APPEAL NO. 000248

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 January 13, 2000. The issues involved whether the appellant, who is the claimant, had a compensable injury on _____, which included her right medial and lateral meniscus tears, and whether she had disability as a result of the _____ injury.

The hearing officer found that claimant's meniscus tears in her right knee were not the result of her compensable injury and were the cause of her inability to work from June 2 through September 6, 1999. He found no disability from the injury, apparently aside from the specific diagnoses cited in the first stated issue. He commented in his decision that the claimant was not credible.

The claimant is no longer represented and has appealed. She argues that her credibility was unjustifiably assailed by the hearing officer. She disagrees with the hearing officer's fact finding that excluded evidence would not have made a difference in the outcome and complains that all of her medical records were not used. She points out that it is inconsistent to find that she had a compensable injury and yet also find that two diagnoses to the injured knee did not result from the accident under consideration. The claimant argues some facts not brought out in the CCH. The respondent (carrier) responds that it presented the testimony of "several" employer witnesses to rebut claimant's testimony. The carrier makes general arguments concerning the right of the hearing officer to disbelieve the claimant.

DECISION

Reversed and remanded.

At the beginning of the CCH, the parties stipulated that claimant sustained "a compensable injury" on _____. When the claimant sought to tender her documentary evidence, the carrier's attorney objected on the basis of the failure to exchange, except for emergency room (ER) records from (date) which it also tendered into evidence. The claimant's attorney responded that all information that she submitted had been exchanged previously at the benefit review conference (BRC). This was not refuted by the carrier's attorney, who stated rather that the basis for his objection was that they were not again exchanged within 15 days after the BRC. The hearing officer, stating that this was his interpretation of the exchange requirements, denied admission of essentially all of the claimant's documentary evidence.

The parties stipulated that the claimant had sustained "a compensable injury on _____." The parties did not seek to limit the stipulation to any condition or diagnosis. The only medical records allowed in by the hearing officer were those from the ER, where complaints of neck and right knee pain were clearly documented.

It was undisputed that the claimant was involved in a motor vehicle accident (MVA) on _____, while on a training conference for (employer). The vehicle in which she was riding was rear-ended by another vehicle. She was riding in the front passenger seat at the time. The claimant said she was thrown forward and hit her knees on the dashboard of the car. She was taken to the ER. She also reported a headache. It was also noted that claimant had discoid lupus. Joint effusion, tenderness to palpation, and limited range of motion in the right knee was noted. The doctor recommended x-rays of the neck and right knee and the claimant declined, stating that she had a flight to catch back to her home city, which was several hours away from her training site. A knee immobilizer was applied and she was told to see her physician upon returning home.

The claimant testified that she had previously undergone knee surgery in December 1998 on her right knee to repair a cartilage tear. The claimant said that she had physical therapy, was discharged from care in March 1999, and had no further problems with her knee prior to the accident. She said that after the accident, her knee would "lock up." Claimant's supervisor, Ms. E, agreed that claimant had not complained before of her knee "locking up," although she was aware that claimant had prior knee problems, but was unable to recall any of the operative dates other than to say claimant had been on medical leave in January and came back to work in February.

The claimant said she kept trying to work in pain and that she felt her production was impacted by her knee pain because it was harder to get out and visit prospective clients. She testified that after she returned to (city) she sought treatment from another doctor and was given therapy. Through her therapy she was treated also by Dr. T.

There was some testimony concerning the fact that the claimant was apparently beneath the desired production level of the employer. Ms. E stated that when this happened, a production improvement plan (PIP) would be formulated, presented to the employee, and signed. Ms. E stated that this was not a first step to "paper" a termination but to set out goals for increasing account production. She said that as of June 1st claimant had been 50% below average and a plan was drawn up and presented to the claimant in a 30-minute conversation at about 9:00 a.m. on June 1st. Ms. E said that claimant refused to sign the PIP, contending she had not been fairly evaluated. The claimant said she was not able to see a higher level supervisor, whom Ms. E advised her to see. It was Ms. E's impression that this supervisor was available but that the claimant did not go to him. Instead, claimant said she had to leave for a therapy appointment, and saw Dr. T on that day. He took her off work, and ordered an MRI of the right knee.

The claimant testified that Dr. T discussed her MRI (done on June 6th) with her and told her she had two tears in the ligaments around her knee. (The MRI report had been excluded from evidence.) Claimant testified that her regular health insurance would not pay for needed surgery because it was of the opinion that her injury was work related and yet the carrier had also denied coverage. Claimant said she was off work from June 2 to September 6, 1999, at which point she resumed part-time work and later full time, for the same employer, in a different job, at first, than she had at the time of her injury.

Ms. E testified that she understood the damage to the vehicle to amount to $500.00 to $600.00. There was no evidence concerning the make or model of the car. While the claimant also asserted that her left knee was hurt, she said that no one had discussed any conditions in the left knee with her and there was no evidence of any damage to the left knee.

First of all, we agree with the claimant's contentions in her appeal of Finding of Fact No. 4, which states that the excluded evidence would not have made a difference in the outcome. One of the documents excluded was a conclusion by an orthopedic doctor, Dr. E, that her probable tears were a new injury and not related to her initial knee problem. The hearing officer was in error when he stated (and based his exclusion of evidence on) his opinion that an additional exchange was required for records already exchanged at the BRC. The Appeals Panel has specifically addressed this and held that documents exchanged at the BRC do not have to be reexchanged. Texas Workers' Compensation Commission Appeal No. 941048, decided September 16, 1994; Texas Workers' Compensation Commission Appeal No. 952066, decided January 18, 1996 (Unpublished). (We have held the same for documents shown to have been exchanged before the BRC. Texas Workers' Compensation Commission Appeal No. 982712, decided November 23, 1998.)

The fact that claimant had a prior knee injury and surgery does not, in and of itself, preclude her subsequent knee injury from being considered as compensable. 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). In this regard, we observe that unless the collision involves very little or no damage, the dollar amount of damage experienced by the car (presumably advanced to show that the force of the collision was not great) is not dispositive of the existence of an injury to persons inside the car.

Whether or not the words "sole cause" are used during a CCH, a carrier that wishes to assert that a current condition and incapacity results only from conditions in existence prior to an intervening accident bears the burden of proving that the preexisting condition is the sole cause. Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992. We agree that the claimant must initially show a causal connection between the incident and diagnosis. However, the erroneously-excluded report of Dr. E lends support to causal connection. The ligament tears did not arise in a vacuum; they either were there at the time of the _____, MVA or arose at the time of the accident or thereafter. The carrier tendered no other records than the ER records, and it had already stipulated to a compensable "injury" rather than incident.

As we have noted in another case, a two-month gap between an accident and an evolving diagnosis does not defeat a causal connection between the two. *See* Texas Workers' Compensation Commission Appeal No. 992594, decided January 3, 2000 (Unpublished).

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. In this case, there was an accident immediately after which claimant began to experience her knee pain. Although the hearing officer questioned the credibility of the claimant, he believed her enough to find, as fact, that she had right medial and lateral meniscus tears diagnosed after the MVA.

We reverse and remand for further development and consideration of the evidence, specifically that which was excluded by the hearing officer and was exchanged at the BRC. We are confident that a review of the evidence will be done, notwithstanding the speculative finding that the evidence, if admitted, would not have changed the outcome. On remand, the stipulation as to compensable injury should be clarified to specify the body parts for which liability was accepted. If questions remain as to the credibility of the evidence, those matters on which testimony was considered important but not believed should be identified. The disability issue is likewise covered by this remand.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Judy L. Stephens
Appeals Judge