APPEAL NO. 92712

On November 17, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the claimant sustained a compensable injury when she aggravated a prior work-related injury in the course and scope of her employment on (hearing officer) (date of injury), and that she has disability. The hearing officer ordered the appellant, hereinafter the carrier, to pay medical and income benefits in accordance with her decision and the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The carrier disputes certain findings of fact and conclusions of law, and contends that the claimant and the Commission should be bound by the findings of a "designated doctor" concerning whether the claimant sustained a "new injury." The carrier requests that we reverse the decision of the hearing officer and render a new decision that denies benefits to the claimant, or in the alternative, remand the case for a second hearing. The respondent, hereinafter the claimant, did not file a response to the carrier's request for review.

DECISION

The decision of the hearing officer that the claimant sustained a compensable injury on (date of injury) is affirmed. The hearing officer's findings, conclusions, and decision with respect to the claimant's disability are modified to reflect that the claimant's disability ceased on May 19, 1992, and as modified are affirmed.

The issue at the hearing as agreed to by the parties was "whether the claimant sustained a new injury on or about (date of injury), or if her current disability, if any, is a result of an old injury on November 3, 1988." The carrier was represented by an attorney. The claimant was not represented by an attorney, but was assisted by a Commission Ombudsman.

Prior to her claimed injury of (date of injury), the claimant had been in the employ of the employer, (employer), for about five years. She worked as an aircraft electrician. She testified that she injured her back, neck, hips, ankle, and shoulder in a work-related accident while working for the employer in 1988. She said that she worked on and off since 1988 because her doctor would take her off work every three or six months because the doctor told her that her job was "aggravating my body" and "messing up my body." She said that the last time she received medical care for her 1988 injuries was on August 24, 1991, except that she went back to her doctor "for to return to work in September." She testified that she worked for her employer from September 1991 to (month year), that she didn't go back to her doctor with any kind of complaints during that period, and in response to the question as to whether she had any kind of medical problem in that time period, the claimant said "no, not really." However, the claimant also said that since 1988 she has had pain in "a lot of areas," and that she was in pain prior to her alleged injury of (date of injury). She said her pain was from her prior surgeries, returning to work, and adjusting to work. She explained that her pain prior to her claimed injury of (month year) was "a different pain."

The claimant also said that she broke her wrist in a car accident in August 1990, but said "it was repaired."

The claimant testified that on (date of injury) she was installing a power supply socket in an aircraft and had to hook up a harness for the installation. She said she had to use a quarter-inch wrench about two and one-half inches long and had to work in an "odd" position in a little space because people and equipment were in her way. She said that she had not installed equipment like that for awhile because of her "condition." After 10 or 15 minutes of work installing the socket, she said she "kept feeling different symptoms like pains" and that the pain was in her wrist and neck. She further stated that after about an hour of working on the installation, she "felt the tension and the strain and tightening in my muscles and everything and I felt a pop in my neck and like a tear, trying to carry on; and then I felt--my hand was all swollen from trying to install the things and I felt a pop and a tear in that; and after that, I went to the nurse's station to see what happened." She also said that she had a "strain" in her neck. She further testified that she reported to her supervisor that she thought she had strained her hand, and that she went to the employer's nurse station on the date of the incident and reported that she had neck pain, a "pop" in her neck, and a "pop" in her wrist.

The claimant said that on (date) she went to (Dr. E), who, along with other doctors had treated her for her 1988 injuries; that she told the doctor that she had a "popping sensation" in her neck that had occurred at work installing the power supply socket; that she understood from her discussion with the doctor that she had "injuries to my wrist and neck" and that "it's supposed to be related to a new injury." She said that (Dr. E) gave her medication, took her off work, and told her to come back for tests. She said she has not had the tests yet. The claimant said she also saw (Dr. E) on December 27, 1991, and twice a week after that. The claimant further testified that (Dr. E) released her to return to work in May 1992 without restrictions. She said she did not return to work because when she called her supervisor on May 18, 1992, and reported to him that she was released to return to work, her supervisor told her that she was "on the layoff list and I could be getting my notice any day." When asked if there was another reason why she did not return to work, the claimant said "no." She said she received her layoff notice on October 15, 1992, but that she had "got it word of mouth on the phone that I had been laid off by my supervisor."

On June 26, 1989, (Dr. T), reported that the claimant had been a patient at his clinic since August 5, 1988, that she had recurrent complaints of neck and back pain since her on-the-job accident last fall, and that she was diagnosed as having acute cervicothoraco lumbar myositis with multiple somatic dysfunctions. (Dr. S), M.D., reported on November 14, 1989 that the claimant had soreness in her right shoulder, right hand, both legs, and lower and middle back. On January 24, 1990, (Dr. T) diagnosed the claimant as having tenosynovitis of the right shoulder girdle, acute somatic dysfunction at the T-4/T5 interval, and acute lumbosacral strain.

On January 10, 1990, (Dr. E), M.D., reported that the claimant told him that while at

work on November 3, 1988, she injured her neck, mid-back, low back, right wrist, and left ankle when someone pulled a stand out from under her and she fell five feet. She also complained of bilateral shoulder pain and left knee pain. (Dr. E's) diagnostic impression was cervical/thoracic/lumbosacral spine syndrome, right wrist trauma--rule out carpal tunnel syndrome, left ankle trauma, and internal derangement of the left knee. On January 12, 1990, the claimant had a left ankle arthrogram performed which revealed a probable partial tear of the medial deltoid ligament area. (Dr. E) noted on January 15, 1990 that the claimant had pain in her wrist, mild neck pain, and continuing back pain. On January 15, 1990 the claimant underwent a right shoulder arthrogram.

(Dr. H), D.O., reported on August 31, 1990 that the claimant had sustained a fracture of the right wrist in an automobile accident on August 13, 1990, and that he felt that placing the wrist in a brace would be satisfactory treatment. In November 1990, (Dr. H) reported that he did not think the claimant needed surgical treatment for her right wrist and that she did not have any carpal tunnel symptoms nor any other symptoms other than an inability to forward flex the wrist.

On May 13, 1991, the claimant had a right wrist arthrogram and right wrist arthroscopic surgery performed by (Dr. E). On June 22, 1991, (Dr. E) noted that physical examination of the wrist was essentially unremarkable and that the claimant denied further complaints. On July 19, 1991, (Dr. E) noted that the claimant had some persistent soreness in the ulnar aspect of her right wrist, but that she had good motion and negative Tinel's sign at the elbow and wrist. There was no evidence of infection or swelling of the wrist. On July 25, 1991, the claimant had surgery performed at the L4-5 level of her lumbar spine. In a note dated July 26, 1991, (Dr. E) noted that the claimant appeared to be doing generally well, but that she had some continuing right wrist soreness. On August 5, 1991, (Dr. E) noted that the claimant complained of low back pain which she said was "debilitating" to her. The only other record from (Dr. E) which was in evidence was a signed but undated handwritten note "To Whom It May Concern" wherein (Dr. E) stated that the claimant "was seen in this office on these dates as a new patient: 12/27/91, 1/3/92, 1/8/92, & 2/26/92. (We note that the hearing officer listed Claimant's Exhibit No. 3, a note from (Dr. E) dated March 3, 1992, as having been admitted into evidence when in fact it was excluded from evidence on the basis that it had not been exchanged with the carrier).

An MRI of the claimant's right wrist performed on January 10, 1992, suggested the presence of minimum flexor tendon tenosynovitis associated with carpal tunnel syndrome. An MRI of the claimant's cervical spine performed on January 10, 1992, revealed evidence of minimal straightening of the cervical lordotic curvature compatible with a minimal degree of paraspinous muscular spasm.

As a result of a benefit review conference (BRC) agreement dated March 5, 1992, the claimant was examined by (Dr. R), M.D., on May 22, 1992. (Dr. R) noted the claimant's injuries of November 3, 1988, her subsequent medical treatment and surgeries, and the right wrist fracture sustained in the automobile accident. He said that the claimant related

to him that her latest date of injury was (date of injury), at which time she was working on an aircraft when she began to experience increased pain in the right wrist, right shoulder, and neck. (Dr. R) gave the following diagnosis:

1.Mild malunion, distal right radius fracture which was in all probability aggravated on the injury listed of (date of injury) with some synovitis due to overuse.

2.Chronic cervical myositis which was also, by history, aggravated by the incident on (date of injury).

3.Probable chronic supraspinatus tendinitis, right shoulder, stemming from the initial injury in 1988.

4.Post-op L4 discectomy.

5.Chronic lumbar strain with decompensation.

(Dr. R) stated that "I don't feel that she has experienced a new injury, but simply in both instances of the neck and right wrist as well as the entire arm being aggravation of pre-existing problems."

Also in evidence was an "Employee Injury/Case Report" which the carrier represented to be records from the employer's plant hospital. This report indicated that from November 4, 1988 through December 1989, the claimant frequently reported problems she had with various parts of her body, including her right wrist and neck. In 1990 she went to the plant hospital on three occasions, her last visit in that year being on June 11th when she reported that she continued to have pain in her middle and lower back. The next visit to the plant hospital was on September 12, 1991 when the claimant reported occasional discomfort in her low back. The claimant was cleared to work without restrictions. The report indicated that the claimant's next visit to the plant hospital was on (date) (the day after her claimed date of injury) and that the reason for the visit was "injury bothering employee, returned for additional medical treatment." On that date, the claimant is reported to have complained of neck pain, and the report noted "strain." A notation of January 2, 1992 indicated that the claimant was to stay off work per (Dr. E), and contained the remark "probable neck strain."

In an unsigned transcription of a recorded statement, Sue Bailey, who is a medical assistant in (Dr. E’s) office, stated that on December 27, 1991 the claimant went to (Dr. E’s) office complaining of neck pain, that she did not remember the claimant saying that it was a new injury, and that she, (Ms. B), feels the neck pain is related to the old injury. Also in evidence was the claimant's unsigned transcription of a recorded statement which contained some inconsistencies with the testimony she gave at the hearing. The claimant explained that she was on medication at the time she gave the recorded statement, and that the transcription did not accurately reflect her recorded statement. There are at least two

places in the transcription were the transcriber noted that she or he could not understand a portion of the recorded statement.

The hearing officer made the following findings of fact and conclusions of law:

Findings of Fact

No. 3.Claimant suffered a prior work-related injury for her employer on November 3, 1988.

No. 4.Claimant's prior work-related injury resulted in recurrent complaints of right wrist, neck, and back pain, as well as acute cervico thoraco lumbar myositis with multiple somatic dysfunctions.

No. 5.On (date of injury), while at work, claimant aggravated her prior injury with subsequent aggravation to her neck, right wrist, as well as her entire arm.

No. 6.Claimant has been unable to work since (date of injury).

No 7.Claimant has been unable to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury.

Conclusions of Law

No. 2.Claimant was an employee of [employer] on (date of injury), acting within the course and scope of her employment when she aggravated her prior injury.

No. 3.Claimant has disability as defined in Article 8308-1.03(16) because she is unable to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury.

No. 4.Claimant's disability began on (date), and claimant has not reached maximum medical improvement as defined in Article 8308-4.25.

On appeal, the carrier disputes Findings of Fact Nos. 5, 6, and 7; and Conclusions of Law Nos. 2, 3, and 4. The carrier contends that the claimant failed to prove that her alleged new injury was not just continued complaints of pain from her old injury, and cites National Union Fire Insurance Co. of Pittsburgh v. Janes, 687 S.W.2d 822 (Tex. Civ. App.-El Paso 1985, writ ref'd n.r.e.), and Texas Workers' Compensation Commission Appeal No. 92058, decided March 26, 1992, for the proposition that pain alone does not make a compensable injury. The carrier also contends that the claimant and the Texas Workers' Compensation Commission (Commission) should be bound by the findings of (Dr. R)

because he was a "designated doctor" agreed to by the claimant in a written BRC agreement.

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). "Injury" is defined as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm." Article 8308-1.03(27). It has been held that an injury that aggravates a preexisting condition is compensable provided that an accident arising out of employment contributed to the incapacity. Texas Employers Indemnity Company v. Etie, 754 S.W.2d 806 (Tex. App.-Houston [14th Dist.] 1988, no writ). *See also* INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st Dist] 1988, no writ) where the court stated that an injury that aggravates a preexisting bodily infirmity is compensable provided over-exertion or an accident arising out of employment contributed to the incapacity. In Janes, *supra*, the court stated that "mere pain is not compensable under the workers' compensation statute" and the Appeals Panel quoted that statement in Appeal No. 92058, *supra*. However, in this case there is evidence other than "mere pain" to substantiate that a compensable injury occurred to the claimant on (date of injury). The claimant testified that she felt a pop, tear, and strain in her neck, and felt a pop and tear in her hand while working installing the socket on (date of injury). While she acknowledged that prior to that incident she had felt pain in a lot of areas of her body, she described the pain as being different from the pain she felt after the incident of (date of injury). The medical records do not show any report of neck or wrist complaints to a health care provider after she returned to work in September 1991 until after the incident of (date of injury). The records of the plant hospital do not show any visits after September 19, 1991 until she reported neck pain on (date), and the two previous visits to the plant hospital on September 12, 1991, and June 11, 1990 showed only that she was complaining of back pain. Thus, the medical records show that during the several months that the claimant was working between September and (month year), she did not complain to a health care provider about neck or wrist pain. This evidence is contrary to the carrier's assertion that the claimant's complaints of pain prior to her claimed injury of (date of injury) paralleled her complaints of pain after her claimed injury of (date of injury). In addition, while (Dr. R) reported that he did not feel that the claimant had experienced a new injury, he did indicate that her right wrist fracture was in all probability aggravated by the (date of injury) injury, that her chronic cervical myositis was also aggravated by the incident on (date of injury) and that her entire arm was an aggravation of preexisting problems. As previously observed, aggravation of a preexisting injury can itself constitute a compensable injury. *See* Gulf Insurance Company v. Gibbs, 534 S.W.2d 720 (Tex. Civ. App.-Houston [1st Dist.] 1976, writ ref'd n.r.e.).

The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e). Having reviewed the evidence, we conclude that the hearing officer's Finding of Fact No. 5 and Conclusion of Law No. 2 that the claimant aggravated her prior injury on (date of injury) with regard to her neck, right wrist, and right arm, are supported by sufficient evidence, are

not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, and are affirmed. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We note that just because inferences different than those drawn by the hearing officer could reasonably be made, and that we may well have viewed the evidence in a different light, is not enough to reverse the findings of the fact finder. *See* Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992.

We disagree with the carrier's contention that the claimant and the Commission are bound by the findings of (Dr. R). The BRC agreement of March 5, 1992, lists the disputed issue as "[w]hether disability is as a result of a new injury occurring on (date of injury), or previous injury 11-3-88," and states in the resolution column that "[t]he parties are willing to agree to a designated doctor to make a determination of the issue at hand. I have designated (Dr. R) to make a determination as to whether the current disability is as a result of a new injury or a prior injury of Nov of 88." Pursuant to Article 8308-6.15, a dispute may be resolved either in whole or in part at the BRC. If the conference results in the resolution of some of the disputed issues by mutual agreement, or in a settlement, the benefit review officer must reduce the agreement or settlement to writing. The benefit review officer and each party or the designated representative of the party must sign the agreement or settlement. A settlement is not effective unless it is approved by the director of the Commission's Division of Hearings in accordance with Article 8308-4.33. An agreement signed by an unrepresented claimant remains binding on the claimant through the final conclusion of all matters relating to the claim while the claim is pending before the Commission, unless the Commission for good cause relieves the claimant of the effect of such agreement. A "designated doctor" means a doctor who is appointed by mutual agreement of the parties or by the Commission to recommend a resolution of a dispute as to the medical condition of an injured employee. (Emphasis added.) Article 8308-1.03(15). However, a designated doctor's report is given presumptive weight only under the provisions of Articles 8308-4.25(b) (relating to a dispute over MMI) and 8308-4.26(g) (relating to a dispute over impairment rating). A designated doctor's report is to be adopted by the Commission only if the parties agree on a designated doctor to resolve an impairment rating dispute under Article 8308-4.26(g). In this case, there were no disputed issues concerning MMI or impairment rating. Hence, the findings of (Dr. R), the doctor agreed to by the parties and "designated" by the benefit review officer to make a determination as to whether the claimant's current disability is a result of a new injury or a prior injury, do not have presumptive weight under Articles 8308-4.25(b) or 8308-4.26(g), nor are they to be adopted by the Commission under Article 8308-4.26(g). Therefore, the weight to be given (Dr. R's) report was for the hearing officer to determine under Article 8308-6.34(e), without the application of presumptive weight. We note that the claimant testified that she understood that (Dr. R) was going to check her out and if he thought she had a new injury he was to treat her, and if he thought she did not have a new injury he was not to treat her. (Dr. R) stated much to the same effect in his report. As we view the BRC agreement, the claimant agreed to be examined by (Dr. R), and (Dr. R) would make his recommendation, but the claimant did not agree that she would give up her claim based on his findings. If

the parties had intended that she give up her claim if the doctor found no "new injury" then it would have the effect of a "settlement" as defined in Article 8308-1.03(43) and would require the approval of the Director of Hearings under Article 8308-4.33(d), which approval we seriously doubt would be forthcoming considering the speculative nature of the BRC agreement. Basically, the issues of whether an employee has sustained a compensable injury and whether the employee has disability are for the Commission to determine, and the "designation" of a doctor to "determine" either of those issues does not supplant the Commission's authority. (We note that (Dr. R's) findings concerning aggravation of preexisting conditions created a mixed question of law and fact for the Commission's determination as to whether the claimant sustained a compensable injury on (date of injury).)

We modify the hearing officer's Finding of Facts Nos. 6 and 7, Conclusion of Law No. 3, and Decision and Order to reflect that the claimant's disability ceased on May 19, 1992. "Disability" means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). The claimant said that (Dr. E) had returned her to work without restrictions in May of 1992 and that the only reason she did not return to work was because she was told by her supervisor that she was on the layoff list. Thus, the claimant admitted that as of May 19, 1992, her inability to obtain and retain employment at wages equivalent to her preinjury wage was due to her pending layoff and was not because of a compensable injury.

The hearing officer's determination that the claimant sustained a compensable injury on (date of injury) is affirmed. The hearing officer's findings, conclusions, and decision with respect to the claimant's disability are modified to reflect that the claimant's disability ceased on May 19, 1992, and as modified are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge