APPEAL NO. 000697

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 6, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and therefore did not have disability. Further, the hearing officer found that the respondent (self-insured) had not waived the right to dispute compensability and had newly discovered evidence upon which to reopen the issue of compensability. In so holding, the hearing officer held that the self-insured "could not have reasonably learned of the claimant's inconsistent activities at a flea market at an earlier date." There are no dates found in any of the facts except for that of the claimed injury.

Both parties have filed long briefs in support of their appeal and response. The claimant appeals and argues that the self-insured plainly waived the right to dispute compensability, and did not have newly discovered evidence that it could not have moved to develop or discover within the initial 60-day period. The claimant also protests the finding of the hearing officer that claimant did not fall as he stated, pointing out that the self-insured never disputed that claimant fell, only that he did not have an aggravated injury therefrom. The claimant argues medical evidence in favor of finding that an injury resulted and that his earlier back injury became worse after _____. The claimant argues that the evidence strongly proves he was unable to work due to his injury. The self-insured asserts that claimant encountered nothing more than a "recurrence" of symptoms from his underlying degenerative disc disease. The self-insured argues against cases cited by the claimant in support of the contention that there was no "newly discovered" evidence, and states that the fact finding of the hearing officer in this regard should be accorded deference. The self-insured asserts that it could not have defended against the claim based upon the videotape alone.

DECISION

We affirm the determination of the hearing officer with respect to the issue of disability. We reverse the determinations that the claimant did not sustain a compensable injury on _____, and that the self-insured had newly discovered evidence upon which to reopen compensability of the claim. We render a decision that the self-insured, having failed to dispute compensability of the claimed injury within 60 days after it had written notice of that injury, waived the right to dispute the compensability of the injury. We render a decision that the dispute to compensability having been waived, the claimant's documented injury is compensable.

All dates are 1999 unless otherwise stated. The claimant was employed (employer). He said that he had a prior back injury on _____, for which the self-insured was also responsible. His treating doctor was the company doctor, Dr. S. Claimant said that this was the doctor who treated work-related injuries, and that it was not permitted for him to go to his own family doctor. However, he also testified that his family doctor had died. Claimant had an MRI on February 17, 1999, which showed that he had multiple bulging discs. The report of the test done that day shows minimal protrusions at L2-3, L4-5, and L5-S1. There was mild

central stenosis at L4-5 due to slight anterior subluxation of L4 on L5. The claimant lost no time from work due to his _____ injury.

The claimant reported for work at 11:00 p.m. on _____. Around 4:00 a.m., as he was passing from the warehouse area, he went to open a heavy sliding door. He said his hand slipped off the knob and he fell backwards, striking both a water cooler and bicycle located behind him. A coworker who was 20 feet away, apparently did not see this happen. The claimant said that there was a security camera in the area and that the tapes had been requested but not produced. He did not know if his attorney had tried to obtain a subpoena.

The claimant testified, and the record shows, that he was taken to the emergency room of a local hospital where he was admitted at 4:57 a.m. The admission form shows that this was with respect to a _____ "occurrence." He was discharged by Dr. H, whose diagnosis was "exacerbation of back pain by fall." The claimant was put on strict rest for two days and advised to see Dr. S, who would make the determination for him to return to work. Dr. S's treatment notes from June 30th are made in two different handwritings. One handwriting records that claimant was there on follow-up for his multiple bulging discs from _____. However, the other handwriting records that claimant had neck and thoracic pain when he "fell" two days ago. The claimant was diagnosed with degenerative disc disease, and scheduled for a second opinion. Another note from that date states that the claimant was also seen on follow-up for an _____ wrist injury, and certified at maximum medical improvement (MMI) with a zero percent impairment rating (IR) for that injury.

The claimant said that when he went in to see Dr. S, the nurse wrote up a report of his injury but Dr. S angrily wadded it up and threw it away and said that there was no new injury and he continued to treat him under the _____ injury. The claimant was kept off work by Dr. S. Dr. S appears to have essentially treated claimant with medication and referred him for chiropractic adjustments on August 4th.

The medical records show that claimant was seen by Dr. S or other doctors from February through June up to 10 days before the _____ injury. The claimant was seen by another doctor at Dr. S's clinic on June 18th on a follow-up to his earlier back injury. The handwriting on this report is essentially undecipherable and was not "decoded" for purposes of the CCH. The claimant is noted as having a two-level bulging lumbar disc and there is also a word that may say "inflammation." A June 7th report recorded a pain level of 10 out of 10.

On July 26th, Dr. S wrote that claimant was not at MMI and in fact had never been at MMI. This letter does not list a date of injury, but does indicate that analysis of claimant's multiple bulging discs is ongoing. Claimant went through the second opinion process for spinal surgery. The initial recommendation for surgery was made by referral doctor Dr. O, who ordered a CT scan/myelogram of the spine on August 10th which was reported as showing moderate to severe stenosis at L4-5, with an undoubted impingement on the nerve root at L5. The report said that the changes were the result of severe hypertrophic degeneration in the

facet joints at L4-5 and L5-S1. No significant bulging was demonstrated at any other level. Another doctor concurred with Dr. O's surgical recommendation, although the test of his concurrence is not in evidence. After he reviewed the videotape, Dr. S released claimant back to full-duty work effective October 1st.

The file includes a brief note from (a private investigation firm) that the firm was asked on July 23rd to go out to a flea market and look for the claimant. The claimant agreed that he assisted his wife on occasion when she sold at the monthly "first Monday" flea markets at (city), Texas. He said that he attended both the August and September markets. However, surveillance was not undertaken until September 5th for reasons never explained in the record. Although there was argument, there was no evidence as to why a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) was not filed by the self-insured until October 8th. This TWCC-21 disputed the claim for reasons that claimant had an ordinary disease of life and a preexisting condition and that he did not sustain a new injury on _____. The TWCC-21 records _____ as the date written notice of injury was first received. A peer review is referenced as "attached" but one is not attached to the TWCC-21 in evidence.

This is likely a reference to a peer review report generated by two doctors at (a healthcare management firm). This report noted that Dr. B certified claimant to be at MMI on June 14th with a zero percent IR. The account of the _____ incident is different than in other records--it states that claimant was injured when he pulled a guard off a belt drive. The claimant said he never talked to either of the two doctors and did not therefore furnish this account of the accident. It is clear throughout the report that the peer review doctors believed that the _____ incident was a "lifting" incident. In concluding that there had been no "real" change in claimant's condition after _____ and that he suffered from an ongoing degenerative disease, the peer review doctors recited claimant=s medical records which were in existence prior to August 28th (the 60th day after written notice of injury was received). The videotape is only commented upon with respect to claimant's functional abilities, with the peer review doctors concluding that there was no evidence of pain or functional limitations in the tape. The doctors do not state that the videotape activities are inconsistent with the occurrence of an injury.

WHETHER THE SELF-INSURED COULD REOPEN COMPENSABILITY BASED UPON NEWLY DISCOVERED EVIDENCE

It is clear from the argument at the CCH, and the hearing officer's decision, that the videotape was what was primarily cast as "newly discovered evidence." The self-insured's attorney argued that the self-insured had not disputed that the fall occurred as asserted by the claimant so there was no basis, prior to a purported rumor of claimant's work at a flea market, for disputing the claim. The self-insured also asserted that it would have been bad faith to dispute the claim without a peer review report and that an adjuster would have been without the power to do so absent this sort of support. We cannot agree.

Presupposing that the peer review report was the operative document required by the self-insured to file its dispute, it is clear from even a cursory reading of that report that the conclusion that there was no injurious incident on _____ is based almost entirely on claimant's medical records that existed prior to that date or within 60 days of that date and were readily available to the self-insured, as it was also the self-insured for the _____ injury. There is nothing to indicate that the outcome of this report would have been different had the peer review doctors not had the videotape alone with the medical records.

Even assuming that the claimant's attendance at the flea market was deemed relevant to occurrence of an injury as opposed to disability, the self-insured, which had the burden of proof to show newly discovered evidence, presented no witnesses or affidavits to support its argument that surveillance would have been impossible to obtain prior to September 5th. Although the hearing officer recites in his discussion that surveillance was done at the "next available" flea market, this was apparently not so. The claimant testified that he was present at the August market. The significance of filming the claimant at a flea market, as opposed to undertaking surveillance of his other activities prior to September 5th, was not explained.

In short, the self-insured did not file a dispute to the compensability of the _____ injury until October 8, 1999, well beyond the initial 60-day period, and consequently waived its right to dispute compensability in accordance with Section 409.021(c). The only basis upon which the issue of compensability could be revisited was upon a finding of newly discovered evidence that could not reasonably have been discovered earlier. Section 409.021(d). The fruits of a deferred investigation do not constitute "newly discovered" evidence for reopening compensability. Texas Workers' Compensation Commission Appeal No. 992365, decided December 6, 1999; Texas Workers' Compensation Commission Appeal No. 991681, decided September 22, 1999 (Unpublished); Texas Workers' Compensation Commission Appeal No. 962210, decided December 18, 1996 (Unpublished). Because the medical information upon which the peer reviewers based their opinion that claimant's condition was preexisting was available to the self-insured within the initial 60-day period, we cannot agree that their ultimate report constitutes "newly discovered" evidence. The hearing officer's Findings of Fact Nos. 7 through 12 reciting that the videotape is the newly discovered evidence, that it was obtained by the self-insured "as soon as it could," and that it could not have been reasonably obtained earlier, are against the great weight and preponderance of the evidence, and are reversed. We render a decision that the self-insured did not timely file its TWCC-21 and that its untimely filing of October 8th was not based upon newly discovered evidence of a preexisting condition or ordinary disease of life (the substance of its dispute) which could not have been reasonably discovered earlier.

WHETHER THE CLAIMANT HAS A COMPENSABLE INJURY

Within an hour after his fall at work, the claimant was treated at an emergency room where a history of falling is recorded, and his medical records (except those of the peer review doctors erroneously portraying the incident as a lifting incident) consistently record a fall. His post _____ testing shows a markedly worse condition than that following his _____ injury when he lost no time from work and was certified with a zero percent IR. As we have stated, aggravation of a preexisting condition constitutes 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).

While a reasonable evaluation of this evidence would point toward a finding in favor of injury, we need not discuss the weight of the evidence further, because the self-insured has waived the right to dispute compensability and the back injury therefore became compensable. As stated in Appeal No. 992365, *supra*:

> The hearing officer found that the dispute was filed by the carrier beyond 60 days after it received written notice of injury, and stated that if there was "an injury," then waiver would apply. She found that there was no "injury," and that, by virtue of [Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.)], there would be no waiver of a noninjury into existence. Because we cannot agree there is "no" evidence of physical damage or harm to the body, *i.e.*, an "injury," as were the facts in the Williamson case, we cannot agree that this case applies to relieve the carrier in this case from the apparent effects of deferred investigation of the facts of this claim. Section 409.021(c) is unequivocal on the consequences of the failure to raise defenses to the occurrence of an injury within 60 days after notice of injury is received. We decline to expand the Williamson case into situations where there was plain evidence of an injury, but carrier asserts that it was not "compensable." This would effectively write Section 409.021 out of existence.

Likewise, we hold here that the claimant's back injury asserted for _____ is compensable, and reverse the hearing officer's findings of fact and conclusions of law which hold that there was no compensable injury.

DID THE CLAIMANT HAVE DISABILITY

Temporary income benefits are due when an injured worker has not reached MMI and has a disability. Section 408.101(a). 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." If the videotape is pertinent to anything, it goes to whether the compensable injury resulted in the inability to obtain and retain employment equivalent to the claimant's preinjury average weekly wage. He was taken off work during much of the period by Dr. S and put back to work by Dr. S on October 1st. Because an injured worker may move in and out of

disability, the right to assert that disability has ended is not precluded by the 60-day period set out in Section 409.021.

The videotape shows the claimant unpacking boxes of lightweight action figures, sitting for long periods of time at the booth, and then packing up. At one point, he walks around his booth with the aid of a cane, and appears to duck with some stiffness under a rope. He then packs up the booth along with some adult males who did most of the lifting of large or obviously heavy objects. The "heavy cooler" described in the hearing officer's accounting of this videotape is a smaller-sized cooler. The auto parts that the hearing officer stated were lifted may be references to three hubcaps that claimant bent down and moved with one hand, and one grill-like piece that had a handle on top and did not entail stooping to lift.

However, while observers may differ as to how heavy claimant's overall lifting activities were, the claimant does bend down to pick up objects off the ground several times and does not appear to be experiencing 10 out of 10 pain as reported to Dr. S. He also bends down to lift and carry five "two by four" pieces of wood. The claimant also lifts and carries one board used as a table top that appears to be about seven feet long and three feet wide and stands it against the side of his trailer. He reaches overhead frequently in the course of taking down canopies and supporting poles (referred to by claimant as a "tent") at the end of the selling period. In short, a finder of fact could find these activities consistent with the ability to work. We affirm the hearing officer's determination as to disability as supported by the record and not against the great weight and preponderance of the evidence. We reverse the determinations that the claimant did not sustain a compensable injury on _____, and that the self-insured had newly discovered evidence upon which to reopen compensability of the claim. We render a decision that the self-insured, having failed to dispute compensability of the claimed injury within 60 days after it had written notice of that injury, waived the right to dispute the compensability of the injury. We render a decision that the dispute to compensability having been waived, the claimant's documented injury is compensable.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

CONCURRING AND DISSENTING OPINION

I respectfully dissent from the decision reversing the findings of fact and conclusions of law that the self-insured=s contest of compensability was based on newly discovered evidence that could not reasonably have been discovered at an earlier date and that the claimant did not sustain a compensable injury on _____. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). An appeals level body is not a fact finder, and it does not normally 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). While the evidence would support determinations that the self-insured did not timely contest the compensability of the claimed injury because it did not do so on or before August 28, 1999, in my opinion, the hearing officer=s determinations concerning newly discovered evidence are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King=s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). I would affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge