APPEAL NO. 000733

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 14, 2000. The hearing officer determined that respondent=s (claimant) _____, compensable injury is a producing cause of his bilateral avascular necrosis, and flattening or collapse of the femoral heads; that the claimant=s July 15, 1998, compensable injury is also a producing cause of his bilateral avascular necrosis, and flattening or collapse of the femoral heads; that appellant (carrier) did not waive the right to contest compensability of the bilateral avascular necrosis, and flattening or collapse of the femoral heads by not contesting compensability within 60 days of being notified of those disorders; and that regarding the _____, injury, the first certification of maximum medical improvement (MMI) and impairment rating (IR) by Dr. M on March 28, 1998, became final under Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.5(e) (Rule 130.5(e)). The carrier appealed, arguing that the claimant failed to prove an aggravation to his preexisting avascular necrosis condition through either injury. The carrier asserts that the ordinary degenerative process of avascular necrosis is "well known" and that the claimant merely experienced the course of this disease. The claimant responded that the decision of the hearing officer is well supported in the evidence. There is no appeal of either the first IR finality determination or the holding that the carrier did not waive the right to dispute compensability.

DECISION

We affirm the hearing officer's decision.

The claimant was employed by (employer) performing masonry work. There were two occurrences at work that he described as bringing on his pain and injury. The first, on _____, involved handing cinder blocks from scaffold to scaffold to prepare for bricklayers. He said that when he went to lift one block, he felt pain in his left leg and hip, such that he was sent by his employer to the (clinic). He was given some medication, and he returned to work. The claimant said he had felt a pop in that area, and therefore did not agree with the doctor's assessment that he had a pinched nerve.

The claimant said that while the pain did not go away, the medication allowed him to tolerate it. The claimant said that it was recommended that he be on light duty but he continued to do his regular job as there was no light duty in masonry work. On _____, he slipped and fell on some rock, landing on his left hip. He was sent again to the (clinic). The claimant described his pain at this time as unbearable.

The claimant understood from the doctor at the clinic that his hip was collapsed. His left leg was shorter than the other and he had difficulty walking. The claimant said he last worked on the last Friday of September 1999.

The claimant had surgery in August 1997 to remove a tumor from his back. He said that he was given steroids after that surgery, but no one ever discussed with him a relationship between that medication and his current hip problems. The claimant went to work for the employer around October 1997 and had no problems with his hip prior to the March 18th lifting incident. On cross-examination, the claimant stated that it was primarily his left hip bothering him and he had no problems with his right hip. To the extent there was evidence indicating complaints of right extremity pain, he said that these were wrong.

The claimant's supervisor, Mr. M, said that he did not recall what hip claimant injured, but that the employer's report of injury had noted right hip for the _____ injury, and the left hip for the ____ incident. Mr. M said that the claimant always walked with a limp, favoring his right side. However, he said that claimant's ability to work was not affected prior to March 1998. He stopped working with claimant shortly before the second incident.

The adjuster for the carrier, Ms. C, testified that the first claim for _____, was a right hip and leg injury, treated as a "medical only" claim by the carrier and closed in April 1998. The _____ injury was for a left hip and leg injury, which was also treated as a medical only claim. Ms. C said she was a "lost time" adjuster, and began handling claimant's claim in May 1999. Ms. C was asked if she understood that avascular necrosis could be worsened or become symptomatic because of work and she agreed that it could. However, she said that she would have to rely on medical evidence to know if that happened.

The doctor who treated the claimant at the clinic for the _____ injury was Dr. C. On January 31, 2000, Dr. C wrote a long letter analyzing the extent of the claimant's preexisting illness and whether it was aggravated by the incidents at work. Dr. C first evaluated claimant in August 1998. He commented on the poor quality of x-rays that claimant had from the clinic on July 3, 1998, but he noted that there was no collapse of the head at this time (prior to the second injury). Dr. C said that by the time he saw claimant in August 1998, he was clearly undergoing progressive collapse and loss of sphericity in the femoral head.

Dr. C said that if steroids were the cause of avascular necrosis, he would have thought that there would have been a manifestation on these x-rays. However, Dr. C noted that because claimant had bilateral involvement, it was reasonable to assume that steroids were a causative factor in the development of the disease. Dr. C said that the stress of the _____ lifting incident could cause a sudden microfracturing of the femoral head, as could the stress from a fall in _____. He said that the collapse was "definitely related" from the standpoint of an aggravation, with the lifting incident causing microfracturing and the fall being "the proverbial straw that breaks the camel's back." He said that two incidents to the left hip would explain why the left hip was worse than the right. Dr. C said that claimant's collapse on the right, compared to the left, was minimal, but the work-related injuries were certainly causal factors in the progressive collapse. Answers to written interrogatories are corroborative of Dr. C's opinion.

A doctor for the carrier, Dr. B, noted that there was "no explanation" as to why the left hip was worse than the right and had advanced more rapidly. Dr. B agreed that there were microfractures that occurred around the time of the _____ incident when the disease first "manifested itself." He said that the steroids given to the claimant after his spine surgery were the underlying cause of the aseptic necrosis in claimant's hips.

There was no evidence submitted, aside from that discussed above, that generally commented what the course of avascular necrosis might be irrespective of the injuries sustained by the claimant. In his opening statement, the carrier's attorney described the claimant as the "classic eggshell plaintiff." This description gets to the heart of workers' compensation case law on "aggravation" as it has been developed. 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 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.

In short, whether the incidents described by the claimant would have hurt a sound person is not the measure of the carrier's liability. The hearing officer had to determine whether this claimant, with his preexisting hip disease, was further injured.

The carrier states throughout its appeal that the course of avascular necrosis, or the effects of steroids, is within common knowledge. We disagree that either aspect of this case involves that which would be readily know to a lay person. In fact, carrier's own adjuster, Ms. C, a lay person, testified that she generally understood that avascular necrosis could be aggravated through work, but that she would need to rely on medical evidence in assessing whether that had occurred. To the extent that the carrier sought to rely on the effect of steroids or the ordinary course of avascular necrosis, it was required to prove this through medical evidence as matters beyond common experience. *See* Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980); Texas Workers' Compensation Commission Appeal No. 941563, decided January 5, 1995; Texas Workers' Compensation Commission Appeal No. 960678, decided May 17, 1996; Texas Workers' Compensation Commission Appeal No. 991117, decided July 8, 1999.

While the evidence for the right hip is not as strong as that presented for an aggravation injury to the left hip, Dr. C's letter does indicate a bilateral effect. His opinion presents

sufficient medical evidence upon which the hearing officer could find that the claimant met his burden of proving an aggravation. The burden then shifted to the carrier to prove that claimant's condition developed solely from the ordinary course of a degenerative disease, unaffected by the two incidents described. The hearing officer could believe that Dr. B's opinion fails to address this, as opposed to attempting to identify the original cause of avascular necrosis. The carrier's invocation in its appeal of "common knowledge" as to the course of avascular necrosis, without citation to the record, is tacit admission of the dearth of medical evidence presented on this point.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We therefore affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge