

APPEAL NO. 010887
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FILED JUNE 4, 2001

These appeals arise pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on April 11, 2001. The hearing officer who consolidated the two claims for purposes of the hearing, issued separate, similar decisions with the same recitals of the evidence, findings of fact, and conclusions of law but with different orders. She determined that the recurrent lumbar disc herniations of appellant/cross-respondent (claimant) are causally related to her compensable injury of _____, and are not causally related to an alleged compensable injury of _____, and that she did not sustain a compensable injury on _____. The existence and duration of her disability (from August 17, 2000, through the date of the hearing) was resolved by agreement. Both the claimant and appellant (carrier 1), who provided workers' compensation insurance for the employer at the time of the claimant's _____, injury, have appealed on evidentiary sufficiency grounds, urging that the evidence established that the claimant sustained a new back injury on _____, by the aggravation of her prior injury from repetitive job activities and that respondent (carrier 2) is therefore liable for both medical benefits and temporary income benefits (TIBs). Carrier 2 filed a response to both appeals, urging that the evidence is sufficient to support the challenged determination of the hearing officer and detailing how it views the claimant's positions to have changed several times in an effort to not only obtain the additional surgery but also to obtain more TIBs.

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant did not sustain a new low back injury on _____. The claimant testified that after her earlier low back injury, she underwent successful spinal surgery for a herniated disc at the L4-5 level by Dr. S on October 12, 1992, returned to her job as an order puller which involved repeated bending, pulling, and lifting, and had only a few flareups of her back injury; that she was later promoted to shipping supervisor, a job where the order filling, and therefore the physical movements, was more intense; that in _____ she began to experience low back pain which was more central in her back and "different" than that which she had experienced with her _____; that she saw Dr. S on May 15, 2000, and he then felt she was having symptoms from the 1992 injury; and that she filed a claim with the prior injury date. She said that an MRI in July 2000 showed not only increased pathology at the L4-5 level but also problems at the L2-3 and L3-4 levels; that on September 18, 2000, Dr. S performed additional lumbar spine surgery, fusing her lumbar spine from L2 to S1; and that following that surgery Dr. S changed his opinion and, based on the additional pathology he found during the surgery, felt that she had indeed sustained a new injury (apparently an aggravation injury from repetitive trauma). The claimant relies on the evidence of new and increased lumbar spine damage and Dr. S's changed opinion, stated in his letter of

_____, to a carrier, to support her position that she did sustain a new injury on _____, Concerning statements in Dr. S's May 25, 2000, report, which conflict with her testimony, she said she cannot control what a doctor puts into a report. She also asserts that carrier 1 did not put on evidence of its own which was contrary to her evidence. Carrier 1 relies on basically the same medical evidence to support its contention that the claimant proved that she sustained a new injury on _____.

It was the claimant's burden, not the burden of carrier 1, to prove that she sustained a new injury as she claimed. The hearing officer, who is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), makes clear in her discussion of the evidence why she did not find persuasive the claimant's evidence, including the changed opinion of Dr. S. We are satisfied that the appealed determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decisions and orders of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Michael B. McShane
Appeals Judge