APPEAL NO. 010739

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 March 14, 2001. The hearing officer held that the respondent's (claimant) injury "extended to" the lumbar spine disc herniations but not to cervical or thoracic herniations and bulges. He found that the claimant had disability beginning February 29, 2000, through the date of the CCH.

The appellant (carrier) has appealed and argues that it was error to admit Claimant's Exhibit No. 1 over its objection. The carrier further argues at considerable length the facts that it believes show that the claimant had a continuation of a prior injury. The carrier concedes four days of disability while the claimant was hospitalized for this injury, yet argues that any inability to work thereafter resulted from preexisting problems. The claimant responds that the fact determinations of the hearing officer should not be set aside, and that the hearing officer did not abused is discretion in admitting its exhibit.

DECISION

We affirm the hearing officer's decision.

Brief facts. Although inaccurately phrased as an "extent of injury" issue, the substance of the first issue that was litigated was whether the claimant sustained an injury on _____, or whether his condition was a continuation of the effects of a prior injury in _____; the defense that was raised as to back injuries (but not chest wall injuries) in the carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated "2-11-00 (sic). A later TWCC-21 raised a question of whether there was an injury at all that occurred on _____. The extent issue apparently results from a wedding of these two theories of defense.

The claimant, who was employed by (employer), agreed that he pulled his back when he lifted a tire in _____. He kept working and sought medical treatment within the next week. Although he received medication and some additional treatment, the claimant said he had no lost time from work nor did he experience any numbness in the legs. On cross-examination, he agreed he had some occasional numbness after this event.

The claimant was working underneath a car on his back on _____, taking a transmission out with another worker, when it began to fall toward him. He pushed it so it would not fall on his head, but was struck in the chest and shoulder and blacked out. He was transported by ambulance to the hospital where he awoke, and was discharged after three days. The claimant said he had been unable to work after this accident; he had back surgery in January 2001 from which a one-year recovery period was anticipated.

An October 18, 1999, MRI of the lumbar spine reported a left-sided protrusion of six millimeters (6 mm) at L4-5 which caused some moderate stenosis. A 4 mm leftward protrusion was found at L5-S1. A January 15, 2001, MRI reported the 6 mm narrowing but also characterized spinal cord encroachment as marked. An L3-4 broad left-sided protrusion with thecal sac deformity was noted. L5-S1 was, however, reported as unremarkable. The claimant agreed that surgery had been recommended after his September 1999 injury. Another MRI of the cervical area after the 2000 injury also showed a herniation at C6-7 and a bulge and possible annular tear at C5-6. At least some of the claimant's doctors reported an awareness of the 1999 injury, although with one exception there were no assessments attributing the lumbar conditions to either the _____ or _____ injury exclusively.

Admission of exhibit over objection. The carrier objected to Claimant's Exhibit No. 1, shown as "faxed" to the carrier on March 12, 2001, as untimely exchanged. The benefit review conference (BRC) had been held on October 26, 2000; the original January 11, 2001, CCH was continued to allow for development by the carrier of additional opinion evidence. The carrier's attorney's objection was only to pages 3-4 of Claimant's Exhibit No. 1. After considering arguments of counsel, the hearing officer admitted the exhibit in its entirety, making no finding of good cause. We agree that this was error. The documents were plainly exchanged later than 15 days following the BRC. While belatedly exchanged documents can be admitted by the hearing officer on a showing of good cause (Section 410.161), no finding of good cause was made here. The Appeals Panel will not substitute its own judgment, one way or the other, as to the existence of good cause, but is compelled to find that the documents were erroneously admitted and cannot be considered.

However, even if Claimant's Exhibit No. 1 is not considered by the hearing officer, there is sufficient evidence in the rest of the record to support the finding of injury to the lumbar spine on _____. One of the pages not objected to in the exhibit, for example, draws conclusions about causation. In short, the abuse of discretion in admitting those pages does not constitute reversible error because it is not clear that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Whether there was an injury. The hearing officer did not err in finding that the claimant sustained an aggravation to his lumbar spine on _____. The claimant had the initial burden of proving a compensable injury. This includes the burden to prove (not merely assert) aggravation to a preexisting injury or condition. It is axiomatic, in case law having to do with aggravation, that 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 and 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). The compensable injury includes these enhanced effects, and, unless a first condition is one for which compensation is payable under the 1989 Act, a subsequent carrier's liability is not reduced by reason of the prior condition. St. Paul Fire & Marine Insurance Company v. Murphree, 357 S.W.2d 744 (Tex. 1962). The hearing officer was not limited in his analysis only to a comparison of a preinjury and postinjury MRI, but could consider testimony and compare the aftermath on the claimant's ability to function after each incident at work.

Whether there was disability. The hearing officer did not err in holding that the claimant had disability since the date of his accident. The carrier agreed that the claimant's hospitalization, until March 3, 2000, constituted disability. It was the obligation of the carrier on the disability issue to show the sole cause of the claimant's inability to work after March 3, 2000, was the _____ injury. The hearing officer evidently found this burden not met and there is sufficient evidence to support this determination.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company

v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The hearing officer did not err, and is supported by the record, in his decision that the claimant sustained lumbar and cervical sprain, and we affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge