APPEAL NO. 021644
FILED AUGUST 7, 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 May 24, 2002. The hearing officer determined that the appellant (claimant) sustained a compensable repetitive trauma injury with a date of injury of _____, and that the claimant did not have disability from the compensable injury. The claimant appeals the disability determination. The respondent (carrier) responds to the appeal, urging affirmance.

DECISION

Reversed and remanded.

At the hearing, the claimant testified that he had a previous back injury during _____ and was off work until October of 2000, at which time he returned to work as a sweeper driver. The claimant admitted that he still had problems with his back when he returned to work. On December 26, 2000, the claimant was assigned to clean up a hardened mixture of sand and chemicals attached to the cement floor under the "Robert's machine." The claimant testified that this task required him to operate a circular grinder and air chisel while on his knees or laying flat under the machine and that he was on his knees about 90% of the time performing the task. The claimant further testified that during the course of performing this assignment for 5 days, 10 hours a day, he sustained repetitive trauma injuries to his bilateral knees, left elbow, and low back on _____.

On January 4, 2001, Dr. B took the claimant off work. On February 8, 2001, Dr. K increased the claimant's pain medication and prescribed a lumbar back support belt. On February 27, 2001, an MRI was performed on the lumbar spine, depicting a 3-4 mm disc herniation at L5-S1. A report from Dr. Mc dated September 10, 2001, indicated that the claimant has bilateral meniscus tears to his knees. Dr. M, in a letter dated September 11, 2001, stated that the [claimant's] lumbar spine symptoms had a dramatic increase since his [_____ injury]." Dr. M also opined that the claimant's "work activities . . . were the cause of his current work related injuries to the right and left knees and elbow" and that it is her opinion that the claimant's "lumbar and cervical symptoms are an exacerbation" of the 1999 injury.

The hearing officer determined that the claimant sustained a repetitive trauma injury.[1] The hearing officer also states the claimant "sustained minor injuries superimposed on the prior back injury . . . " and that "If at any time after _____, Claimant [had disability] it was not by reason of the said repetitive

[1] The hearing officer also determined that the claimant knew or should have known his symptoms involving his knees, left elbow, and increased back pain were related to his employment when the symptoms appeared on _____.

trauma injury." Those determinations are in conflict. It would be illogical to find that the new injury superimposed on preexisting injuries to the back did not contribute in some way to the back condition that resulted in Dr. B taking the claimant off work. The two back injuries are so intertwined they are incapable of being separated. We note that prior to the new back injury the claimant was capable of working, but after the injury he was not able to work.

The employer accepts the employee as he is when he 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). In this case it appears that the hearing officer conducted a weighing of the injuries to determine which contributed more to the claimant's disability. This is a situation involving a preexisting condition and a new injury to the same area of the back. If the new injury contributed, even by an infinitesimal amount to disability of the claimant, that disability is compensable.

We must remand the issue of disability back to the hearing officer to determine if the combination of the new injuries and the 1999 back injury resulted in disability and, if so, for what period. We caution the hearing officer as we indicated above, if there is any new injury to the same region of the back as the 1999 injury, the 1999 back injury cannot be the sole cause of the claimant's claimed disability.[2] 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 his 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. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

[2] There is no evidence that the new injury to the back had resolved as of the date of the hearing.

The true corporate name of the insurance carrier is **LM INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.

_____
Roy L. Warren
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Robert E. Lang
Appeals Panel
Manager/Judge