APPEAL NO. 950171

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on December 19, 1994, before (hearing officer), hearing officer. With regard to the two issues before her, the hearing officer determined that the claimant did not sustain a compensable injury in (month) of (year) and that his disability between July 21 and November 8, 1994 was due to a prior injury. The claimant appeals, contending that the evidence is in support of his position. The carrier basically states that the hearing officer's decision is supported by the evidence.

DECISION

Affirmed.

The claimant, who was employed by (employer) since March 8, 1993, suffered a compensable back injury on (date of injury 1). He was treated by (Dr. B) for that injury and also received an impairment rating. He was returned to light duty work on April 25, 1994. It was claimant's testimony that he reinjured his lower back on (date of injury 2), when he lifted a sump to stack it while in the course of unloading a trailer. He said he felt a sharp pain and informed his supervisor, (Mr. R), what had happened. He returned to Dr. B on July 21st and was taken off work on that date. On September 13th, Dr. B released him to light duty work but he said that the employer had filled his position. He said he secured a new job on November 8, 1994, and has been working ever since.

Mr. R, employer's warehouse manager, testified that claimant was assigned to him as a shipping and receiving helper after claimant returned to work after his first injury. He said the job was light duty and involved paperwork and shipping out certain non-heavy items. He recalled the occasion claimant described, when a truck delivered a load of sumps (he defined a sump as a circular container approximately 2 ½ feet tall and about 2 ½ feet in diameter, which enclosed a pump; he said the sump weighed around 65 to 75 pounds). However, he said that although claimant may have unloaded a few sumps by rolling them off the truck, he refused to assist Mr. R in lifting and stacking them, saying that he might hurt his back if he did so. Mr. R also said claimant continued to work the next two days and did not complain or seem to be in pain.

(Mr. LR), employer's parts manager, said that Mr. R had told him claimant was making mistakes in the paperwork he was supposed to do, and that he spoke to claimant about this on July 19th. Prior to that date, he said, claimant had not mentioned a new back injury. Mr. LR said he told claimant he would work with him, and denied that he was trying to run claimant off. He said claimant did not come to work on July 20th, due to his daughter's doctor appointment, and that on July 21st the employer received a telefax saying that the claimant was injured and had been taken off work by Dr. B.

The claimant introduced into evidence four notes from Dr. B, taking claimant off work due to a (date), injury. The carrier introduced several medical reports from Dr. B, including one dated July 21st which stated that the claimant was complaining that his progress was not quick enough; the report says the claimant was encouraged to continue with his present program, including home exercises. According to the claimant, at the time of the July incident he was continuing to treat with Dr. B for his original injury.

The hearing officer determined that the claimant failed to meet his burden to prove that he sustained a compensable injury in (month) of (year), and that his inability to obtain and retain employment between July 21 and November 8, 1994, was due to something other than a compensable injury in (month year). While an aggravation of a prior injury can constitute an injury in its own right, Texas Workers' Compensation Commission Appeal No. 92317, decided August 25, 1992, the claimant nevertheless must establish the existence of a later, untoward and undesigned event which resulted in damage or harm to the physical structure of the body. Section 401.011(26). Per her finding of fact that the claimant did not mention a new and separate injury or aggravation to Dr. B at his regular visit on July 21, 1994, the hearing officer obviously was not persuaded by claimant's testimony to the contrary. In addition, she could have credited the testimony of Mr. R that the claimant specifically refused to lift any of the sumps, as well as the testimony of Mr. LR that claimant did not mention a new injury several days later when Mr. LR and claimant spoke about the latter's job performance. In short, upon our review of the evidence below, we do not find the hearing officer's decision to be against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). In addition, we find no error in her determination of the issue of disability, as the 1989 Act requires that the existence of a compensable injury is a necessary prerequisite to disability. Section 401.011(16).

The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge