APPEAL NO. 001484

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 April 28, 2000. The issue before the hearing officer, although phrased in terms of whether the respondent=s (claimant) injury "extended" to spondylosis and spondylolisthesis, had to do with whether those conditions were part of the claimant's accepted low back injury of _____. The hearing officer determined that there was indeed a causal relationship.

The appellant (carrier) has appealed and argues that these findings are against the great weight and preponderance of the evidence. It argues that these are congenital conditions or degenerative conditions that were not "caused by" the mechanism of injury described, and further argues that there is a dearth of required medical evidence to establish causation. The carrier further requests that the late filing of the hearing officer's decision after it was written be investigated by the Appeals Panel. The carrier also suggests that the claimant does not have spondylosis or spondylolisthesis. The claimant responds that the evidence supports that the claimant, to the extent that his conditions were preexisting, aggravated his back such that these conditions became symptomatic. The claimant points out that the carrier had accepted a low back injury, and it was only during the spinal surgery second opinion process, when it appeared that the claimant had some preexisting conditions that would also be repaired during the surgery, that a dispute arose. The claimant points out that the carrier has drawn out the process in order to thwart the claimant's surgery within the one-year time frame.

DECISION

Finding the appeal without merit, we affirm the hearing officer's decision.

It is useful to outline the context in which this dispute of "extent" of injury has arisen. The carrier accepted a low back injury for the claimant, which occurred on _____. All medical treatment and temporary income benefits (TIBs) were paid. The carrier's attorney at the beginning of the CCH indicated that TIBs were still being paid at the time of the CCH, but asserted that when the back injury was accepted, it was accepted with an "understanding" that only a typical strain was involved.

The recommendation for the claimant's spinal surgery was made on June 15, 1999. By September 2, 1999, a second doctor had concurred with the need for surgery, and the Texas Workers' Compensation Commission (Commission) so notified the parties on September 14, 1999. On October 6, 1999, a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) was filed which stated as the basis for dispute:

> Carrier respectfully disputes that the compensable injury extends to lumbar spondylosis and spondylolisthesis. These ailments are ordinary diseases of

life, nontraumatic and degenerative in nature, unrelated to the above referenced date of injury.

The attorney for the carrier stated at the CCH that the basis for filing this TWCC-21 was "newly discovered evidence." As part of his recommendation in favor of the claimant, the benefit review officer noted that there was no evidence in the Commission files that the carrier limited the injury it accepted only to a back strain. The carrier responded to this report during the opening statement at the CCH by noting that "waiver" was not an issue.

The claimant worked as an auto body repairman for (employer). He said that his job involved lifting and heavy work on a daily basis, and he had performed such work for nearly 25 years (we note that the claimant was 35 years old). He said that on _____, he was lifting a hood from a Toyota and as he turned with the hood in his hands, he felt a pop in his back. He eased the hood to the ground and then rested for 20 minutes with sharp pain. The claimant estimated that the hood would weigh between 50 to 80 pounds. The claimant said that he worked on commission and therefore had to finish his job; but the next day, he went to see the company doctor, who took him off work for two days and stated that he had a lumbar strain.

The claimant said that after the company doctor took him off work, he then returned to work for about a week. The claimant left work because he was unable to continue due to his back pain. He had not worked since (day after the date of injury).

The claimant made clear that he had never before had back problems or been diagnosed with any back conditions. He said that he was initially treated with chiropractic treatments, head treatments, and medication, but they had no effect. His pain spread into his leg within a week after his accident. He was referred to another doctor by the company doctor due to his continuing pain. The claimant had an MRI in November 1998. The claimant was eventually treated by Dr. M. The claimant said that Dr. M told him that spondylosis and spondylolisthesis could become symptomatic after a trauma.

The medical records in evidence show:

- November 10, 1998 MRI--degenerative changes throughout lumbar area, multilevel spondylosis reported. Protrusion at L4-5 affecting the L5 nerve root.

- December 9, 1998-- Dr. SZ, consulted by claimant for pain management, opined that claimant's MRI showed a herniation at L4-5. He proposed injections for pain relief.

- January 5, 1999--Dr. M diagnosed post-traumatic internal disc derangement and L5 radiculopathy, probably secondary to an L4-5 injury.

- March 29, 1999BNerve conduction test shows moderately severe L5 and S1 radiculopathy.

- April 2, 1999--Myelogram reported to show mild spondylosis throughout lumbar spine. Impressions on the thecal sac at three levels. Possible edema of L4 nerve root. Underfilling of nerve roots at two levels. Tomography showed protrusion at L1-2, diffuse bulge at L2-3 with sac flattening, likewise at L3-4 and L4-5. Mild to moderate stenosis at L3-4.

- April 23, 1999-- Dr. S examines the claimant for the carrier and reports to the carrier his results. Dr. S noted multilevel spondylosis as shown by MRI. He noted a previous recommendation of surgery in December 1998 by a referral doctor. Dr. S noted some signs of symptom magnification. Dr. S stated that the myelogram did not reveal a surgical condition or a disc lesion. Dr. S assigned a zero percent impairment rating. Dr. S made no statements one way or the other about causation or extent of injury. Dr. S did not see the 1998 MRI because claimant brought the wrong films with him.

- May 17, 1999--Discogram performed and L3-4 shows annular tear and protrusion; L4-5 diffusely degenerated disc. A "6/17/99" addendum adds spondylosis and spondylolisthesis at L5-S1.

- June 15, 1999--Dr. M noted that claimant's EMG showed L5 and S1 radiculopathy. Dr. M said that he would recommend surgery, noting multiple-level spondylosis, instability at L5, and periarticular debris at L4-5.

- August 5, 1999-- Dr. H, the carrier's second opinion doctor, apparently considered a surveillance videotape along with his examination and recommended against surgery, noting that the claimant had symptom magnification and would not benefit from surgery.

- September 2, 1999-- Dr. MU, the claimant's second opinion doctor, agrees with the need for decompression surgery. Dr. MU notes that the claimant has disc degeneration and L5 nerve root impingement and spondylosis throughout his lumbar spine.

$ November 10, 1999-- Dr. B reviews the claimant's medical records for the carrier and concludes that the claimant has a herniated disc at L4-5, "no more and no less." Dr. B noted his disagreement with the type, but not the need, for spinal surgery. He disagreed with addressing the spondylosis and spondylolisthesis surgically.

In February 2000, Dr. S was asked by the carrier to provide definitions of spondylolisthesis and spondylosis. His basic opinion was that both conditions were degenerative and age-related. He opined that the lifting incident described by the claimant did not aggravate or accelerate these conditions. Dr. S disputed that the claimant's testing even showed that he had spondylolisthesis. He said that if surgery were performed on the claimant, it would not be to address the compensable injury.

The Appeals Panel does not investigate or probe matters relating to when hearings decisions are filed. As the carrier notes, the disparity between the date a hearing officer writes a decision, and the date it is mailed to the parties, is not a basis for setting aside an opinion.

The carrier is literally correct that a waiver issue was not presented. This is largely due to the fact that it accepted a low back injury. What the situation suggests instead is whether the carrier could move to reopen the issue of compensability under Section 409.021(d). Although the carrier's attorney stated that the October 1999 TWCC-21 was filed because of "newly discovered evidence," the existence of conditions (including spondylosis) well beyond a simple strain were noted in the medical records for nearly a year before the TWCC-21 was filed. The timing of the dispute, especially given the fact that the carrier has continued to pay TIBs for nearly one and one-half years for what it now contends was merely a lumbar strain, suggests a collateral attack on the spinal surgery procedure for which there has been a concurrence. While we believe that the benefit review conference report presented a potential subissue for the hearing officer to determine regarding newly discovered evidence, the decision on the merits is sufficiently supported by the evidence in this case separate and apart from any newly discovered evidence considerations.

There is essentially no medical evidence limiting the claimant's low back injury to a simple strain. Although other medical records indicate that this was the company doctor's initial diagnosis, that doctor soon after the injury referred the claimant to other doctors who determined that the claimant's pain merited further testing. It was undisputed that the claimant did not have back problems prior to _____, and no ongoing back condition or diagnosis that could be said to be the "sole cause" of the claimant's pain was proven. Aggravation of preexisting spondylosis would constitute a compensable injury. There is sufficient evidence to support the hearing officer=s determination of a causal relationship.

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). Thus, while the issue is phrased somewhat in terms of whether the spondylosis and spondylolisthesis are "causally related" to the accident, those conditions need not have been discreetly caused by the accident in order to be considered part of the compensable injury. We do not agree that medical testimony (to the exclusion of lay testimony) was required in this case to prove aggravation of the claimant's degenerative spine, which was not, in any case, the only condition necessitating the recommendation for surgery. *See* Peterson v. Continental Casualty Company, 997 S.W.2d 893 (Tex. App.-Houston [1st Dist.] 1999, no pet. h.).

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this is the case here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge