APPEAL NO. 92681

A contested case hearing was held on October 20, 1992. He (hearing officer) determined that (claimant) suffered an injury on ___ and that appellant (carrier 1) was the carrier responsible for benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq* (Vernon Supp. 1993) (1989 Act). Appellant urges error in several of the hearing officer's findings of fact and conclusions of law and in his decision in its entirety, arguing alternatively that they are supported by no evidence or are against the great weight and preponderance of the evidence. Appellant also urges that the complained of findings and conclusions are arbitrary and capricious, that the hearing officer abused his discretion in rendering his Decision and Order because there was no evidence that the claimant lost time as a result of a compensable injury on or about ___, and that, as a matter of law, the date of injury in connection with a claim of repetitious trauma/occupational disease is in ___. Respondent (carrier 2) asks that the decision be affirmed.

DECISION

Finding the evidence sufficient to support the determinations of the hearing officer, with modification, the decision is affirmed.

The issues in this case as ultimately set out by the hearing officer were: (1) "[w]hat is the Claimant's correct date of injury as it pertains to a repetitious trauma injury," and (2) "[w]hich Carrier is liable for compensation to the Claimant as the result of her work related injury?" The first issue as reported out of the benefit review conference and as initially stated by the hearing officer did not include the words "repetitious trauma" in relating to the injury date. However, counsel for carrier 1 interjected, with the concurrence of carrier 2, that the words repetitious trauma should be added. Carrier 1 was the workers' compensation carrier for the claimant's employer on ___, and carrier 2 was the carrier on ___. The claimant, in somewhat halting English, testified that she worked for the employer as a warehouse worker and that she had not had any back problems until about 11:30 on ___, when she was lifting a particular 60 or 70 pound box and she felt "a sharp on my lower and on my upper back." She stated she laid down a bit, told her supervisor that her back hurt and that her supervisor took her to the company doctor. The company doctor took x-rays, gave her pills, diagnosed a back strain, and told her to go back to work with a 40 pound lifting restriction. She stated that there was only one accident and that she went back to work and that the pain "was increasing, was progressing day by day until I went to my own doctor [on or about ___,] and said I can't work very well, I can't do anything very well. And he examinnate (sic) my body and he told me that I'm no good, I'm no okay." This was the first time she went to her own doctor because "my back was getting worse every day, every time" and she has not worked since. She testified that from ___, until ___, she was performing her usual work which

included lifting and bending and that it kept getting worse and that it got to where it hurt when she stood or sat for any period of time and that she did not stand up straight. She stated her back problems started on ___ and they continued all the way through to "today." In a recorded interview admitted into evidence, the claimant stated that following the injury on ___ every day she would arrive at work with a backache and that she told "them" that she needed to rest because her "back was hurting so much I couldn't stand it." The claimant also stated that one of her doctors told her that because of the repetitive lifting she had a back problem.

A medical report from the claimant's treating doctor states she is a patient for "the treatment of a spinal distortion along with related myological and ligamentous disorders." A report from a referral doctor, after stating the history of the ___, injury, indicates that "this was a repetitive type injury" and gives as the "impression" injury to the cervical and lumbar area with bilateral radiculopathy.

Pertinent findings and conclusions of the hearing officer are as follows:

FINDINGS OF FACT

5. On ___, the Claimant suffered a work-related injury to her back which both Carriers acknowledge was compensable under the Act.

6. The Claimant began to lose time from work as the result of the ___, injury on ___.

7. The Claimant's ___, injury was never resolved and was exacerbated by her immediate return to work.

8. Claimant did not suffer a new injury in _____ of (year).

CONCLUSIONS OF LAW

2. The date of injury for the Claimant's repetitious trauma injury was ___.

3. (Carrier 1) is the Carrier which is liable to the Claimant for compensation as the result of this claim.

Carrier 1 disputes Findings of Fact Nos. 6, 7, and 8 and the Conclusions of Law. Our review of the evidence in the record convinces us there is sufficient evidence to support each of the hearing officer's findings of fact. The testimony of the claimant is uncontroverted that she had no back injury or problems prior to approximately 11:30 on ___. At that time, the evidence is clear and undisputed, she sustained a specific injury,

definite in time and place, she reported the same and was taken to a company doctor. She stated unequivocally that although the company doctor released her to return to work, her back continued to pain her from the time of her injury, that it got progressive worse and that eventually, on ___, she finally went to her doctor. That she was returned to work by the company doctor the same day does not establish a marking point for the initiation of a new, separately compensable injury. Rather, given the circumstances involved and according to the evidence brought out at the contested case hearing, the hearing officer was fully justified in inferring and finding that the ___ injury was never resolved and was exacerbated by the immediate return to work.

Whether there is continuation of the effects of an injury or whether there is a new and distinct injury, either as a result of a separate specific accident or because of the aggravation of a prior injury, is a question of fact for the fact finder. Texas Workers' Compensation Commission Appeal No. 92654 & 92655, decided January 22, 1992. In that case, as is the situation in the instant case, there was a change of carriers between the initial injury and the asserted new injury. In upholding the hearing officer's decision that the claimant there did not sustain a new injury we stated that "[w]hile we generally agree with the assertion on appeal by carrier 1 that as a matter of law a compensable injury embraces an aggravation of a previously existing condition or injury, whether a claimant sustained such an aggravation or merely suffered a continuation of an original injury is a question of fact for the fact finder." The date of the original injury in that case was July 5, 1991, and the asserted new injury through aggravation was March 16, 1992. Similarly, we upheld the hearing officer's determination that there was no new injury or aggravation of a prior injury sustained on September 11, 1991; rather, the pain and swelling of the claimant's knee was a natural result of an injury sustained on May 13, 1991. Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. That case also noted that a return to duty does not automatically transfer the original injury into a new injury. In this case although there was a cursory reference in a referral doctor's report that this was a "repetitive type injury", this does not amount to the great weight and preponderance of the evidence on the matter, particularly when weighed against the testimony of the claimant regarding only one incident occurring which resulted in virtually continuous back problems from that point forward. The reference certainly does not provide a basis to hold that as a matter of law a new injury occurred at the time the claimant felt she could no longer perform her duties with the employer. And, we have stated that a claimant "can provide probative evidence concerning his injury and it can support the establishment of an injury even in the absence of medical evidence or even where it is contradicted by some other medical evidence." Texas Workers' Compensation Appeal No. 92515, decided November 5, 1992.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e). His determinations will be upheld where, as here, there is sufficient evidence to support those determinations. Only if the hearing officer's determination was so against the great

weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would reversal or set aside action be appropriate. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We have reviewed the evidence from the view point of "no evidence" and "insufficient evidence" as raised by carrier 1 and find no merit to its position. We have also reviewed the hearing officer's findings for arbitrariness and capriciousness and his decision for abuse of discretion and find no merit to the assertions.

As set out above, the hearing officer concluded in his second conclusion that the date of injury for the claimant's "repetitious trauma" injury was ___,. From his findings, it is clear that he determined the specific injury was sustained by the claimant on ___, and its effects continued from ___, until ___, and that there was no new injury, through aggravation or otherwise. He specifically found the ___, injury was never resolved and was exacerbated by the immediate return to work. In addition, there was no evidence whatsoever that the claimant had any previous back problem prior to the specific injury on ___. Under these circumstances, the inclusion of the words "repetitious trauma" was unnecessary and was not supported by the findings of fact. However, this does not affect the outcome and we cure the matter by modifying that conclusion to exclude the words "repetitious trauma" and affirm the remainder. *See* Texas Workers' Compensation Commission Appeal No. 92639, decided January 14, 1993; Texas Workers' Compensation Commission Appeal No. 92602, decided December 22, 1992; Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. The Decision and Order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge