APPEAL NO. 011501
FILED AUGUST 7, 2001

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 June 6, 2001. The hearing officer determined that the respondent (claimant) had a new injury by way of aggravation that occurred on _____, and that he had disability from this injury for the period of time from August 17, 2000, through April 8, 2001. While the hearing officer made comments in his discussion of the evidence on election of remedies, he made no express findings of fact or conclusions of law on the issue.

The appellant (carrier) has appealed. The carrier asserts that the claimant's condition was merely a continuation of a serious work-related back injury that occurred six months before the claimed injury. The carrier further noted that the hearing officer made no express findings of fact and conclusions of law on the election of remedies issue, and argues that the claimant should be bound by his "intellectual decision" to use his regular health insurance. The disability finding is disputed for the reason that the new injury to which it was linked did not occur. The claimant responds that the carrier has mischaracterized the medical evidence in its appeal and that the hearing officer has properly interpreted the evidence. The claimant asks that no election of remedies be found, referencing the hearing officer's observations on this matter.

DECISION

Affirmed as reformed.

FACTS

The controversy over the matter before the hearing officer is somewhat confusing in that the asserted "pre-existing condition" resulted from a work-related injury in February 2000, albeit one from which the claimant sustained no lost time. If that injury would have been covered by another carrier, it was not brought out at the CCH.

Briefly, the claimant worked as a truck driver for the employer for two years and three months. He described a bar on the double-decker truck (apparently used to deliver motor vehicles) which weighed 100 pounds, and which had to be lifted aside to unload the truck. The claimant said that as he was making a delivery on _____, he lifted this bar and felt a burning pain in his back. He called in to report the accident, and the next day was taken off work by his physician, Dr. S. The claimant agreed that he was taken off work by Dr. S and was eventually referred for further testing to Dr. SD. The claimant agreed that he was treated before this incident by Dr. S for the effects of a similar injury in February 2000, but one which did not cause as much pain or result in time lost from work. The claimant returned to work on April 9, 2001.

The hearing officer has described how he compared objective testing performed after each injury to conclude that the _____, incident has resulted in an aggravation or worsening of the claimant's lumbar condition. Although considerable medical evidence was developed, an example of the comparison would be that a June 2000 CT myelogram showed a small right-sided disc protrusion at L5-S1 with no nerve root impingement and a mild bulge at L4-5. A late July EMG showed no radiculopathy. By contrast, a September 8, 2000, discogram showed an annular tear at L5-S1 and a left posterior herniation at L4-5. A doctor for the carrier who examined the claimant in December 2000 found that there was no aggravation due to an August 16 incident, but he refers to the sparse medical records he had after this date and makes no mention of any objective testing but the June 2000 myelogram.

INJURY AND DISABILITY

We have reviewed the evidence and find no error by the hearing officer in concluding that there was an aggravation and that it resulted in disability for the period under review.

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 . . . ." We do not agree that such evidence cannot be supplied through lay testimony as well as medical evidence.

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.

ELECTION OF REMEDIES

While the hearing officer erred by not making express findings of fact and conclusions of law on the election of remedies issue, it is clear from his discussion on the matter that he believed that no election had been made and that the claimant was entitled to workers' compensation. We are persuaded that the omission of express declarations is a clerical

oversight. Accordingly, we reform the decision by including, as a conclusion of law, the following:

4. The claimant did not make an election of remedies when medical treatment was provided through his health insurance.

We affirm the hearing officer's implied findings of fact leading to the disposition of the election-of-remedies issue for the reasons set out in Texas Workers' Compensation Commission Appeal No. 990022, decided February 19, 1999.

CONCLUSION

An appeals-level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). 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, as reformed.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Michael B. McShane
Appeals Judge