APPEAL NO. 020223
FILED MARCH 13, 2002

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 January 8, 2002. The hearing officer resolved the disputed issues before him by determining that the appellant (claimant) was in the course and scope of her employment when she was involved in a motor vehicle accident (MVA) on _____; that the claimant sustained a compensable injury on _____; and that between _____, and the date of the hearing, the claimant has not had disability as a result of the compensable injury. The claimant appealed the hearing officer's determination as to disability on sufficiency grounds. The respondent (carrier) responded, urging affirmance. The hearing officer's determination that the claimant sustained a compensable injury on _____, was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The facts in this case are largely undisputed. The claimant testified that she was employed as a sales representative and that on _____, after completing work at one store she was en route to her next stop when she was involved in an MVA. The medical records in evidence show that the claimant sought treatment from Dr. L, that same day. Dr. L's initial examination report indicates diagnoses of cervical segmental dysfunction; facet syndrome; cervical myofascitis; loss of lordosis, cervical; cervicalgia; thoracalgia; thoracic segmental dysfunction; lumbalgia; and lumbosacral segmental dysfunction. The claimant testified that although she had pain, she only missed work a day or two following the MVA, and that Dr. L did not take her off work. Dr. L's office note from September 26, 2001, indicates that on a scale of 0-10, the claimant's neck pain was 1, mid back pain was 1, and low back pain was 1. The note further indicates that the claimant was progressing as expected; that dyskinesia was noted in the cervical, thoracic, and lumbar regions; that taut/tender fibers were noted in the cervical, thoracic, and lumbar regions; that limited range of motion was noted in the cervical and lumbar regions; and that she should be seen twice a week.

The claimant testified that on September 26, 2001, after her visit with Dr. L, she was working out at the gym when she felt a pop in her neck. The claimant testified that while the workout was not prescribed by Dr. L, it met with his approval. Dr. L's office note from September 27, 2001, indicates that on a scale of 0-10, the claimant's neck pain was 10, mid back pain was 5, and low back pain was 1. The note further indicates that the claimant's condition had worsened from the previous visit. Dr. L took the claimant off work on September 28, 2001, and ordered an MRI. The MRI indicated a multilevel herniation. Dr. L opined that the _____, MVA caused weakness and instability in the claimant's neck, and while working out on the evening of September 26, 2001, she suffered an exacerbation of her condition as well as further injury. Dr. L referred the

claimant to Dr. W, an orthopedic surgeon, who recommended conservative treatment. The carrier presented no testimonial or documentary evidence.

The hearing officer determined that the claimant was unable to obtain and retain employment at wages equivalent to her preinjury wages due to the "September 26, 2001, injury, and not to the injury of _____." It appears that the hearing officer concluded that there was a second noncompensable injury which is the sole cause of the claimant's current disability. We are uncertain as to what standard the hearing officer applied in determining sole cause, what evidence he relied upon in finding sole cause, and whether he properly placed the burden of proof. This is especially so because the hearing officer does not make a specific sole cause determination. We discussed the matter of a subsequent noncompensable injury being the sole cause of a claimant's present condition in Texas Workers' Compensation Commission Appeal No. 94844, decided August 15, 1994, where we stated:

> To prove a subsequent noncompensable injury is the sole cause the burden is on the carrier to prove that the claimant's subsequent injury is the sole contributing factor to the claimant's current condition or disability. Texas Workers' Compensation Commission Appeal No. 94280, decided April 22, 1994; *See also* Texas Workers' Compensation Commission Appeal No. 93864, decided November 10, 1993, and decisions and cases cited therein. This is so because an injury is compensable even though aggravated by a subsequently occurring injury or condition. *See* Guzman v. Maryland Casualty Co., 130 Tex. 62, 107 S.W.2d 356 (1937); Hardware Mutual Casualty Co. v. Westbrooks, 511 S.W.2d 406 (Tex. Civ. App-Amarillo 1974, no writ); Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991; Texas Workers' Compensation Commission Appeal No. 91085A, decided January 3, 1992; Texas Workers' Compensation Commission Appeal No. 92018, decided March 5, 1992; Texas Workers' Compensation Commission Appeal No. 92692, decided February 12, 1993. Perhaps enlightening in how to frame the legal test of this question is the language found in the instruction in the Texas Pattern Jury Charges concerning sole cause when there is a subsequent noncompensable injury or condition, which provides as follows:
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> > There may be more than one producing cause of incapacity, but there can only be one sole cause of incapacity. . . .

The hearing officer did not follow the sole cause standard to reach his decision. Because we are uncertain of the legal and evidentiary grounds relied upon by the hearing officer in reaching his conclusion that the claimant did not have disability as a result of her compensable injury, we must remand the issue of disability back to the hearing officer so that he may explicitly state the standard of proof he is applying to determine no disability, the evidence on which he is relying, and, if he is basing his determination on sole cause, on whom did he place the burden and what evidence supports such a determination. The

hearing officer shall base his determination solely on the evidence currently in the record. No new evidence shall be admitted, and no rehearing shall be held on remand. If the hearing officer determines that the claimant does have disability as a result of her compensable injury, he needs to specify the period of disability.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in the Texas Government Code in the computation of the 15-day period.

According to information provided by the carrier, the true corporate name of the insurance carrier is **EMPLOYERS INSURANCE OF WAUSAU** and the name and address of its registered agent for service of process is

RICK KNIGHT
105 DECKER COURT, SUITE 600
IRVING, TEXAS 75062.

Gary L. Kilgore
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Michael B. McShane
Appeals Judge