APPEAL NO. 92463

On July 31, 1992, a contested case hearing was held. The hearing officer determined that the respondent/claimant (hereinafter Ms. A), did not sustain a new injury on _____ when she returned to work as a housekeeper for (employer). Because she was injured in the course and scope of her employment with the employer on _____, and her pain and swelling was determined to be a natural result of that injury, the appellant, Cigna Insurance Company, remained liable for her injury. The respondent/carrier, who had become the employer's carrier subsequent to her _____ injury, was not determined to have liability for the consequences resulting from her injury after she returned to work.

Appellant asks for reconsideration by the Appeals Panel, arguing that the great weight of the evidence supports its contention that Ms. A sustained an aggravation to her pre-existing knee condition, which is an injury in its own right "as a matter of law", and that respondent/carrier is therefore liable for benefits. Appellant quotes two pages of the treating doctor's 48 page deposition as sufficient to establish the great weight and preponderance of the evidence in its favor. Respondent/carrier replies that the decision of the hearing officer is supported by the evidence, pointing out the lack of any evidence that there was either an accident or a repetitive trauma, after Ms. A returned to work, that resulted in new and separate physical harm or damage to her body. Respondent/carrier further argues that an aggravation of a pre-existing condition can no longer be considered as an injury as that term is defined in the new Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq* (Vernon's Supp. 1992) (1989 Act). There was no response from Ms. A.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

Ms. A injured her right knee on _____, while rising from a squatting position on the floor when she was cleaning at (company), an annex of the employer. She customarily cleaned offices located in that annex. She sought immediate treatment from employer's emergency room, and when the pain and swelling did not decrease, she then consulted Dr. G, a board certified orthopedic surgeon, who took her off work and eventually found that she had a tear in the medial meniscus cartilage. Arthroscopic surgery was performed on June 25, 1991. Ms. A described her therapy over the ensuing weeks as initially quite painful. Eventually, the pain decreased and her swelling subsided. She testified, however, that the pain never entirely went away.

Ms. A said that she wished to return to work and discussed this with Dr. G in mid-August. He cautioned her to wait another two weeks. On August 30, 1991, he gave her a full release to her work. Ms. A testified that she did not feel 100% recovered, however, and suggested to Dr. G that she wear a sleeve protector device. Ms. A returned to the

employer on September 3, 1991, to her job at the annex. She stated that she was told to report the next day to the main hospital. Ms. A testified that the cleaning work at the hospital was different and more strenuous than at the annex, in that she had to pull around a linen cart, load sheets, change beds, and do more mopping. She stated that she was not required to get down on her hands and knees. Ms. A stated that around the third or fourth day after she returned to work, her knee pain increased, she had swelling, and eventually had to stop work on September 10th. She saw Dr. G on September 17th; he took her off work. She stated that she returned to limited duty work for employer on November 20, 1991, where she still was at the time of the contested case hearing.

Ms. A testified that she could not recall any incident or accident in September 1991 which caused the renewed pain. She characterized the pain as similar to that she experienced post-surgery. Although she testified generally as to her activities at the hospital, there was no evidence of any activity of repetitious, traumatic nature that could be linked to Ms. A's increased pain. Ms. A herself strongly felt that the pain she experienced upon returning to work resulted from her _____ injury, rather than any new injury, and she reflected during her testimony that maybe she hadn't been ready after all to go back full time. There is no evidence that Ms. A was found to have reached maximum medical improvement from her (date of injury) injury.

Between her injury on _____, and her return to work in September, the employer changed workers' compensation carriers. The appellant has taken the position that it is not liable for further compensation relating to disability or physical conditions occurring after _____, and argues that a new injury, by way of aggravation, occurred after Ms. A was given a full release to work by her treating doctor. Appellant asks that the respondent/carrier be given the liability.

It is important to review the entire body of medical evidence rather than the excerpts quoted by appellant. Undoubtedly, Ms. A improved gradually after her surgery. Dr. G's notes for August 30, 1991 indicate that she could return to work the following week, but that she would be re-evaluated in about a month to make sure that she continued to improve. The next notes on September 17, 1991, record minimal swelling and tenderness of the knee. The recorded diagnosis on that date is "recurrent knee irritation secondary to overuse." He took Ms. A off work for the following three weeks. A re-check on October 11, 1991 indicates a history that Ms. A had to be on her feet a lot due to a sudden death in the family and that, consequently, her pain remained and her gait was affected.

On March 5, 1992, Dr. G wrote to appellant: "[Ms. A] did not sustain a new injury. The recurrent irritation that is diagnosed in the 9-17-91 office note refers to the fact that she was released to full duty on 8-30-91; and after working on her injured knee, she irritated the old injury again." At various times throughout an oral videotaped deposition,

Dr. G refers to the knee as "aggravated" but also states repeatedly that although she experienced pain and swelling in September, there was no evidence of any new physical damage or harm to her knee. He admits to some confusion over being asked, in a previous deposition on written questions, whether Ms. A sustained an "injury" on _____ as defined in the 1989 Act. In that deposition on written questions, Dr. G answered "yes". In the oral deposition, he attempted to explain that there was some confusion in that the definition of injury includes "those diseases or infections naturally resulting from damage or harm." Dr. G stated that, in his opinion based upon reasonable medical probability, her September 1991 pain and inflammation related back to the _____ injury. He testified that stress to a weakened knee upon return to work commonly caused the type of pain and discomfort he observed in Ms. A in September 1991. Dr. G testified also that the inflammation in her knee in September was caused by weakness resulting from the original injury. He testified that she experienced pain and swelling several times during her recovery period, before her return to work, which were related to activity. He stated that he would not characterize her activities at work in September 1991 as "repetitious trauma". Dr. G pointed out, in response to a question from appellant's attorney, that although he released Ms. A to work, she had not reached maximum medical improvement. He also stated that she had not reached maximum medical improvement as of the date of the deposition on July 13, 1992.

We have stated previously that a release to return to work is not equivalent to a certification of maximum medical improvement. Texas Workers' Compensation Commission Appeal No. 91014 decided September 20, 1991. Nor does a release to work necessarily end disability, as defined in the 1989 Act, Art. 8308-1.03(16), as disability may occur intermittently. Texas Workers' Compensation Commission Appeal No. 92299 decided August 10, 1992. Medical benefits are payable for life for health care that cures or relieves the effects naturally resulting from the compensable injury, that promotes recovery, or that enhances the ability of the employee to return to or "retain" employment. Art. 8308-4.61(a). Disability is the inability, because of the compensable injury, to obtain or "retain" employment equivalent to the pre-injury wage, Art. 8308-1.03(16), and temporary income benefits are payable to an injured employee who has not attained maximum medical improvement who also has disability. Art. 8308-4.23(a).

In this case, Ms. A may have been able to obtain, but was not able to retain, her full time employment. Appellant contends that this was because of a new injury in September 1991, rather than the _____ injury. Where a subsequent injury is alleged to be the sole producing cause of disability, this must be proved. American Surety Co. of N.Y. v. Rushing, 356 S.W.2d 817 (Tex. Civ. App.-Texarkana 1962, writ ref'd n.r.e.). While we agree that, under the 1989 Act, a carrier is not absolved of liability because an injured employee had a pre-existing condition, and that an aggravation of that condition is an injury in its own right, Mountain States Mutual Casualty Co. v. Redd, 397 S.W.2d 321 (Tex. Civ. App.-Amarillo 1965, writ ref'd n.r.e.), a bare assertion that an aggravation has

occurred does not relieve the proponent of the burden of proving that an injury, as defined in Art. 8308-1.03(27), has been sustained.

An injury may result from an accident or from occupational disease, which includes repetitive trauma. An accident is an undesigned, untoward event, traceable to a definite time, place and cause. Olson v. Hartford Accident and Indemnity Co., 477 S.W.2d 859 (Tex. 1972). To recover for repetitive trauma, it must be proven that repetitious physical activities occurred on the job and that such activities caused an injury; the disease must be inherent in that type of employment as opposed to employment generally. Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). Respondent/carrier's argument that there is no evidence of injury in the record is well taken. Ms. A has denied a specific September 1991 event and no proof was otherwise offered that one occurred. Although she generally described some of her duties at the hospital, saying they were harder than those performed at the annex, Dr. G stated that he would not characterize such activities as repetitive trauma. However characterized, there were no hospital cleaning activities that were linked to Ms. A's increased pain in September 1991, let alone any new or accelerated physical damage or harm.

The appellant argues that Dr. G's description of the September 1991 inflammation as an aggravation proves its case that a new injury was sustained. However, it is clear from reading such statements in the context of Dr. G's entire testimony, and not in isolation, that Dr. G uses the term "aggravation" in the layman's sense, rather than the term of art developed in workers' compensation case law, and, further, that the overwhelming weight of his opinion is that Ms. A's renewed pain and inflammation is a consequence of her _____ injury. Dr. G's treatment notes and testimony additionally indicate that it was general activity, and not specifically work-related activity, that caused her recurrent pain; his October 1991 notes, made after Ms. A had been off work for three weeks, link her pain and limping to being on her feet a lot as a result of a death in her family. Appellant argues that Ms. A "experienced no problem" while working at the annex compared to the effects suffered from working in September at the hospital; this argument overlooks the fact that the annex work occurred prior to the _____ injury, and that Ms. A did experience pain when she worked after the injury.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. 1989 Act, Art. 8308-6.34(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 Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The claimant (in this case, the appellant, asserting a new injury) has the burden of proving, through a preponderance of the evidence, that an injury occurred in the course

and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). Notwithstanding appellant's assertion that an aggravation "as a matter of law" is an injury, whether or not an injury has occurred is an issue for the trier of fact. Dealers National Insurance Co. v. Simmons, 421 S.w.2d 669, 675 (Tex. Civ. App.-Houston [14th Dist.] writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 92060 decided April 1, 1992. We would note that, even if there were evidence in this record of a subsequent injury, appellant's liability would not necessarily be absolved. *See* Federal Underwriters' Exchange v. Tubbe, 193 S.W.2d 563 (Tex. Civ. App.-Beaumont 1946, writ ref'd n.r.e.). To the extent that the appellant sought a "contribution" against its temporary income benefit obligation, we would note that the statute allowing for contribution in the 1989 Act, Art. 8308-4.30, applies only to earlier compensable injuries, and offsets only the impairment and supplemental income benefits. Texas Workers' Compensation Appeal No. 91030 decided October 20, 1991.

Essentially, the appellant's position is an attempt to deflect onto a subsequent carrier, with no showing of a subsequent accident or a repetitive trauma, its own liabilities for lifetime medical benefits and income benefits resulting from a compensable injury rendered in the service of its insured at a time when it extended coverage. Given the lack of any evidence supportive of an accident at a time or place certain, or of any repetitious activity unique to Ms. A's work at the hospital in September, as against Dr. G's total medical opinion and indications that Ms. A's pain in September was a natural post-surgery occurrence related to activity in general, a contrary decision by the hearing officer may well have been reversible on appeal.

There being sufficient evidence to support the decision of the hearing officer, we affirm his decision.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge