APPEAL NO. 000963

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 28, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____; that claimant is not barred from pursuing workers' compensation benefits because of an election of remedies; and that claimant had disability beginning on November 12, 1999, and continuing through the date of the CCH. The appellant (carrier) appealed, arguing that the claimant's back condition results from a long history of back problems and not from any injury at work. The carrier also argues that there was no proof of long-term disability. The claimant responded that the evidence supports the decision. Although claimant also responded to a determination concerning election of remedies, the carrier did not appeal the determination that no election of remedies took place.

DECISION

We affirm the hearing officer's decision.

The claimant, a man in his mid 50s, was employed by (employer) as a road driver for approximately 12 years. He stated that he had been previously injured in _____ and had surgery. He returned to work, working with some pain for about five months as he recovered. The claimant said he had been pain free since about June 1996 except for occasional muscle aches.

The injury in question occurred on _____, a Saturday. The claimant said he parked his truck at the rear end of the terminal at about 4:30 a.m.; as he walked away from the truck through an area he said was poorly lighted at that time, he stepped into a hole and fell into the trailer next to his. He said that his back was jarred by this. Photographs in evidence show the area to be pockmarked with potholes and uneven pavement.

The claimant did not feel immediate pain and went into the dispatch office, filled out his paperwork, and then went home to sleep. The claimant said he had been feeling ill and achy in general so he spent much of the day asleep or in bed. The claimant said he had worked about 70 hours that week.

The claimant said he began having back pain around midnight that night, to the point where he could hardly get out of bed. He said that the nature of the pain was like a knife in the tailbone, driven all the way down to his right ankle. The claimant called his doctor, who suggested that an ambulance should take him to the hospital. He said that ambulance workers asked him if he fell or tripped and he responded that he had at work. He had tests and emergency back surgery on November 12th. He said the surgery was performed at L4-5, the site of previous injuries.

The claimant said he had not been able to return to work since that date. He said that he was currently unable to put on his socks, reach overhead, or even pick up a coffee pot to make coffee.

The claimant said he had fallen three times that year in the lot, but pain had not followed from previous incidents. On cross-examination, the claimant also said that he had a much earlier back injury and surgery in 1982. The claimant disputed that he would have felt immediate pain when he "blew a disc out" after he stumbled, and he pointed out that neither of his previous two injuries had resulted in immediate pain either but he had pain that developed a few days later. The claimant denied anything subsequent to stumbling at work that would have resulted in jarring his back, and he said that his personal vehicle rode "like a Cadillac" and did not cause him to bump around.

Mr. S, a manager of drivers for the employer, testified that the claimant called him on November 8th and explained that he was going to have surgery. When he asked claimant what happened, the claimant claimed to have hurt himself on Saturday at work, and said that he had slipped and fell against a truck and must have hurt himself then.

The history of claimant's stumbling at work is included in the emergency room records. An MRI of November 8th reported scar formation at L5-S1, and a recurrent herniation at L4-5. A myelogram done on November 9th suggested a right-sided herniation with inferior migration. A post myelogram CT scan on November 10th reported a mild diffuse posterior bulge at L3-4 and a likely herniation at L4-5 with migration of a disc fragment. A small protrusion was also visualized at L5-S1.

Claimant's treating doctor subsequently was Dr. M, who wrote a long letter to the claims adjuster on February 4, 2000, in support of the causal connection between claimant's stumbling incident and his back injury. Dr. M analyzed the claimant's past medical records, and discounted the contention that claimant's preexisting disease of the back spontaneously led to herniation. Dr. M stated that "it would be virtually impossible to argue that this was not an acute new episode from a medical perspective." Dr. M had not at that time reviewed claimant's surgical records from the emergency surgery but based his opinion on claimant's recovery from previous surgeries and no significant sequelae thereafter.

The carrier presented an opinion from Dr. P stating that claimant had a significant preexisting problem and the structural bulges were likely in place prior to stepping in the hole. He argues that claimant would have had acute pain earlier than he did if stepping in the hole caused injury. Two other doctors for the carrier stated that they could not say with certainty that claimant's problems were or were not the result of stepping in the hole. In fact, Dr. R said it was possible but not probable that the incident caused the bulging disc.

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. A claimant's testimony alone may establish that an injury has occurred and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ).

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.

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. Rather, as we discussed in Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, a compensable aggravation injury must be proven by evidence of "some enhancement, acceleration, or worsening of the underlying condition. . . ."

However, the evidence here, showing that emergency surgery was performed within a week of the incident plainly evidences that something more than the recurrence of pain was involved. The hearing officer stated that he found claimant's testimony credible, and therefore believed that he stumbled in the yard as he said he did. Generally, lay testimony establishing a sequence of events which provide a strong, logically traceable connection between the event and the condition is sufficient proof of causation. Morgan v. Compugraphic Corp., 675 S.W.2d 729, 733 (Tex. 1984). The fact that pain may not immediately occur, but may develop over the course of a day or two after a trauma, is very nearly within common experience. In this case, it is a proposition also supported by medical evidence. The claimant's testimony was sufficient to establish that disability after his surgery continued.

We agree that the hearing officer's decision is fully supported by the evidence and that the carrier did not meet its burden of proving sole cause. The hearing officer's decision and order are affirmed.

The carrier's defense to this series of events was that the claimant's back just started hurting him, unrelated to the stumbling incident. Notwithstanding the occurrence of surgery within a week, the carrier also argues that there is "no evidence" of a physical injury to the back. We reject these contentions and affirm the hearing officer's decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Tommy W. Lueders
Appeals Judge