APPEAL NO. 000609

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 March 1, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, by aggravation to his back and that the claimant had disability beginning on August 3, 1999, and continuing through the date of the CCH.

The appellant (carrier) has appealed. The carrier recites factual discrepancies and contradictions in the evidence, finding significant the fact that the claimant merely estimated how heavy the trash bags were that he lifted and contended caused injury or that he did not immediately report his injury when he called to report that his trash truck broke down. The carrier further argues that the claimant had a preexisting condition, including chronic back problems, for years. The carrier argues that the hearing officer was not impartial when she "cross-examined" the expert witness provided by the carrier. It further argues that no testimony was elicited tracing the injury to a specific time and place. The carrier also argues that there has been no compensable disability. The carrier does not address the hearing officer's determination that the claimant had an injury by aggravation, except to argue that the claimant had only subjective pain. The claimant responds by reciting evidence in favor of the decision and asks that it be affirmed.

DECISION

We affirm the hearing officer's decision.

The claimant stated that he had been involved in trash collection for a number of years and since 1998 with (employer). He was a front-end loader driver; this was a garbage truck that raises dumpsters on double prongs at the front of the truck and raises them overhead to dump the contents.

The claimant said that he reported for work around 11:00 p.m. on (day before the date of injury); his sixth stop was (a fast food restaurant) where he admitted he had not been able to pick up trash at an earlier scheduled time due to construction work and concrete abutments that blocked access to its dumpster. As a result, the garbage was overflowing and there were several bags that could not fit into the dumpster right away.

The claimant said that with the assistance of the restaurant employees who were closing down for the night, he was able to pitch several garbage bags in the area into the dumpster after it was initially dumped and emptied. He said that this happened at around 1:00 to 2:00 a.m. on _____. He estimated that the dumpster was filled an additional two times to clear out all the trash. The claimant estimated that the 55-gallon trash bags weighed from 50 to 80 pounds and he would pitch them in by twisting and

throwing them upward to clear the edge of the dumpster. The claimant said that in the course of this activity, he began to feel pain in his right hip, down his right leg to his ankle.

The claimant completed this job and then as he drove toward another customer, his truck broke down. The claimant called his supervisor, Mr. B, and reported that his truck broke down. He agreed that he did not report his injury, but also contended that this was due to the fact that he did not realize the nature of his injury until he saw his family doctor, Dr. B, on August 3rd. He was taken off work for two days and an MRI was also done that day. The MRI reported Grade I spondylolisthesis at L5-S1 encroaching upon exiting nerve roots bilaterally. There was a mild central disc bulge at L4-5 and evidence of disc dessication at these levels.

The claimant denied ever being treated for back problems before or even experiencing back pain prior to _____. If there were statements to the contrary in any doctor's reports, he maintained he did not know why such information would be recorded.

The claimant reported his injury to his employer at least by August 4th; this was the date his supervisor, Mr. B, stated that the claimant told him about injuring his back while lifting trash at the fast food restaurant. Mr. B said he did not regard this report as anything unusual, even though the claimant had not reported it when he called in the broken-down truck, because such things happened all the time. Mr. B, who said he had known the claimant for 12 years in other jobs as well as the one for the employer and found him to be a good and hard worker, agreed that trash bags such as the ones typically left around dumpsters would weigh 50 or more pounds. Mr. B said that the claimant had told him on one occasion that he sustained a back injury while working for another employer. He said that nothing more was said about this and that the topic arose in a general discussion about aches and pains. Mr. B said that the claimant seldom missed work and did not even take vacations, which was consistent with the claimant's own testimony.

However, the fast food restaurant manager, Ms. C, testified telephonically and was adamant that she did not see the claimant assist with throwing trash into the dumpsters. She said that she and four of her workers who were still there closing up the restaurant did this and went outside after they heard the garbage truck drive up. Ms. C said she had a conversation with the claimant, who got out of the truck, concerning the fact that he would only pick up what was contained in the dumpster and that the dumpsters would have to be refilled to clear out the trash that had built up. She said he waited for the employees to do this. Ms. C also estimated that the large garbage bags would weigh 20 pounds at most.

The claimant returned to work on August 5th but then left after three more days when he began to hemorrhage in reaction to pain medication. He said he was referred by Dr. B to Dr. K. Dr. K's August 11th report begins:

> [Claimant] is a 45 year old male with a several year history of pain in the lower portion of his back and primarily radiating down his right thigh. He has been able to tolerate this fairly well until one week ago when he started having more pain in his back with exacerbation.

An August 16th treatment note is essentially illegible and was not deciphered during the CCH. Words that can be read appear to be: "mild chronic LBP but acute [illegible] while working" and there appears to be a reference to a preemployment back x-ray that the claimant had. This x-ray was done June 1, 1998, and reported only Grade I spondylolisthesis at L5-S1 with reactive bony changes. Dr. B diagnosed spondylolisthesis with radiculopathy, "DDD & L Spine" and scoliosis of the lumbar spine.

The claimant had surgery for Grade II spondylolisthesis on October 22, 1999. Because the claim was contested, it was paid for through the claimant's private insurance. His treating doctor at the time, Dr. F, wrote in November 1999 that the claimant's degenerative changes were completely within normal limits. He felt that the claimant's back problems that he treated were a work-related injury based on lifting trash bags on _____.

A radiologist, Dr. S, testified at the CCH for the carrier. He indicated that the MRI conditions did not show evidence of recent injury. He stated that, within reasonable medical probability, the MRI did not show injury. However, asked by the hearing officer after direct and cross-examination as to whether he was testifying that the claimant did not have an injury within a reasonable medical probability, Dr. S stated that this was not his testimony and that he was only assessing the MRI. However, he also testified as to the following: that degenerative disease and/or spondylolisthesis could be asymptomatic for years and become symptomatic after a traumatic incident; that twisting and lifting could cause symptoms; and that there could be changes caused by such an incident which would lead to radicular symptoms developing and which would not be evident absent an MRI taken at an earlier time.

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). 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.

It appears that the hearing officer believed that the claimant had a preexisting condition; however, this did not foreclose injury occurring as the claimant said that it did. The carrier's own witness, Dr. S, gave supportive testimony that asymptomatic spondylolisthesis could become symptomatic after an incident such as the claimant described and that radicular symptoms could thereafter be manifested. Although the claimant could not recall exactly when during the trash collection at the fast food restaurant that he injured his back, it is clear that the hearing officer believed that the claimant sustained an injury at some point during this identifiable episode. This would fulfill the requirement of a time and date certain for a specific injury. *See* Hartford Accident and Indemnity Company v. Contreras, 498 S.W.2d 419 (Tex. Civ. App.-Houston [1st Dist.] 1973, writ ref'd n.r.e.). He need not remember the actual bag that caused the pain to occur.

We have reviewed the testimony and simply cannot agree that the hearing officer's questioning of Dr. S amounted in any way to "cross-examination." She made neutral requests for facts, none of which suggested answers to the witness, and the fact that the carrier may now view Dr. S's impartial answers as favorable to the claimant's cause does not equate to bias or prejudice on the part of the hearing officer. The hearing officer is to ensure full development of the facts required for the determinations to be made. Section 410.163(b).

The carrier oversimplifies the testimony of Dr. S in its appeal when it states that he indicated, based on reasonable medical probability, that the claimant did not have an injury. Dr. S was clear and careful to state that he was testifying as a radiologist and that it was the MRI that did not indicate a recent injury. He refused to globally state, one way or the other, whether the claimant had or did not have an injury and, in fact, agreed that an injury could have occurred that would not be manifested on the MRI; he said that it could not be ruled out for certain that a change had occurred without an MRI prior to August 3, 1999.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We find that her decision that an injury occurred is sufficiently supported and, because the claimant was off of work due to this injury and subsequent surgery, the disability determination is likewise supported. We affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge