APPEAL NO. 023008
FILED JANUARY 7, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A consolidated contested case hearing (CCH) was held on November 4, 2002. The hearing officer determined that the appellant (claimant) sustained a compensable lumbar strain injury on (1996 injury); that the claimant's compensable injury of (1996 injury), is not a producing cause of the claimant's lumbar condition after (1998 injury); that the claimant sustained a compensable lumbar strain injury on (1998 injury); that the claimant's compensable injury of (1998 injury), does not extend to and include the claimant's lumbar spine condition after April 3, 2001; and that the claimant is not entitled to supplemental income benefits (SIBs) for the seventh quarter. The claimant contends that the hearing officer erred in his determination that the claimant's present spinal condition is a continuation of the 1987 injury. Both carriers respond, urging affirmance.

DECISION

Finding the great weight and preponderance of the evidence against the determination that the claimant's current condition is the natural result of his 1987 back injury, we reverse and render a decision that the 1998 injury included the claimant's lumbar condition. We affirm the determination that the 1996 injury was not a producing cause of that condition following the 1998 injury, and likewise affirm that the claimant was not entitled to the seventh quarter of SIBs.

SUMMARY OF FACTS

The claimant sustained a back injury on (1987 injury), resulting in a herniated disc at L4-5; he had fusion surgery on November 12 of that year, performed by Dr. S. The operative report makes no note of any defects at other levels of the lumbar area. The claim was resolved by a compromise settlement agreement under the previous workers' compensation laws, which ended medical benefits as of May 10, 1993.

On (1996 injury), the claimant once more injured his back when he lifted some buckets. He said that prior to this incident, he was not having pain in his back. The claimant was treated by Dr. G and Dr. W. Objective testing following that injury noted a solid fusion at L4-5, but some instability at L3-4. The carrier for this claim was carrier 1, who accepted liability for the claim. A designated doctor, Dr. P, certified maximum medical improvement (MMI) as of April 3, 1997, with a 10% impairment rating (IR). Dr. P noted that if the L3-4 level were considered without regard to the effects of the 1987 injury and surgery, a 7% IR would result. The claimant returned to work in March 1997, as a dishwasher for a restaurant.

On (1998 injury), the claimant slipped and fell at the restaurant. The carrier for this injury was carrier 2, who also accepted liability for the injury. Records indicate that

he had pain in his cervical, thoracic, and lumbar areas. At the time of the CCH, the claimant was once more being treated by Dr. S for his 1998 injury. The claimant had not been able to work since this accident.

A peer review doctor, Dr. T, who had not examined the claimant but had reviewed the records of all three injuries, testified that a fusion at L4-5 would have put more stress through ordinary activities of life on the level immediately above and below the fused level. Dr. T also testified that his interpretation of the records after the 1996 injury was that the claimant sustained only a strain/sprain. Dr. T testified that a strain was ligamentous in nature, and later described a disc as a "fancy ligament." He said that degenerative conditions as observed in the L3-4 level after the 1996 injury were the type one would expect to see that many years after the 1987 surgery. Dr. T also said that a fall on the buttocks (the mechanism of the 1998 injury) would have the effect of enhancing the claimant's underlying condition. Although he stated that the 1987 surgery set in motion inevitable degenerative conditions, Dr. T agreed that the 1998 event caused such conditions to arrive sooner rather than later, and although he believed the 1996 incident did not contribute to the claimant's condition, he agreed that the 1998 injury did contribute to his current condition. He then stated that he would expect the claimant to have similar degenerative conditions had not either the 1996 or 1998 injuries occurred.

Dr. X examined the claimant a number of times for each carrier after both the 1996 and 1998 injuries. He agreed in April 2002 that surgery was indicated. However, he characterized the 1998 injury as a strain, although he said it had "exacerbated" the claimant's postsurgical degeneration. Dr. X characterized the degeneration as progressive and chronic. Dr. X opined, based in part on a functional capacity evaluation, that the claimant could work at the sedentary level. In August 2002, Dr. X noted that the claimant's presentation was bizarre and that he had chronic deterioration unaffected by his 1996 or 1998 injuries. After the 1996 injury, Dr. X had certified a 5% IR for the lumbar spine injury.

The claimant was treated for his 1998 back injury by Dr. S, who had performed the 1987 surgery. Dr. S's reports are emphatically opposed to the opinions of Dr. T and Dr. X that would characterize the 1998 injury as merely a strain with no impact on the degenerative condition. Dr. S noted that when the claimant fell, the fused level held but the adjoining areas did not, and that the cause of changes he observed at L3-4 and L2-3 were due to the fall. He said that the claimant's back condition prevented him from doing any work.

There are medical opinions that indicate that there is some functional overlay or symptom magnification. Another required medical examination doctor who examined the claimant on July 16, 2002, stated that the degenerative condition at the L3-4 level was not caused by a single fall in 1998 although "it may have been exacerbated" by the 1998 fall. This doctor also felt that the claimant was not a good candidate for surgery.

The claimant was evaluated by a designated doctor who certified a 19% IR but stated that 14% was apportioned to the 1987 injury and surgery. Six percent IR was certified for impairment to the cervical spine. However, by a benefit review conference (BRC) agreement dated July 18, 2000, the claimant and carrier 2 agreed that the claimant's IR from his 1998 injury was 19% and he had reached MMI on September 18, 1999. There was no issue at the CCH as to whether this agreement should be set aside.

Under all the facts presented, we agree that the determination that the current condition of the claimant resulted solely from his 1987 injury and subsequent surgery is against the great weight and preponderance of the evidence so as to be manifestly unfair or unjust. While a finding that the 1996 injury was not a producing cause of the lumbar condition after (1998 injury), may be affirmed, we cannot agree that a determination that the lumbar condition after April 3, 2001, was not part of the 1998 injury is likewise supportable.

The great weight and preponderance of the evidence is that the underlying lumbar condition was aggravated or accelerated by the fall in 1998. Even the opinion of Dr. X, who is strongest in contending that the additional herniated lumbar discs at L2-3 and L3-4 are a natural progression of the 1987 surgery, concedes that the fall likely "exacerbated" this condition. Moreover, the BRC agreement accepts the full IR assigned to the entire spinal injury, with no apportionment as the designated doctor had suggested, and six quarters of SIBs had already transpired on carrier 2's claim at the time of the CCH. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.102(g) (Rule 130.102(g)) provides that disputes to the IR must be raised prior to the expiration of the first quarter of SIBs or the IR is final and binding. In this case, the dispute over extent of injury to the lumbar area is in effect an attack on the IR under the facts of this case and arguably an attack as well on the BRC agreement which, in accepting 19%, necessarily accepted that it was based upon the "compensable injury" including the lumbar injury which plainly went beyond a lumbar strain in the assessment by the designated doctor.

Accordingly, we affirm the determination that the 1996 injury was not a producing cause of the lumbar condition but reverse and render a decision that the 1998 injury included the claimant's lumbar condition after April 3, 2001. We likewise reverse the findings and conclusions that the 1998 injury was limited to a lumbar strain.

WHETHER THE CLAIMANT WAS ENTITLED TO THE SEVENTH QUARTER OF SIBs

Although the hearing officer's determination on the "direct result" provision of SIBs entitlement was plainly influenced by his determination that the lumbar condition was not part of the 1998 injury, and is therefore reversible, we affirm the determination that the claimant did not make a good faith search for employment commensurate with his ability to work, in accordance with Rule 130.102(d) or (e). On this matter, the great weight and preponderance of the evidence is not against the decision and we affirm.

The true corporate name of the insurance carrier for docket number 1 is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSELL OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

The true corporate name of the insurance carrier for docket number 2 is **AMERICAN PROTECTION INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

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Judy L. S. Barnes
Appeals Judge

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Daniel R. Barry
Appeals Judge