

APPEAL NO. 002240

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 September 1, 2000. The issues concerned whether the respondent (claimant) sustained a compensable injury on _____, and had disability from this injury.

The hearing officer held that the claimant injured her back on _____, and that beginning the next day and continuing through the date of the hearing, this injury caused an inability to obtain and retain employment equivalent to her preinjury average weekly wage, and that she had disability.

The appellant (carrier) appeals, arguing that because the claimant was merely turning to talk to a coworker at the time of her back injury, she was not performing a function within the course and scope of employment. The carrier argues that because the claimant's back bothered her prior to this injury, it was obvious she had hurt her back elsewhere. There is no response filed by the claimant.

DECISION

We affirm the hearing officer's decision.

The claimant had worked for (employer) for 21 years. The claimant had a back injury in 1987 but said that the effects of this had resolved. She was in a motor vehicle accident in 1994 which injured her shoulder but not her back. The claimant said that she had an MRI in November 1999 due to numbness she was having in her upper back.

On _____, the claimant said she was standing in front of a cabinet and had reached up to retrieve a receptacle of parts, which she then began to count. The claimant said that a coworker suddenly walked up next to her and she turned, still holding the parts container. The claimant said that a sudden pain shot down her back into her left leg, causing it to buckle.

The claimant went to the emergency room that day, was taken off work, and therapy was prescribed. It appears that she was released with some restrictions that same day. She was told she had a muscle spasm. The claimant had not returned to work since the incident. The claimant was treated by Dr. K, who opined that she had sustained an acute new injury (comparing this to the 1987 back injury).

An MRI done March 21, 2000, was reported as showing bulges at L3-4 and L4-5, with degenerative changes in the facet joint at L4-5. The claimant said that this showed change from the 1999 MRI but the earlier one is not in evidence. A peer review report from Dr. O, the carrier's doctor, referred to that MRI as showing a transitional lumbosacral vertebral body, and minimal bulging at L3-4 and L4-5. Dr. O concluded that the claimant did not have a "new" injury, but an exacerbation of her previously weakened lumbar spine.

The claimant said that she has not been able to walk normally since the occurrence. She said her left leg had buckled an additional time since the incident. The claimant said that she had to be careful how she turned, and was fearful of putting her full weight on her left leg, so she walked with a limp.

A statement signed by two women stated that they saw the claimant begin to buckle while talking to another worker. The statement says that the claimant was "just standing" when the back pain started. A statement from Ms. G said she was talking with the claimant who was "getting parts," and that the claimant started falling to the floor. The claimant said in an interview with the adjuster that she agreed with this statement. During the course of that interview, the adjuster told the claimant that they would deny the claim because the claimant had just been standing there and she should contact the carrier for the 1987 injury about reopening the medical. The adjuster told the claimant that medical evidence was required for them to accept the claim.

It is axiomatic, in case law having to do with aggravation, that the employer accepts the employee as she is when she 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. Dr. O's letter may be interpreted as consistent with an aggravation of the previously weakened back. The claimant testified as to enhanced effects of this injury.

The carrier also argues that at the precise moment of injury, the claimant was doing nothing more than standing. However, the claimant testified that she had reached for and obtained a container of parts which she was holding as she turned. The hearing officer could believe from this that more than mere standing was involved. We have stated that an employee does not move in and out of the course and scope of employment based upon the precise activity undertaken when pain or an injury occurs. Texas Workers' Compensation Commission Appeal No. 990896, decided June 14, 1999 (Unpublished). We do not agree that an injury arising from an activity that could also be experienced outside of work is, per se, noncompensable for that fact alone. Texas Workers' Compensation Commission Appeal No. 990252, decided March 25, 1999. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ) defines course and scope of employment as an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance

of the affairs or business of the employer. At the time of the injury, the claimant was holding a parts container and working on her line.

The hearing officer is the sole judge of the relevance, 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:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge