report the claimed injury to the employer within 30 days after the injury; and that claimant did not have disability from the claimed injury of (second date of injury). The hearing officer ordered that respondent/cross-appellant (carrier) is not liable for benefits. Claimant requests that the hearing officer's decision on the issues of compensable injury and disability be reversed and that a decision be rendered in her favor on those issues. Carrier requests that the hearing officer's decision on the timely notice issue be reversed and that a decision be rendered in its favor on that issue, and that the hearing officer's decision on the issues of compensable injury and disability be affirmed.

DECISION

Affirmed.

According to documents in evidence, claimant sustained a lower back injury while performing packing work for employer on (first date of injury), and was treated by (Dr. H) for that injury. Dr. H's records and physical therapy records reflect complaints of right lower back pain, right buttock pain, right hip pain, and right leg pain. Dr. H took claimant off work. There is one brief notation in the physical therapy records of December 22, 1995, that numbness and tingling in the left foot was better, but all other physical therapy records for the (first date of injury) mention the right-side complaints. (Dr. D) reported that a lumbar MRI done on October 27, 1995, showed a disc herniation centrally at L4-5 that appeared to impinge on both the right and left nerve roots. Dr. B's impression of the MRI was bilateral spondylolysis with grade I and II spondylolisthesis of L5 on S1, disc herniation seen centrally at L4-5, and disc bulge identified at L5-S1.

Dr. H wrote in November 1995 that, if claimant were to have an operation, she would need a fusion and a laminectomy, but stated that he felt that a conservative approach would be best and recommended physical therapy. In January 1996, Dr. H wrote that claimant has a disk herniation at L4-5 but had improved and did not seem to be a surgical candidate at that time and that she could discontinue therapy. Dr. H released claimant to sedentary work on January 11, 1996, and an employer document reflects that she returned to work on that day. The physical therapist wrote on January 16, 1996, that claimant's right lower extremity symptoms had been abolished but that she continued to have complaints of pain in the right lumbar and buttock region and that physical therapy was being discontinued because no further orders had been received from Dr. H. Dr. H noted that claimant was able to return to work on January 24, 1996, with a restriction of no overtime. Claimant said that her injury of (first date of injury), kept her off work for about 11 weeks

and that she had back and right leg pain but no left leg pain with that injury. Claimant said that her treatment for her (first date of injury) consisted of physical therapy, traction, and medications; and that when she returned to work in January 1996 performing her packer job, she had no problems, was not taken off work again for her (first date of injury) and did not have to see a doctor, have additional physical therapy, or take prescription medication for that injury.

Claimant said that on weekdays (Monday through Wednesday) she did packer work for employer and on weekends (Saturday and Sunday) she did sanitation work for employer. Claimant said that on Sunday, (second date of injury), she was to disconnect a metal chute to sanitize it and was squatting on an eight-foot ladder to disconnect the latches that held the chute in place on the ceiling. She said that the chute weighed more than 15 pounds and that when she undid the last latch the chute was too heavy for her to hold and she dropped it. She said that the chute jerked and kind of took her with it but that she did not fall. She said that when that happened she felt discomfort in her lower back like she had pulled a muscle; that she took a break to take an Advil; that she continued to work that day and the next two days; that on (third day after injury), she had severe pain down her right leg and called (MN), employer's safety coordinator, and told him that she had hurt her back performing her sanitation work for employer when the chute came down and it was too heavy for her to hold on to; and that MN got her an appointment with (Dr. S). MN testified that claimant told him her back was hurting but that she had indicated it was from her prior injury and that he did not find out until April 6, 1999, that claimant was claiming a new work-related injury.

On February 25, 1999, Dr. S noted that claimant was complaining of lower back pain that started while doing some cleaning at work, that claimant stated that the pain felt the same as it did when she developed a herniated disc about three years ago, and that at that time claimant had seen Dr. H who wanted to do surgery but claimant was not interested in surgical treatment. Dr. S noted that physical examination revealed tender points over L5-S1 and slightly to the right. Dr. S diagnosed a possible herniated disc and prescribed pain medications. In another report of the February 25, 1999, visit, Dr. S noted a date of injury of (second date of injury), and that claimant had felt lower back pain while working in the sanitation department on that day and she took claimant off work. In subsequent reports, Dr. S diagnosed claimant as having a lumbar herniated disc and kept claimant off work. On March 15, 1999, Dr. S noted continued complaints of lumbar pain and gave an assessment of a low back strain but also diagnosed a lumbar herniated disc. Dr. S noted that on March 30, 1999, claimant "comes in now complaining of pain going down her left leg. Actually it is mostly into her left buttocks" and Dr. S recommended an MRI. Claimant said that following the work incident of (second date of injury), the pain in her right leg was so severe that she did not realize that she had pain in her left leg until the pain in her right leg eased up and she cut down on her pain medications and that it was around March 30, 1999, when she began feeling the left leg pain. Claimant said that her (second date of injury) is much more severe than her 1995 injury.

Dr. D, who did the report of the (first date of injury) lumbar MRI, reported that claimant's lumbar MRI of April 21, 1999, showed a central and left lateral disc protrusion at L4-5 that distorts the theca and may impinge on the left nerve root and a central disc protrusion at L5-S1 that does not appear to impinge on neural structures. Dr. D noted that he compared the April 1999 MRI to the (first date of injury) MRI. Dr. D's impression of the April 1999 MRI was bilateral spondylolysis with grade I and II spondylolisthesis at L4, degenerative disc disease at L4-5 and L5-S1, disc protrusion with possible disc herniation noted central and to the left at L4-5, central disc protrusion at L5-S1, and "no significant interval changes have occurred since the previous examination dated 10/27/95."

Dr. S wrote on April 29, 1999, that the MRI basically showed no interval change; that claimant was having pain down her left leg; and that physical therapy was prescribed. Dr. S noted on May 13, 1999, that claimant was still unable to work.

Claimant began treating with (Dr. B) on May 25, 1999, and he diagnosed claimant as having herniated discs at L4-5 and L5-S1 with radicular symptoms involving primarily the left leg. In July 1999, Dr. B noted that claimant was complaining of right- and left-sided low back pain and that she occasionally had left leg pain and he prescribed epidural injections and physical therapy. Dr. B wrote in August 1999 that he had reviewed claimant's (first date of injury) MRI and her April 1999 MRI and, although the quality of the 1995 MRI was relatively poor compared to the 1999 MRI, he did not see any significant interval changes between those MRIs. Dr. B wrote that it appeared that claimant has spondylolysis with mild spondylolisthesis at L4, degenerative disc disease at L4-5 and L5-S1, and a moderate disc herniation at L4-5 central into the left. Dr. B also wrote that in reviewing his notes, it appeared that claimant's first injury occurred on (first date of injury), at which time her symptoms consisted of low back pain and right-sided leg pain; that claimant stated that her symptoms had resolved after about four months of conservative therapy and that she had not had any problems with her back until her recent injury of (second date of injury); and that since that time she has had lower back pain as well as pain radiating into the left and right legs. Dr. B stated that, in his opinion, claimant's most recent injury is a reaggravation of a previous injury and that her symptoms are most likely related to the pathology that is present on the MRI. Dr. B noted that claimant could return to light-duty work on September 6, 1999, but another report notes a return-to-work date of October 4, 1999, with a restriction of no lifting more than 20 pounds. Claimant said that she returned to modified work on October 12, 1999.

(Dr. C) reported that at carrier's request he had reviewed claimant's medical records, including the actual films of both the 1995 and 1999 MRIs, and he opined that "I do not find objective evidence of a 'new injury' from the alleged [second date of injury] injury."

Claimant had the burden to prove that she was injured in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Section 401.011(10) defines "compensable injury" as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(26) 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. The term includes an occupational disease." In Texas Workers' Compensation Commission Appeal No. 950125, decided March 10, 1995, the Appeals Panel noted that whether a claimant sustained a new injury or merely suffered a continuation of an original injury is normally a question of fact to be determined by the hearing officer; that we had held that, to be considered a new injury, there must be evidence that an injury as defined in the 1989 Act has occurred; that we had recognized that an aggravation of a previous condition or injury can rise to the level of a new injury; that an aggravation, to be compensable, must be a new injury and not merely a transient increase in pain from an existing condition; that what must be proven is not a mere recurrence of symptoms inherent in the etiology of the preexisting condition that has not been completely resolved, but that there has been some enhancement, acceleration, or worsening of the underlying condition from an injury; that a return to work after an injury does not automatically transform an original injury into a new injury; and that that is particularly true where a claimant returns to work, is not 100% over the effects of an injury, and experiences subsequent pain or medical problems related to the original injury.

In the instant case, the hearing officer found that, although claimant had lower back pain on (second date of injury), while in the course and scope of her employment removing a metal chute from the ceiling to sanitize it, there were no significant changes shown on the April 21, 1999, MRI and the MRI of October 27, 1995, following the 1995 injury, and she concluded that claimant did not sustain a compensable injury in the course and scope of employment on (second date of injury). Claimant contends that there is a significant change between the 1995 MRI and the 1999 MRI; however, Drs. D, S, and B reported no significant interval change between those studies and Dr. C found no objective evidence of a new injury based on a review of medical records, including the MRI films. The 1989 Act makes the hearing officer the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence. An appellate 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. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision that claimant did not sustain a compensable injury on (second date of injury), is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The hearing officer found that, as a result of her back condition, claimant was unable to obtain and retain employment at wages equivalent to the preinjury wage from February 25, 1999, until October 12, 1999, when claimant returned to work. We decline to strike that finding as requested by carrier. However, the hearing officer concluded that claimant did not have

disability resulting from an injury sustained on (second date of injury). Since we are affirming the hearing officer's decision that claimant did not sustain a compensable injury on (second date of injury), claimant would not have disability, as defined by Section 401.011(16), as a result of a claimed compensable injury of (second date of injury).

Section 409.001(a) provides that, for an injury other than an occupational disease, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the injury occurs. The hearing officer found that on (third day after injury), claimant notified MN, employer's safety coordinator, that she had experienced lower back pain since the (second date of injury), incident, and the hearing officer concluded that claimant reported the claimed injury of (second date of injury), to the employer within 30 days of the injury. There is conflicting testimony on the notice issue. We note that claimant testified that, not only did she tell MN she had pain, but that she told him on (third day after injury), that she had hurt her back doing her sanitation work when she was getting the chute down to clean it. MN testified that it was not until April 6th that he became aware that claimant was claiming a new injury. The conflicts in the evidence were for the hearing officer to resolve. We conclude that the hearing officer's determination on the notice issue is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain, *supra*.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge