APPEAL NO. 000913

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 February 17, 2000. The hearing was held on remand of a previous decision by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 992764, decided January 24, 2000. In that decision, the Appeals Panel found that certain evidence had been admitted in error by the hearing officer and should have been excluded because it was not timely exchanged. The Appeals Panel further noted that an issue over whether respondent's (claimant) lumbar spine injury of herniated discs was part of his lumbar injury that occurred in _____ or resulted from an earlier _____ injury had been somewhat miscast as a 60-day "waiver" issue under Section 409.021(c), but was instead an attempt by the appellant (carrier) to reopen the lumbar injury under Section 409.021(d) based upon newly discovered evidence.

The hearing officer reopened the hearing and the record over objection by the carrier. The hearing officer determined that the claimant's herniated discs were part of his _____, slip-and-fall injury; that the carrier had timely disputed the cervical injury, but that the carrier had not shown that its dispute of the lumbar condition was based upon newly discovered evidence that could not reasonably have been discovered earlier.

The carrier has appealed. It argues that the hearing officer abused his discretion in holding another evidentiary hearing on remand and that this went beyond the direction of the Appeals Panel. The carrier further argues that the lumbar herniated discs are a continuation of a _____ injury and that the claimant did not prove that his _____ fall was a "producing cause" of the lumbar condition. The carrier argues that there is no evidence of a cervical "injury." The carrier argues that the hearing officer abused his discretion in admitting two documents that were discussed at the benefit review conference (BRC) but not subsequently exchanged. Lastly, the carrier asserts that it had the basis to reopen the lumbar injury, but then argues this in terms of when it received first written notice of that injury and argues that it reacted within 60 days of that document. The claimant has responded, and urges that there was no reversible error by the hearing officer in admission of two pages of an exhibit that was discussed at the BRC. The claimant urges that the decision is supported by the evidence of record. On the matter of reopening, the claimant points out that Section 409.021(d) does not automatically grant an additional 60 days to seek a reopening of the case.

DECISION

We affirm the hearing officer's decision.

We will repeat some of the factual discussion from our previous decision. As we noted previously, the claimant in this case had a previous work-related back injury on _____, while working for (employer), a meat packing company. This resulted in lumbar surgery on October 29, 1992. The claimant was off work for about five months and then returned. There are references to him having received 19% and 16% impairment

ratings. Although claimant testified that he had no problems after his last surgery until the date of his _____ accident, medical records indicated that he began to have problems again in late 1993. A spinal myelogram from June 8, 1993, showed a mild bulge at L3-4, a laminectomy defect at L4-5, and no other significant findings noted. An MRI with contrast two weeks later reported a small midline herniation at L3-4.

In 1994 Dr. P recommended further surgery. Dr. P reported on October 24, 1994, that another myelogram showed an anterior defect at L3-4 and deformity of the nerve root at that level with stenosis. He further recorded that he called and spoke to claimant's wife, urging that claimant needed a decompression at L3-4. On November 17, 1994, a woman associated with Dr. P wrote to the claimant and told him that surgery was agreeable to a second opinion doctor and he should call Dr. P to schedule surgery. (The concurring opinion from the second opinion doctor is also in evidence and he characterized the L3-4 problem as a herniated disc.) Dr. P's notes show that he called the adjusting firm on December 6, 1994, "re later date of injury" but apparently no later injury had been reported. On December 6, 1994, he noted that claimant refused to have surgery because he would not receive any benefits from workers' compensation. Another note on March 24, 1995, noted that claimant declined surgery because he was ineligible for further impairment income benefits and therefore had to work.

The injury in question here occurred on _____. The claimant still worked for the same employer, and was in charge of "washing heads" with a high pressure hose. He was standing on a raised steel platform performing his job when he slipped and fell backwards. His treating doctor was still Dr. P. Dr. P's notes of August 25, 1998, record that claimant had difficulty on examination with flexion and extension of his neck as well as lumbar flexion, that he had positive sitting sciatica, spasm in the paravertebral lumbar muscles bilaterally, and that he had thoracic pain which might result from a herniated disc. Dr. P recommended MRIs of both regions, and noted that x-rays taken that day showed some narrowing at C5-6 and L5-S1. Dr. P also noted claimant's previous history of an injury in _____ and surgery. The x-rays showed his hemi-laminectomies at L5-S1. At the claimant's follow-up visit on September 8, 1998, it was noted that he continued to complain of low back and right sciatic pain as well as neck pain and pain into the right shoulder. He continued to have marked limitation on lumbar flexion. Dr. P continued to recommend MRI testing.

As noted in the original opinion, the employer filed its Employer's First Report of Injury or Illness (TWCC-1) on August 25, 1998, and characterized the injury as a lumbar sprain. The doctor listed is not Dr. P. There was no evidence that any Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) was filed by the carrier responsive to this report. The carrier did not assert or prove that it did not receive the TWCC-1 shortly after it was completed.

A lumbar MRI report of September 14, 1998, found no evidence of recurrent herniation at L5-S1, a defect compatible with a recurrent herniation at L4-5, and a central disc herniation at L3-4 superimposed on a broad spondylitis bulge.

The May 28, 1999, TWCC-21 filed by the carrier disputes claimant's "entire back and left leg" and rises an untimely notice defense, a sole cause defense (preexisting condition) and an intervening injury defense. Nowhere does this form dispute only an "extent" of the injury to a diagnosis of herniation or identify any newly discovered evidence as a basis for reopening the claim. As noted in our earlier decision, the claimant testified that he received three injections to his neck but had had no further treatment for that area.

A Recommendation for Spinal Surgery (TWCC-63) shows that the carrier is the adjusting firm, with Ms. C listed as the adjuster, and the _____ date of injury is used. There is a letter from Ms. C to the Texas Workers' Compensation Commission (Commission) dated January 5, 1999, conveying a choice of a second opinion doctor. Both the _____ and _____ injuries and claim numbers are at the top of the letter. The carrier for whom Ms. C was writing the letter is not identified. Ms. C stated that there was a discrepancy on the TWCC-63 and claimant had two back injuries and she was therefore submitting her second opinion forms to reflect both injury dates and claim numbers and to preserve a right to a second opinion on both. An affidavit from this same adjuster identified her as the "custodian of records" for the claimant's records and is written with the style of this case at the top, with the appellant/carrier's name. The affidavit states that the first written notice of a neck injury relating to the _____ injury was in a record which has been excluded from this record, and goes on to describe a brief summary of events and surgical recommendations relating to the _____ injury and time period thereafter.

The carrier at the CCH objected to the second opinion reports for this surgery, but there was presumably at least one concurrence as claimant was admitted for surgery on June 11, 1999; a report by Dr. PK stated he would perform an L4-5, L3-4 exploration with probable interbody fusion and instrumentation.

Further light on the events leading to surgery is shed by a decision and order issued April 15, 1999, holding that the second spinal opinion process was not ripe. Apparently, the hearing officer agreed with the assertion by the carrier that it had not been given the opportunity for a second opinion because the Commission's Medical Review Division had identified the wrong carrier in processing the request. There are no records indicating the name of the carrier that was deemed to be the "wrong" carrier or the entity for whom the adjuster was acting in January 1999 when she requested a second opinion.

WHETHER THE HEARING OFFICER ERRED IN FINDING THAT CLAIMANT HAD A CERVICAL AND LUMBAR INJURY (INCLUDING HIS HERNIATED DISCS) ON _____.

We affirm the hearing officer's decision that the claimant sustained a neck injury and lumbar injury when he slipped and fell on _____. Regarding the neck, there need not be an objective defect on an objective test for the hearing officer to be persuaded that there has been a soft tissue injury or a strain or sprain. Well before the date that the adjuster contends constituted a first report of a cervical injury, the claimant complained of

neck pain immediately following his slip and fall. The hearing officer's decision is sufficiently supported.

Although the carrier focuses its argument on whether the _____, slip and fall was a "producing cause" of the herniation, this is not the only basis upon which an injury may be found. Plainly, the claimant had some preexisting problems with his back. He was, however, able to work until after his fall. 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). 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 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.

Although claimant undoubtedly had lumbar problems prior to falling, 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). We are struck that the carrier indicated that the _____ injury should be deemed limited to a lumbar strain only; this stance effectively concedes that the slip and fall caused an injury to the lumbar area. The hearing officer, with support in the record, concluded that the fall was nearly literally "the straw that broke the camel's back." A compensable injury includes enhanced effects that result from the preexisting weakness 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). The carrier here is not liable only for the injury that might have occurred but for the preexisting weakness. 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.

The hearing officer evidently did not agree that the carrier had proved that claimant's enhanced pain and discomfort and limited range of motion, documented in August and September 1998 by Dr. P, amounted to a mere continuation of a prior condition. The hearing officer could draw this conclusion from the medical evidence and the mechanics of the claimant's slip and fall. We cannot agree that he erred in finding that claimant's injury included an enhancement of his lumbar condition or that the previous injury was not the sole cause thereof.

WHETHER THE CARRIER DEMONSTRATED THAT ITS LATE-FILED DISPUTE OF THE LUMBAR INJURY WAS BASED UPON NEWLY DISCOVERED EVIDENCE THAT COULD NOT REASONABLY HAVE BEEN DISCOVERED EARLIER.

Section 409.021(d) provides that a carrier may reopen the issue of compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier. It is important to point out that the carrier in this case did not dispute a particular diagnosis of herniated lumbar discs, although the issue about the scope of the injury was so cast. Rather, the TWCC-21 filed disputed the "entire" back injury, notwithstanding the assertion made by the carrier that it was disputing only the extent.

The carrier's argument does not appear to differentiate between provisions of Section 409.021 which have to do with filing a dispute upon receipt of "written notice of injury" and that provision having to do with reopening the compensability of an injury after the initial 60 days have transpired. In this case, the carrier did not file a TWCC-21 disputing the injury within the 60-day period after receiving the TWCC-1.[1] As our previous decision stated, the TWCC-1 is, by definition, a written notice of injury under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1 (Rule 124.1). This triggers the duty of the carrier to investigate the claim, and it is the investigation which is to yield information not only about how the accident happened but the scope and extent of the injury. Texas Workers' Compensation Commission Appeal No. 971401, decided September 3, 1997. Because of this, the claimant is not limited to the diagnosis of the injury framed by the employer in its TWCC-1. *See* Texas Workers' Compensation Commission Appeal No. 971949, decided November 5, 1997.

We also previously stated that a carrier may not just act as a passive repository of documents and then later dispute an extent of injury or raise a defense that would have been readily apparent within the first 60 days upon timely investigation of the claim. *See* Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993; Texas Workers' Compensation Commission Appeal No. 981489, decided August 17, 1998 (Unpublished).

As in Texas Workers' Compensation Commission Appeal No. 992584, decided January 3, 2000, the carrier here had the obligation to prove that information about a prior back condition could not have been ascertained by it upon prompt investigation of the claim within the first 60 days after the TWCC-1 was received, which, at a minimum, could have included a contact with the employer to find out if claimant had prior injuries. Although the carrier argues that there was no evidence that it received the September 1998 MRI report, this is somewhat academic. The fact is, a number of medical records were in existence from the treating doctor which were readily discoverable by the carrier.

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[1] Although the date of receipt was not clarified, the adjuster's letter of January 5, 2000, certainly makes clear that the _____ claim was well known to the carrier at least by then. Further, the carrier has not asserted that it was not aware of the TWCC-1, but, on the contrary, argues that this document only informed it of a lumbar strain. The hearing officer could conclude that this document had been received by the carrier well before 60 days prior to the May 28, 1999, TWCC-21.

The December 14, 1998, report plainly shows it was mailed to the adjuster for the carrier and it assesses the herniated lumbar discs. There was no reaction to this by the carrier. It is also clear from Ms. C's affidavit that she was the joint "custodian" of claimant's records on both claims, and from her January 5, 1999, letter that she was well aware of both injuries; the existence of a preexisting injury defense was ascertainable well before the TWCC-21 was eventually filed. As in Appeal No. 992584, *supra, cited above*, it was not until spinal surgery was recommended that the carrier activated any dispute to the lumbar injury. We affirm the hearing officer's determination that there was no basis to reopen compensability, although this holding is somewhat moot in light of the hearing officer's substantive findings in favor of the claimant concerning his lumbar injury.

WHETHER THE HEARING OFFICER ERRED IN ADMITTING TWO PAGES OF ONE OF CLAIMANT'S EXHIBITS.

The carrier has raised this point of error a second time. We did not find error in the admission of these two pages and continue to hold that as to the pages discussed at the BRC, there was no abuse of discretion in admitting them at the CCH.

WHETHER THE HEARING OFFICER ERRED IN HOLDING A REMAND HEARING.

We cannot agree that the hearing officer abused his discretion in holding a second hearing. As he pointed out, the carrier had the burden of proof on the clarified issue of reopening of compensability and he wished to afford an opportunity to have evidence presented on this. In any case, we disagree that our remand decision precluded the exercise of the hearing officer's discretion in this matter or limited him to consideration of only argument. We note that Section 410.203(d), calling for priority settings for remand hearings, implies that a hearing on remand is contemplated. We are not inclined to hold our hearing officers in error for choosing to afford more due process than arguably required.

For the reasons stated above, we affirm the decision and order on all appealed points of error.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge