

APPEAL NO. 002341

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 September 18, 2000. The sole issue at the CCH was whether the appellant (claimant) sustained a neck injury in addition to a left shoulder injury on _____.

The hearing officer, in her decision, engaged in a differentiation of the various disc levels in the neck. The hearing officer found that the claimant sustained an aggravation of her preexisting neck injury at C6-7 and this appears to be the only spinal level she felt was injured. As part of the decision, the hearing officer stated that an injury at C4-5 was not urged.

The claimant appeals, arguing that the hearing officer is wrong in her assessment that an injury at C4-5 was not urged. She argues that the evidence supports that the injury extended to her neck at both the C4-5 and C6-7 levels. The respondent (carrier) argues that the decision should be affirmed.

DECISION

Reversed and rendered.

The claimant had a previous noncompensable injury at C5-6 and subsequent surgery at that level in December 1998 at that level. She said that she was discharged after five or six weeks, and had been released and working without problem until _____. Correspondence from her surgeon throughout 1999 corroborates the lack of symptoms or problems. It was apparently agreed that the claimant had sustained an injury to her left shoulder on _____, while pulling on some trays that were stuck together and hard to separate. The claimant, who was 61 years old at the time of the CCH, was employed on an assembly line for (employer), where she had been employed for 27 years. She said that she felt a tingling around her shoulder, and experienced increasing pain and discomfort in her neck and shoulder over the next few days.

The medical evidence presented by the claimant is as follows:

- Dr. PO examined the claimant on February 23, 2000, and found muscle spasm and decreased range of motion especially when claimant bent to the right. He diagnosed cervical strain.

- Dr. PR, who was the claimant's surgeon in 1998, wrote to Dr. PO on March 3, 2000, that the claimant's February 28 MRI revealed a solid fusion at C5-6, a herniation at C6-7, and degenerative disc disease and a spur at C4-5. He noted that all of her reported symptoms were in her upper left extremity. He noted that her symptoms were consistent with C7 radiculopathy but that a moderate protrusion at

C4-5 did not appear to be causing her problems at the present time, although he opined that she would eventually have problems with it.

- Dr. PR wrote on April 27 that in all probability, the incident at work on _____ caused the claimant's disc herniation.

A comparison of the claimant's November 1998 MRI and her February 2000 MRI, with respect to the C4-5 level, indicated a worsening on the latter MRI. While mild cord compression was noted in both, the latter MRI noted "severe" degenerative disease and mild-to-moderate (as opposed to merely mild) stenosis.

One of the second opinion doctors, Dr. S, agreed on April 11 that the claimant had significant disc disease in both areas adjacent to her C5-6 fusion. He recommended that the claimant have injections and more of a work-up, focusing on the C4-5 level, and opined that she could realize improvement through conservative treatments. He felt an EMG advisable to determine the source of her problems.

We simply cannot concur with the hearing officer's assessment that injury was in some respect not urged for the discrete cervical level at C4-5. First of all, the issue before the hearing officer to determine was whether the claimant sustained "a neck" injury in addition to her left shoulder injury. This issue does not appear to require a diagnostic determination as to the various disc levels, especially in light of evidence of regional pain and symptomology. Matters about the required extent of any subsequent cervical surgery can and should be dealt with in the second-opinion process. Next, as part of his opening statement, the attorney for the claimant noted that the asserted injury was basically above and below the previous surgical C5-6 level. Clearly, this included the C4-5 level. The carrier's argument was not that various levels were affected or not affected, but that the claimant merely had the natural progression of degenerative disk disease and no aggravation injury in her neck.

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. As we review the evidence, we cannot agree that the hearing officer's assertion in her discussion that there was "no" injury at C4-5 or that injury to this area was not urged is supported by either the reported issue or the evidence. Plainly, evidence supports that the C4-5 level is not normal. There were additional changes noted in the February 2000 MRI from what had been there prior to surgery in 1998. The hearing officer has chosen to believe Dr. PR's contention that the claimant's _____, incident caused injury to her neck by way of aggravation. The claimant testified as to the lack of pain and symptoms prior to this date. Dr. S's opinion urges further testing and treatment of the cervical region, including, specifically, the C4-5 disc which he felt could be the source of symptoms as well. It was not incumbent on the hearing officer to, at this point and *sua sponte*, make an interim diagnosis not urged by either party.

We accordingly reverse the hearing officer's determination that the claimant sustained only a C6-7 injury and, based upon the hearing officer's findings, the evidence, and the issue, render a decision that the claimant's _____, injury extended to her neck as well as to her left shoulder.

Susan M. Kelley
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Robert W. Potts
Appeals Judge