APPEAL NO. 93696

This case arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) and returns to us on remand. In Texas Workers' Compensation Commission Appeal No. 93178, decided April 26, 1993, we remanded for the development of such additional evidence as is appropriate and for further consideration and findings. Following the hearing on remand, on June 2, 1993, the hearing officer, (hearing officer), has concluded that respondent (claimant) sustained a compensable injury on or about (date of injury), that she failed to timely notify (employer) of her injury, that she did not have good cause for failing to timely notify her employer, that her employer did not have actual knowledge of her (date of injury) injury, and that she sustained a new compensable injury on or about (date), 1992. Appellant Texas Workers' Compensation Insurance Fund (Carrier B), who provided employer with workers' compensation insurance at the time of the (date) injury, has requested our review challenging the sufficiency of the evidence to support the conclusion that claimant sustained a new injury on (date), as well as certain of the hearing officer's factual findings. Carrier B maintains, in essence, that claimant did not sustain a new injury on (date) but continued to suffer from her prior injury of (date of injury). Respondent Liberty Mutual Fire Insurance Company (Carrier A), who provided employer's workers' compensation insurance at the time of the (date of injury) injury, appealed the earlier decision but has not appealed from the decision upon remand. The claimant's response urges the sufficiency of the evidence and seeks affirmance.

DECISION

Finding the evidence sufficient to support the challenged factual findings and legal conclusion, we affirm.

At the hearing on remand, the hearing officer officially noticed the hearing record of the earlier hearing as well as the preceding benefit review conference report. The evidence set forth in our earlier decision in this case need not be repeated entirely but will be referred to in part. Claimant, a hair stylist, testified that she began her employment with employer in June 1990. In (date of injury), she experienced numbness, tingling, and pain in her right arm and shoulder, together with loss of grip strength, which was worse when she was busy at work or worked long hours. While not sure of the cause, she suspected it was related to her work. Also in (month) claimant went to an emergency room after work because her pain, which she normally treated with aspirin and a hot bath, was severe; however, she was not treated but was told to see an orthopedic specialist because she had no emergency. She continued to work throughout the summer missing no time from work and apparently not receiving medical treatment. She said that although her work was "aggravating" her arm, she "didn't know for sure that's what it was," and that is why she did not report any injury to her employer. She acknowledged having previously stated she did not say anything to her employer for fear of losing her job. Her normal shift was seven and one-half hours during which period she would give 15 to 16 haircuts. However, on (date), 1992, a day shortly before the commencement of the school term, claimant worked 10½ hours giving approximately 45 haircuts at the rate of approximately one every 15 minutes. These

haircuts were given to school age children. When claimant left work that day, she could not move her arm from the pain. Claimant said: "I had really pushed myself that day, . . . it had never bothered me or aggravated me like it did that day." She missed several days work that week and the next because of her pain, and told her manager, Theresa Walkup (Ms. W), that she was going to see a doctor as she could no longer cut hair. On August 31st, claimant saw (Dr. B) who told claimant she had severe damage to her right shoulder, arm and wrist, diagnosed carpal tunnel syndrome (CTS) and lateral epicondylitis right arm, took her off work, and told her her problems were work related. A notation in Dr. B's records of August 31st over his initials states: "Needs to file W/C." Claimant said it was not until she was so advised by Dr. B that she knew for sure her work was the source of her right arm and shoulder problems, and that she reported such to Ms. W who helped her fill out a report of the injury. Indeed, Carrier B did not dispute the timeliness of claimant's notice of her (date) injury.

Ms. W, who commented that she had not looked at employer's records since the preceding November, could not say whether claimant worked on (date) and testified, variously, that she did not feel it was possible to give 45 haircuts in 10½ hours, and that it is possible to give 40 haircuts in 10 hours if they are "your basic short, men's layer haircut," such as the type given little boys before school begins.

The hearing officer found that prior to (date of injury), claimant sustained a work-related repetitive trauma injury while working for employer, that she knew or should have known on (date of injury) that she had sustained such an injury, that between February and August 31, 1992, while mentioning to her supervisors that she was experiencing chronic pain in her right arm and shoulder, she never informed her employer, nor was her employer otherwise aware, that she believed her condition to be work related, and that she continued to work full-time until August 31st. Based on these findings, the hearing officer concluded that claimant sustained a compensable injury on (date of injury) but that she failed to provide timely notice of such to her employer, that she had no good cause for not providing timely notice, and that her employer did not have actual knowledge of that injury. No appeal has been taken from those findings and conclusions.

The hearing officer went on to find that on (date) claimant would normally have worked seven and one-half hours giving 15 to 16 haircuts but instead worked for 10½ hours and gave 45 haircuts, that she never before gave as many haircuts in one work day, that the 45 haircuts were an extraordinary circumstance which aggravated the existing injury to her right arm as a result of repetitive trauma, that after (date), claimant's symptoms increased dramatically and on August 31st she reported to her employer that she was unable to work, that although claimant sustained a work-related injury prior to (date of injury), on (date) she sustained a new repetitive trauma injury which aggravated the prior injury. Based on these findings, disputed by Carrier B, the hearing officer concluded that claimant sustained a new compensable injury on or about (date), also disputed by Carrier B.

The challenged findings involved matters of fact for the hearing officer as the fact finder to determine. We are satisfied the challenged findings are sufficiently supported by

the evidence. Section 410.165(a) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence but also of its weight and credibility. As the trier of fact the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701, (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer may believe, all, part, or none of the testimony of a witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)). We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

Carrier B maintained before the hearing officer and insists on this appeal that claimant did not sustain a new injury while giving the 45 haircuts on (date), but rather continued to suffer from her (date of injury) injury which had not been timely reported to her employer. The hearing officer was free to consider that on (date) claimant trebled her normal workload and later experienced such severe pain she had to miss work on several days during the following two weeks, and that she was ultimately taken off work by Dr. B on August 31st when she first sought his treatment. We do not find the challenged findings and conclusions to be so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

This case represents the considerable difficulty that can be encountered in the

concept that an aggravation of an injury can be a new or distinct injury in its own right. We have recognized and applied this principle in previous decisions. *See* Texas Workers' Compensation Commission Appeal No. 93577, decided (date), 1993; Texas Workers' Compensation Commission Appeal No. 92654, decided January 22, 1993. As we have observed, it can be a close question as to whether a subsequent manifestation of symptom is a new, distinct injury in it own right or is merely a continuation of an original, specific injury (Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992), or a continuation of an occupational disease. Texas Workers' Compensation Commission Appeal No. 92655, decided January 22, 1993. More troubling is the situation involving, as here, an aggravation of a repetitive trauma injury. By its very definition, a repetitive trauma injury means "damage or harm to the physical structure of the body occurring as the result of repetitious, physical traumatic activities that occur over time and arise out of and in the course and scope of employment." Section 401.011(36). If the same type of repetitive activity is the basis for this type of injury, it is difficult to find a breaking point when activity is not merely the ongoing repetitive injury and not a new injury caused by aggravation. Theoretically, each day of the activity which caused the repetitive trauma injury would "aggravate" the repetitive trauma injury, particularly if there was any variable in the degree of the activity on a day-to-day basis. We have held that an aggravation of an injury to be compensable must amount to a new or distinct injury in its own right. Texas Workers' Compensation Commission Appeal No. 93515, decided July 26, 1993. Where a claimant returns to work, or for that matter continues on working, not completely healed and experiences subsequent pain and medical problems related to an original injury, the subsequent pain and medical problems are not automatically an aggravation amounting to a new injury. Texas Workers' Compensation Commission Appeal 93317, decided June 4, 1993. Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. *See* Texas Workers' Compensation Commission Appeal No. 92518, decided November 16, 1992, where an original injury got better or worse, depending on the circumstances, but the original injury never healed. As a general rule, it is a question of fact as to whether a claimant suffered an aggravation which amounts to a new injury or merely suffered a continuation of an injury. Texas Workers' Compensation Commission Appeal 92681, decided February 3, 1993; Appeal No. 92654, *supra*. And, recognizing that it is basically a question of fact (unless reasonable minds could only come to one conclusion, different from that of the fact finder), we would only have a sound basis to disturb the hearing officer's determination if we were to find it so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 93422, decided July 12, 1993. There is some evidence to support the hearing officer's decision although an inference from the evidence that what was involved here was a continuation of a repetitive trauma type injury finds equal support, in my opinion.

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Stark O. Sanders, Jr.
Chief Appeals Judge