APPEAL NO. 93217

On January 4, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issue considered was whether "the present incapacity of the claimant, is due to his injury of (date of injury); or whether the sole cause of his incapacity is a subsequent injury." The parties stipulated that the claimant had been injured on (date of injury), while employed by (employer). The hearing officer determined that his subsequently diagnosed wrist injury arose out of the same accident when the claimant injured his hands, and ordered only medical benefits due to the injury, which the claimant stated were the only benefits he sought.

The carrier appealed the decision, arguing new evidence not presented at the hearing, which it states that it inadvertently failed to present due to "mass confusion" at the hearing. The carrier further asserts that the hearing officer erred by admitting documents over its objection because the claimant failed to answer interrogatories requesting some of the information, and because one document was a surprise to carrier's attorney. The carrier assigns error for the failure of the hearing officer to find that claimant reached maximum medical improvement (MMI). The carrier states that the finding that the injury is related to the (date of injury) injury, as opposed to an aggravation, is not supported by the evidence. No response was filed by the claimant.

DECISION

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

FACTS

The parties agreed that claimant sustained a compensable injury on (date of injury), while employed by employer. Claimant described that his hands were injured and his skin torn when he was assisting in the moving of an air conditioning unit. It slammed down on his hands; reflexively, claimant said he pulled his hands out, tearing the skin on his hands. He stated that both hands were affected, from mid-palm down to the fingers. At the hospital, loose skin was removed and both hands were medicated and bandaged.

The claimant stated that he was ultimately treated by (Dr. L). The claimant said he resigned his job, on a date determined by other testimony as February 8, 1991, in order to start up his automobile "detailing" business. He described detailing as car cleaning, but much more extensive than a car wash, which required buffing, and even the use of a toothbrush. He stated that he details about three to four cars a month for individuals.

The claimant said that his fingers healed in two weeks. However, two to three months after the accident, he began to have left wrist problems. He stated that Dr. L operated on his wrist in April 1991, that he was in a cast for six weeks, and that he thereafter had physical therapy. He stated that his doctor released him to work around July 1991, and did not tell him what work he could or could not do. The carrier submitted a TWCC-69

form completed by Dr. L, stating that claimant reached MMI effective September 16, 1991 with 10 percent permanent impairment. This document refers to an attached narrative, but it was not attached to the copy put into the record, so any underlying explanation by Dr. L is not before us.

The claimant said that he has worked both at detailing and as a room service attendant at a hotel. He could think of no new injury or accident that occurred involving his hands. Claimant testified that Dr. L has told him that his hands have not completely healed, and that new surgery is required. He stated that Dr. L said his left wrist looked "more prominent" than he would have expected compared to his other surgeries. Claimant stated that the only benefits he was seeking were medical benefits to pay for his hand, and indicated that he was still working at his auto detailing business. Claimant said that he had done auto detailing off and on since he was 16, and had never experienced pain prior to the accident at work.

The claimant submitted a letter from Dr. L dated December 1, 1992, which was admitted over objection by the carrier. Dr. L states "he is continuing to have pain and discomfort due to his initial injury never completely healing. Matt's pain and discomfort is directly related to his initial injury." This letter refers to a July 28, 1992 letter which was not offered by either party. Dr. L's specialty is listed on the letterhead as orthopedic surgery of the hand and upper extremity.

What were described as physical therapy notes entered into evidence by the carrier, and which were made on July 7 and 27, 1992, state that claimant had a "TFCC reconstruction on the left and is having recurrent discomfort." It notes that claimant complains of pain when he pushes down on a buffer in the work. The second note indicates a recommendation of ulnar shortening osteotomy.[1]

Mr. Don Bland, who said he supervised claimant at the time of the accident, said that claimant worked after the injury, and resigned to go into the detailing business. He said he did not think claimant's injury was serious, but affirmed that he was not a doctor.

When the hearing began, the issue was originally cast in terms of "disability." However, midway through the hearing, the hearing officer indicated that it appeared that disability was not in issue as claimant was not contending that income benefits were due. The hearing decision recasts the issue in terms of "incapacity," and the carrier does not complain of the recasting. Two stipulations also appear to have been changed from what was recited on the record; the second and third stipulations, which in the decision recite

[1]It is frankly unclear why physical therapists would be making recommendations for surgery as are indicated here. Although the hearing decision refers to these as notes by Dr. L, they do not appear to be such, as they refer to Dr. L in the third person. The notes also refer to the author conducting examinations of the claimant. Nevertheless, no clarification was furnished by the carrier.

employment and coverage "at all times pertinent to this case" were in fact stipulated in terms of the date of injury, (date of injury). Because "all times" pertinent to the case would necessarily involve time periods when the carrier asserts (in its case and the appeal) that an aggravation was sustained in another job, these stipulations must be clarified in this decision to reflect those made in the record. Therefore, for the second and third stipulations, "on (date of injury)" should be substituted for the phrase "at all times pertinent to this case."

WHETHER THE HEARING OFFICER ERRED IN ADMITTING TESTIMONY AND DOCUMENTS IN SPITE OF CLAIMANT'S FAILURE TO ANSWER INTERROGATORIES

(POINTS OF ERROR #1, 8, and 9)

The claimant admitted that he had not answered interrogatories propounded to him in December 1992, due to his dyslexia and confusion. Although some interrogatories were read into the record, the interrogatory questions were not submitted. The carrier interposed objection to nearly all of claimant's evidence on the basis of the failure to answer interrogatories asking for identity of witnesses and documents. At one point, carrier read into the record an interrogatory calling for identification of medical documents that hadn't been exchanged, and used this as basis for objection to Dr. L's December letter (Claimant's Exhibit 1). The ombudsman, who assisted claimant during the hearing, argued that interrogatories[2] may only seek information not apparent from documents that are subject to disclosure under Article 8308-6.33(d). However, the hearing officer determined that Exhibit 1 had been exchanged to the carrier and overruled the objection. Three other documents that the claimant sought to have admitted were denied admittance because they had not been exchanged, and were not disclosed by answers to interrogatories.

The hearing officer did not err in admitting the document and testimony in question. We agree that interrogatories should not be cavalierly disregarded by either party and if prejudice results from a failure to comply, evidence can and should be appropriately rejected. However, it is true that Article 8308-6.33(c) indicates that interrogatories may not seek information that may be readily derived from documentary evidence subject to disclosure, one of which categories of documents is "all medical records." It seems, therefore, clear that they may not be used to exclude otherwise exchanged information. The hearing officer denied admission to documents whose only route of discovery would have been through the answers to interrogatories. The hearing officer properly admitted Claimant's Exhibit #1 (which was not, as carrier argues, introduced near the end of the hearing.) An exchange to the carrier, over a month before the contested case hearing, was

[2]Interrogatories are provided for in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.33(b) and Texas W.C. Rules, TEXAS ADMIN. CODE § 142.19 (Rule 142.19).

proven.

As to failure to exclude claimant's testimony, we have held that a claimant need not identify himself as a witness and may not be precluded from testimony about the facts of his injury. Texas Workers' Compensation Commission Appeal Decision No. 91088, decided January 15, 1992. The carrier objected to testimony about the facts of the (date of injury) accident. However, because carrier stipulated that claimant was injured on that date, and that such injury was compensable, we can find no basis for excluding facts about the admitted injury from the record.

WHETHER THE HEARING OFFICER ERRED IN FINDING THAT CLAIMANT'S CURRENT LEFT WRIST CONDITION AROSE OUT OF HIS (DATE OF INJURY) INJURY, OR BY FAILING TO DECIDE THE STATED ISSUES OF INCAPACITY OR SOLE CAUSE

(Points of Error #2, 3, 4, 6, and 7)

As part of its argument, the carrier recites from a document not in evidence in the hearing. It attributes the "inadvertent" failure of the carrier to submit the document at the contested case hearing to "mass confusion" that ostensibly reigned at that proceeding. Perhaps this overstatement results from the fact that counsel on appeal did not conduct the hearing. However, it is not an accurate characterization of the hearing, which proceeded in an orderly fashion with no apparent confusion.

Both parties were asked for additional evidence, and given the opportunity to present it. Because the carrier did not tender the document in question, we cannot therefore consider the recitations or references to that document that are set forth in the appeal. Article 8308-6.42(1); Texas Workers' Compensation Commission Appeal Decision No. 92272, decided August 5, 1992.

There is sufficient evidence to support the hearing officer's decision. Although the carrier speculated that later events in the detailing business operated by claimant could have somehow caused the flare-up of his wrist, and argued also that claimant had already reached MMI (implying that no further problems from the original injury would exist), this is offset by claimant's testimony, and Dr. L's letter, as well as the fact that the MMI certification also includes a finding that claimant will have lasting impairment from that injury (which corroborates claimant's testimony that his hands had never completely healed).

An aggravation of a prior condition may amount to 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.). Whether or not an aggravation has occurred is a matter for the trier

of fact. Dealers National Insurance Co. v. Simmons, 421 S.W.2d 669, 675 (Tex. Civ. App.-Houston [14th Dist.] 1967, writ ref'd n.r.e.). We have previously held that the party asserting that an aggravation has occurred must prove that fact, even where there is a renewed pain and inflammation that had earlier subsided. Texas Workers' Compensation Commission Appeal Decision No. 92463, decided October 14, 1992.

Although the carrier complains that the incapacity question posed by the issue was not answered, we cannot agree that the hearing officer failed to decide the issue. An implied finding on these issues in claimant's favor is certainly made by the award of medical benefits and the findings and conclusions that claimant's left wrist injury arose out of the (date of injury) accident. There was no other condition or injury asserted by the claimant other than his left wrist, for which the claimant had denied coverage.

The decision of the hearing officer that the wrist condition arose from the compensable injury is not so against the great weight and preponderance of the evidence so as to be manifestly wrong or unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

WHETHER THE HEARING OFFICER ERRED IN NOT DETERMINING THAT THE CLAIMANT HAD REACHED MAXIMUM MEDICAL IMPROVEMENT

(Point of Error #5)

The payment of medical benefits does not depend upon whether the claimant has, or has not, reached MMI. An employee is specifically entitled to all health care reasonably required by the nature of the compensable injury, "as and when needed." Article 8308-4.61(a). The claimant expressly did not seek income benefits at this hearing, and none were ordered. In addition, MMI was not an issue reported from the benefit review conference as unresolved, nor was it added by agreement of the parties; consequently, the hearing officer could not hear a dispute involving MMI, nor rule on the issue, and his failure to do so is not error. Article 8308-6.31(a).

WHETHER THE HEARING OFFICER ERRED IN NOT CONSIDERING THE TESTIMONY OF THE CARRIER'S WITNESS

(Point of Error #10).

The hearing decision does not list Mr. B as a witness for the carrier. As recited above, Mr. B gave little testimony, at best tangentially related to the issue before the hearing officer. We regard the omission from the decision of Mr. B as a listed witness as an inadvertent oversight rather than an indication of failure to consider Mr. B's testimony. No reversible error is apparent.

We affirm the determination of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge