

## APPEAL NO. 000929

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 13, 2000. With respect to the single issue before him, the hearing officer determined that the claimant's compensable injury of \_\_\_\_\_, does not extend to include his diagnosed L4-5 and L5-S1 herniated nucleus pulposus (HNP) after January 1998. In its appeal, the appellant (sub-claimant) contends that the hearing officer's determination is against the great weight of the evidence. In its response to the sub-claimant's appeal, the respondent (carrier) urges affirmance. The claimant did not appear and that hearing and did not respond to a "10-day letter" from the hearing officer offering him the opportunity to appear and present evidence. The claimant also did not participate in the appeal.

### DECISION

Reversed and rendered.

Initially, we note that there is a letter attached to the sub-claimant's appeal from Dr. G, the claimant's treating doctor who is associated with the sub-claimant clinic. Pursuant to Section 410.203, our review is limited to the record developed at the hearing. We have frequently held that a document submitted for the first time on appeal is generally not considered unless it constitutes newly discovered evidence. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to the party's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ); Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993. In this instance, the information in Dr. G's letter was clearly available before the hearing and it was cumulative of other evidence in the record from Dr. G addressing the issue of whether the claimant's compensable injury is a producing cause of his L4-5 and L5-S1 disc herniations. Thus, the evidence does not meet the requirements of newly discovered evidence to warrant a remand for the hearing officer to consider it.

It is undisputed that on \_\_\_\_\_, the claimant sustained a compensable low back injury. On December 14, 1993, the claimant began treating with Dr. G, who has served as the claimant's treating doctor since that date. Dr. G referred the claimant for a lumbar MRI. On January 6, 1994, the claimant underwent a lumbar MRI which revealed a "broad based right posterolateral disc herniation measuring 4 mm" at L4-5 and a "broad based subligamentous disc herniation and posterior osteophyte measuring 3 mm" at L5-S1. Dr. G provided conservative treatment for the claimant's herniations. Dr. G's records from January 6 to July 28, 1994, reflect complaints of intermittent increased low back pain. Dr. G certified that the claimant reached maximum medical improvement on August 15, 1994, with a 12% impairment rating. Dr. G's records reflect that the claimant came in for treatment for increased low back pain on September 27, 1994, November 3, 1994, and

June 29, 1995. There are no additional treatment notes until January 14, 1998, when claimant presented with complaints of increasing back pain and spasm and bilateral leg paresthesias.

In a recorded statement given on March 31, 1998, the claimant stated that in June 1995 he was released to return to work for his \_\_\_\_\_, compensable injury and that he did not seek medical care for his L4-5 and L5-S1 disc herniations in 1996 or 1997. He stated that he was able to work, play volleyball, jog daily and lift weights daily during that time. He stated that his back "bothered him" at times in the period from June 1995 to January 1998, but that it did not require him to seek medical attention. However, he stated that in January 1998, he was throwing horseshoes in his yard at home and he "stepped wrong," causing him to twist his back. The claimant stated that after that incident, "it just flared up the, the same injury."

As noted above, the claimant sought treatment from Dr. G on January 14, 1998, for his increasing symptoms. Dr. G referred the claimant for a second lumbar MRI, which was performed on March 13, 1998. That test demonstrated a 3-4 mm broad based subligamentous disc bulge at L4-5 and a "right paramedian/posterolateral disc protrusion (1+ cm) associated with marked compression of the thecal sac and probable compression of the proximal right S1 root sleeve" at L5-S1. On June 24, 1998, Dr. G performed spinal surgery at L4-5 and L5-S1. The claimant had a good recovery following his surgery and on August 10, 1998, Dr. G released the claimant to work regular duty.

On June 15, 1998, Dr. G wrote a letter addressing the issue of whether the claimant's compensable injury is a producing cause of his disc herniations after January 1998 and correspondingly, whether the incident of injuring his back while throwing horseshoes at home was the sole cause of his herniations. In relevant part, Dr. G stated:

It is my opinion that [claimant] had a progression of his symptoms and pathology from his initial work-related injury dated \_\_\_\_\_. This is a direct consequence and continuation of his previous injury. The episode in question of throwing horseshoes is not the precipitating event. By definition, he sustained injury on \_\_\_\_\_ and has been under continued observation and treatment during that entire time period. Any intermittent aggravations are simply exacerbations from day to day activities which are to be expected in any individual remaining active in life. Again, I feel his progression of the L5-S1 level HNP is a direct consequence to his \_\_\_\_\_ work-related injury. As noted, there has been a progression on his MRI findings as noted.

In a second letter dated January 25, 1999, Dr. G again addressed the issue of whether the claimant's compensable injury is a producing cause of his herniations after January 1998. He stated:

From a physiological and medical standpoint, when a person has degenerative discs at the L4-5 and 5-1 level[s] and suddenly has a final extruded fragment, this is a completion of the natural history of disc disease. To say that this individual is covered initially, and then when the actual herniation is severe is not covered, is morally and ethically incorrect.

The carrier had Dr. C conduct a review of the claimant's medical records. In an April 2, 1998, report, Dr. C stated:

Based on review of the provided records, in my opinion, the current symptoms may be a continuance of his previous compensable injury, or if there is a history of a recent intervening incident at the workplace corresponding to the current symptoms, then this would be considered a new compensable injury. If a recent incident occurred outside of the workplace, then it would seem unrelated to the original compensable injury of \_\_\_\_\_, as it would be considered an exacerbation of an underlying degenerative lumbar spondylosis.

In this instance the hearing officer determined that the "compensable injury of \_\_\_\_\_, does not extend to Claimant's diagnosed L4-5 and L5-S1 [HNPs] after January, 1998." In support of that legal conclusion, the hearing officer made the following fact finding:

#### **FINDINGS OF FACT**

2. There is no causal connection between the compensable injury of \_\_\_\_\_, and Claimant's diagnosed L4-5 and L5-S1 [HNPs] after January 1998, in that the problems after 1998 were caused by the Claimant's twisting his back while playing horseshoes at home in January, 1998.

In making his fact finding, although he did not use the phrase "sole cause," it is apparent that the hearing officer in fact determined that the incident of twisting his back at home while throwing horseshoes was the sole cause of the claimant's low back herniations. It is well-established that the carrier has the burden to prove that a intervening injury is the sole cause of the claimant's current condition. Texas Employers' Ins. Assoc. v. Page, 553 S.W.2d 98 (Tex. 1977). In this instance, the carrier did not present any medical evidence stating that the sole cause of the claimant's disc herniations at L4-5 and L5-S1 was the incident at home in January 1998. At best, Dr. C's letter can only be characterized as expressing an opinion that it is possible that there was an intervening cause of the herniations. The carrier tried to establish its sole cause burden by relying on the differences in the MRIs from 1994 and 1998 and the fact that they revealed that the herniation at L5-S1 increased in size from 3mm to 1 cm or larger. In addition, the carrier relied heavily on the claimant's recorded statement in which he acknowledged that he did not seek medical treatment in the period from June 1995 to January 1998, that he was able

to work in that period, and that he also jogged, lifted weights, and played volleyball. Our review of the record leads to the conclusion that by relying on the claimant's recorded statement and an inference to be drawn by comparing the 1994 and 1998 lumbar MRIs, the carrier has failed to produce sufficient evidence to sustain its burden of proving that the claimant's herniated discs after January 1998 were solely caused by the incident of twisting his back while throwing horseshoes at home. Our conclusion in that regard is buttressed by the evidence from Dr. G which provides that the condition of the claimant's lumbar spine after January 1998 was a "natural progression of his symptoms and pathology from his initial work-related injury" and that it was "a completion of the natural history of disc disease." Our review of the record demonstrates that the hearing officer's determination that the claimant's diagnosed L4-5 and L5-S1 herniations after January 1998 were solely caused by the incident of the claimant's having twisted his back while throwing horseshoes at home is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, we reverse the determination that the claimant's compensable injury of \_\_\_\_\_ does not extend to the herniations diagnosed after January 1998 and render a new decision that the claimant's compensable injury extends to the diagnosed L4-5 and L5-S1 herniations after January 1998.

The hearing officer's decision and order are reversed and a new decision rendered that the compensable injury of \_\_\_\_\_, extends to the diagnosed L4-5 and L5-S1 herniations after January 1998.

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge