APPEAL NO. 000300

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 12, 2000. The issues at the CCH were whether the respondent's (claimant) compensable injury of _____, was a producing cause of the "chrondral" defect of the right medial femoral condyle and right knee sprain after _____; whether the claimant sustained a compensable injury while in the course and scope of employment on or about _____; and whether the claimant had disability and, if so, for what period. The claimant had worked for the employer for a number of years and had sustained compensable injuries earlier than the one in issue, for which respondent, (carrier 1) was liable. On _____, the carrier was appellant, (carrier 2).

The hearing officer determined that the compensable injury of _____, is a producing cause of the "chrondral" defect of the right medial femoral condyle after _____, but that it is not a producing cause of the right knee sprain after _____; that the claimant sustained a compensable injury in the course and scope of employment in the form of a right knee sprain on or about _____; and that the claimant had disability "as a result of claimant's injury to her right knee" beginning April 12, 1999, and continuing through the date of the hearing. The carriers were ordered to pay benefits in accordance with the decision.

Carrier 2 has appealed. Carrier 2 argues that there is essentially no evidence to support the decision that there was an "injury" that arose from the incident that took place on _____, and points to the significant knee problems that the claimant had prior to that date. It argues that the evidence does not support a nine-month period of disability for a knee sprain. Carrier 2 further argues that the hearing officer committed error by admitting much of claimant's documentary evidence over its objection that it was not admissible. Carrier 2 further argues that such evidence does not rise to the level of probative expert evidence under case law from the Texas Supreme Court. Carrier 1 responds that there is evidence that the incident indeed caused a subsequent injury, that the fact of injury in this case could be established by the claimant's testimony, and that a sprain represents an injury. The claimant responds that the decision is supported by the evidence. She further responds that, to the extent that carrier 2 has argued that disability would relate to prior injuries, it failed to bring this up at the CCH.

DECISION

We affirm.

The claimant was an employee of (employer) on _____, when she sustained an injury to her right knee when her foot was caught between two pallets where she had stepped. She said that her coworker caught her so she did not fall all the way, but she

twisted. The claimant said that she reported the incident that day to Ms. D, the safety manager. She said she iced down her knee.

The claimant was wearing a knee brace at the time and had an extensive history of prior injuries and surgeries to her right knee. It was brought out that she was 5'4" tall and weighed 220 pounds. She was injured initially on _____, when she fell on her right knee. The claimant had surgery later that year or the next year. She had surgery again in 1996, when cartilage was taken out. She was injured again on _____, when she fell on her knee. (The carrier for this injury was not in attendance, but the attorney for carrier 2 said he was authorized to speak for that company, an affiliate, and that their position was the same as carrier 2.) The claimant had a third surgery in October 1997 and it was undisputed that she was seeking the advice of her surgeon, Dr. N, and a consulting surgeon, Dr. S, about another surgery before her March 23rd accident. The medical records indicate that the claimant had another accident in late June, early July, 1998 at work but she said that a claim for this was denied.

The claimant had returned to work for the employer in November 1998. She acknowledged that her impairment income benefits from the 1997 injury had run out before that. She said that she was unaware that she could not receive income benefits unless she had a new injury, although she agreed that one reason she was hesitant about new surgery was that she would need to be out for several months and feared ultimately losing her job.

Ms. D testified that she agreed that the claimant had reported the fall to her around 2:00 p.m. on _____. Ms. D said that the claimant was treated in her office by the on-site therapist and that her knee was iced down. She told the claimant to contact her if it became worse that night, and was indeed called at night, with the claimant crying in the background of the call. The next morning, she said, the claimant reported and was ready to work and did not want to see their doctor, but apparently Ms. D required claimant to before she resumed work. Accordingly, Ms. D went with her to the office of Dr. C, the company doctor.

Ms. D said that she talked to the coworker who said that he saw the claimant stumble but not fall. Ms. D said that the coworker denied that he caught the claimant, and instead she said to him, "You saw me fall, now I have a witness." Ms. D said that the coworker could not have caught the claimant, as claimant said, because he was not in the immediate area. Asked to clarify, Ms. D said that he would have been six feet away from the claimant, but could not have caught her because the claimant was only 5'4".

Ms. D said that the claimant had complained of knee pain before _____, and that she had been to her office “several times" to ice down her knee. Ms. D reviewed her notes and found that November 20, 1998, was the last recorded complaint by the claimant about her knee.

At the beginning of the CCH, the attorney for carrier 2 objected to much of the claimant's documentary evidence, primarily because reports were not signed, or because they reached conclusions that carrier 2 argued were not supported by other medical evidence or were contradictory to it. The hearing officer admitted such evidence, pointing out that, within the laws and rules governing the CCH, such objections went to weight, not admissibility.

The claimant said that she was not offered light duty anymore after carrier 2 denied her claim. She said that Dr. N also refused to treat her further, since mid-1999, until the matter of compensability was resolved. Furthermore, the claimant said that her regular health insurer would not pay for treatment because it adopted the viewpoint that her injury was work related.

The report of Dr. C (whom the claimant saw only once) indicated that there was "definite effusion" noted on his examination. He said that the claimant had limited range of motion due to pain and previous knee damage. Dr. C put the claimant on light duty.

Other medical records show that a 1996 MRI showed a chondral defect in the medial femoral condyle. An MRI from September 8, 1998, was reported as showing a progression of her chondromalacia of the medial femoral condyle. Dr. S wrote on August 31, 1999, to the office of carrier 2's attorney that he had seen the claimant on three occasions in 1999 (last on June 26th) and was of the opinion that no new damage was sustained to her knee. However, a June 21, 1999, report from Dr. S shows that one working diagnosis was a right knee sprain from _____, as do his earlier reports and notes.

As we have stated many times, an aggravation of a preexisting condition is an injury in its own right. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ). 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 generally should be proven by evidence of "some enhancement, acceleration, or worsening of the underlying condition. . . ." However, as the claimant and carrier 1 have pointed out in their response, a strain or sprain itself can constitute an injury, even where a predisposing condition makes the person more susceptible to such an injury. *See* Hanover Insurance Co. v. Johnson, 397 S.W.2d 904 (Tex. Civ. App.-Waco 1965, writ ref'd n.r.e.). 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.

Thus, in this situation, the hearing officer could infer that the "worsening" became not so much an enhancement of what was already present, as much as the incident described by the claimant resulting in injury that would not occur for a sound person. Thus, Dr. S's August 1999 observation that there was no "new" injury does not necessarily resolve the issue of injury through aggravation, in this instance the enhancement of the effect of the stumbling incident at work, manifesting as a strain. We, therefore, affirm the hearing officer's determination that the claimant sustained a compensable knee sprain on _____.

As to whether the evidence supports the period of disability found by the hearing officer, we would first note that all parties in this appeal have accepted the hearing officer's determination of inability to work due to the "knee injury" as a reference to the knee strain and we will likewise agree with that interpretation. A carrier that wishes to assert that a preexisting condition is the sole cause of an incapacity has the burden of proving this. 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. In this case, the hearing officer believed that the strain was a producing cause of her inability to work and, given that the claimant already had an infirm knee, he could well believe that the effects of such an injury would last longer than a strain in a sound person. Although different inferences could be drawn, we cannot agree that those drawn by the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust.

Finally, we do not agree that there was error in admission of evidence. Chapter 410 of the Texas Labor Code sets up a more informal process of adjudication of workers' compensation disputes. Section 410.165(a) provides that conformity to legal rules of evidence is not necessarily in the CCH. Section 410.165(b) states that the hearing officer "shall" accept all written reports signed by a health care provider. Where there are reports that have not been signed, the hearing officer has the discretion to admit records that appear to be authentic medical records. We agree with responses made at the CCH by the claimant, that the objections made by carrier 2 to her evidence went more to the weight than to the admissibility in these proceedings. We cannot agree that the hearing officer erred by admitting these records or similar records tendered by carrier 1 and objected to for similar reasons.

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). In this case, having found no reversible error or great weight against the decision and order of the hearing officer, we affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge