

APPEAL NO. 062010
FILED DECEMBER 4, 2006

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 September 11, 2006. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did not sustain a compensable injury on "April 4, 2006," and had no disability. The claimant appeals, disputing both the injury and disability determinations. The respondent (carrier) responded, urging affirmance. The carrier also filed a request for clerical correction regarding the date of injury.

DECISION

Reversed and remanded.

It was undisputed that the claimant sustained a prior work-related injury on (prior date of injury), when she sustained injuries after a fall. In evidence is a medical report dated July 23, 2001, which reflects that the claimant complained of the majority of her pain being in the left ankle and right knee but that she also reported lesser pains in the left knee and right ankle and back pains and spasms. The claimant testified that she had surgery on her right knee on June 4, 2003, and that she was taken off work as a result of her surgery for four to six weeks.

The claimant testified that on _____, she injured her back while moving buggies containing pants, while performing her job duties. The claimant testified that on March 21, 2003, she complained to her doctor of pain in her lower leg and thigh shooting up to her buttock. There is a medical record dated September 21, 2003, which notes that the claimant was concerned because she was having pain in the right lower portion of the leg and in the right lateral thigh coming from the "SI joint." The same record notes that her doctor wanted to obtain a lumbar MRI and refer her for EMG/NCV testing of the lower extremities to rule out acute lumbar radiculopathy. The claimant contends on appeal that the medical evidence and her testimony presented at the CCH establish that she sustained an injury to her lumbar spine on _____, and had disability.

In her discussion of the evidence, the hearing officer stated that the claimant had preexisting degenerative changes in her low back as well as treatment for her low back in her prior injury of (prior date of injury), stating the claimant asserted that she aggravated those conditions. The hearing officer then stated that "[i]f there was any aggravation, it was minimal, for other than the days she missed in March and April of 2003, the claimant offered no evidence that she was ever unable to work or needed to be working in a restricted duty capacity because of low back problems." The hearing officer specifically found that "[t]he [c]laimant did not sustain a new injury [to] her back on [_____], while pushing the [e]mployer's buggies, but exacerbated her previous back injury of (prior date of injury)."

A compensable injury includes a work-related aggravation of a preexisting condition or injury that causes damage or harm to the physical structure of the employee's body. See Peterson v. Continental Casualty Company, 997 S.W.2d 893 (Tex. App.-Houston [1st Dist.] 1999, no pet.). In Appeals Panel Decision (APD) 94428, decided May 26, 1994, the Appeals Panel stated that an aggravation of a preexisting condition is an injury in its own right. Whether there has been an aggravation is generally a question of fact. In APD 950125, decided March 10, 1995, the Appeals Panel noted that whether a claimant sustained a new injury or merely suffered a continuation of an original injury is normally a question of fact to be determined by the hearing officer; that to be considered a new injury, there must be evidence that an injury as defined in the 1989 Act had occurred; that an aggravation of a previous condition or injury could rise to the level of a new injury, but that to be compensable there must be a new injury and not merely a transient increase in pain from an existing condition. What must be proven is not a mere recurrence of symptoms inherent in the etiology of the preexisting condition that has not been completely resolved, but that there has been some enhancement, acceleration, or worsening of the underlying condition from an injury. A compensable "aggravation" is not merely a recurrence of pain, it is a worsening, exacerbation, or acceleration of a preexisting condition by a work-related injury. See APD 93416, decided July 8, 1993, and APD 94728, decided July 19, 1994.

In the instant case, the hearing officer's discussion indicates that she believed that there may have been an aggravation of the (prior date of injury), injury, but if there was any aggravation, it was minimal. The fact that the aggravation was minimal does not mean that there was no damage or harm to the physical structure of the claimant's body. This conflicts with her finding that the claimant did not sustain a new injury of her back on "April 4, 2003," but exacerbated her previous back injury of (prior date of injury). An aggravation or exacerbation of a preexisting condition can, in certain circumstances, be compensable as a new injury. APD 93533, decided August 19, 1993. We remand this case back to the hearing officer to determine whether or not the claimant sustained a compensable injury by way of aggravation or exacerbation on _____, and whether she had disability and if so for what periods. The hearing officer shall base her determination solely on the evidence currently in the record. No new evidence shall be admitted, and no rehearing shall be held on remand.

The carrier noted in its request for clerical correction that throughout the decision and order the date of injury is misidentified. Date of injury was not an issue before the hearing officer. The parties agreed that the issues in dispute were as follows: (1) Did the claimant sustain a compensable injury on _____?; and (2) Did the claimant have disability resulting from an injury sustained on _____, and if so, for what periods? Neither party alleged a date of injury different than _____. Whether or not the July 21, 2001, injury extended to include the claimant's current low back condition was not an issue. On remand, the hearing officer should make findings of fact and conclusions of law to reflect the correct date of injury: _____.

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 Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **OLD REPUBLIC INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBIN MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 200
IRVING, TEXAS 75063.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge