APPEAL NO. 93866

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). A contested case hearing was held on August 9, 1993, and August 31, 1993.[1] The issues at the hearing were whether the appellant/cross-respondent (claimant) was injured in the course and scope of her employment; whether the claimant gave timely notice of her injury to her employer; whether the respondent/cross-appellant (carrier) timely contested compensability of the claimed injury; and whether the claimant has disability as a result of the injury and is entitled to temporary income benefits (TIBS). The hearing officer determined that the claimant sustained an injury to her hands and wrists in the course and scope of her employment on _____; that she timely reported this injury; that the carrier timely contested compensability; and that the claimant did not have disability from the date of the injury to the date of the hearing. The claimant appeals only the hearing officer's determination that she did not suffer disability from her work-related injury. The carrier appeals only the determination that the claimant suffered an injury in the course and scope of her employment and, in its response to claimant's appeal, asserts error in the hearing officer's admitting a physician's letter over its objection.

DECISION

The decision of the hearing officer is affirmed.

The claimant was hired by the employer in January 1990, to work as a seamstress. Over the course of her employment she was also required to perform other tasks relating to the manufacture of vinyl "money bags" or pouches which are commonly used by businesses to carry currency and coins to a bank for deposit. The bags, measuring approximately 12 inches by five inches, were sewn inside out. They then had to be "everted" or turned right side out. On _____,[2] the claimant was directed by her employer to evert money bags. According to her testimony, the claimant maintained for an undisclosed number of hours, on the relevant date, a production rate of between 150 to 200 bags per hour, a rate considered exaggerated by her supervisors. In any event, as a result of this activity, her hands began to hurt and she reported this to her supervisor.

The claimant's medical records introduced into evidence at the hearing disclosed that she was first diagnosed with rheumatoid arthritis in November 1987. This diagnosis

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[1]The Decision and Order of the hearing officer incorrectly refers to August 8, 1993, as the date the hearing was convened.

[2]The hearing officer found the injury to have occurred on _____. Evidence in the record discloses that the actual injury occurred on (correct date of injury). Which of these dates is the correct date is irrelevant to this opinion.

was confirmed in May 1992, by (Dr. J), a rheumatologist, who found "[s]eronegative progressive rheumatoid arthritis" in both hands. She was given a steroid shot which apparently greatly relieved her symptoms, but the effects of the shot began to wear off by the end of July 1992. She visited her treating doctor, (Dr. C), on _____, because of the pain she felt at work after everting money bags. By letter of _____, to the claimant's employer, Dr. C advised the employer that the claimant had rheumatoid arthritis and stated:

> [Claimant] is able to do sewing well even though she has arthritis. What she cannot do is everting bags and doing multiple repetitive actions. These make her hands and wrist (sic) worse. She has developed these symptoms since she has been working there.

In response to this letter, the claimant's supervisor testified that the claimant was no longer required to evert money bags. She continued her employment full time at the same wages until January 21, 1993, when she was laid off by her employer "due to lack of work and reduction in work force."

On January 26, 1993, the claimant submitted an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) in which she claimed her injury to be rheumatoid arthritis. The carrier disputed this claim on February 4, 1993, on the grounds that the claimant did not sustain "an injury, occupational disease or repetitious trauma injury", but instead suffered from rheumatoid arthritis, "an ordinary disease of life to which the general public is exposed outside of employment."

Additional medical evidence submitted by the claimant includes a letter of February 18, 1993, from Dr. C which advises that the claimant's actions in everting money bags "seemed to worsen her symptoms and she claims it made her job harder." Dr. C further notes that the claimant "has responded poorly to most of the treatment for Arthritis." Finally, over the strenuous objection of the carrier, the hearing officer admitted into evidence a letter of August 25, 1993, from Dr. C to the ombudsman who assisted the claimant at the hearing. The letter read in pertinent part:

> This letter . . . is a statement of disability.
>
> This [claimant] was disabled with Rheumatoid Arthritis. [Claimant] came to me seeking help in getting some relief from the part of the job that mandated repetitive actions. This seemed to be aggravating her condition. She was disabled at the time she was fired (sic) in December of 1992.

The relevant determinations of the hearing officer are:

FINDINGS OF FACT

4. Claimant had a pre-existing medical disease diagnosed as rheumatoid arthritis.

5. Rheumatoid arthritis is an ordinary disease of life to which the general public is exposed.

6. Claimant's employment with Employer aggravated the rheumatoid arthritis in Claimant's hands and wrists on _____.

7. Claimant had a work-related injury to her hands and wrists on _____, while working for Employer.

13. On and subsequent to _____, and continuing to the date of the Benefit Contested Case Hearing, Claimant's health care providers including Claimant's treating doctor did not take Claimant off work with Employer.

14. Beginning _____, and continuing to the date of the Benefit Contested Case Hearing, Claimant had the ability to retain and obtain employment at wages equivalent to the wages Claimant was receiving prior to _____.

CONCLUSIONS OF LAW

2. Claimant sustained an injury to her hands and wrists which arose out of and in the course and scope of employment with Employer on _____.

5. Claimant did not have disability beginning _____, and continuing to the date of the Benefit Contested Case Hearing due to the injury Claimant sustained to her hands and wrists on _____.

The carrier argues on appeal that the hearing officer's findings that the claimant's employment aggravated her arthritis which resulted in a compensable work-related injury are against the great weight and preponderance of the evidence as to be clearly erroneous. The carrier contends, in a twofold argument, first, that on _____, the claimant suffered, not an injury or an aggravation of a pre-existing condition, but only "symptoms" of her arthritis. Thus, "the disease process itself was not the result of

employment, and . . . was not further aggravated or increased by her employment." In addition, carrier argues that "[m]ore importantly, the aggravation, acceleration, or excitement of a non-occupational disease does not constitute a compensable injury" citing Texas Employers' Insurance Association v. Schaefer, 598 S.W.2d 924 (Tex. Civ. App.-Eastland 1980), aff'd 612 S.W.2d 199 (Tex. 1980) and Home Insurance Company v. Davis, 642 S.W.2d 268 (Tex. App.-Texarkana, no writ 1982).

The Appeals Panel has held that the aggravation of an existing condition or injury in the course and scope of employment may be compensable. Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991; Texas Workers' Compensation Commission Appeal No. 92654/5, decided January 22, 1993; and Texas Workers' Compensation Commission Appeal No. 93577, decided August 18, 1993. When used in this sense, the term "aggravation" has a somewhat technical meaning. *See* Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. To be compensable, an aggravation must be a new and distinct injury in its own right with a reasonably identifiable cause, whether that be another work-related injury, repetitive trauma, or occupational disease. Texas Workers' Compensation Commission Appeal No. 93317, June 4, 1993; Texas Workers' Compensation Commission Appeal No. 92463, October 14, 1992. The existence of symptoms or the mere re-occurrence or remanifestation of a prior injury is not in itself a compensable aggravation. Texas Workers' Compensation Commission Appeal No. 93577, August 18, 1993. Whether an alleged compensable injury is an aggravation of a previous injury and a new injury in its own right or "merely the continued manifestation of the original injury", Appeal No. 93577, *supra*, is a question of fact for the fact finder to decide based on his review of all the evidence presented.

The carrier submits that the evidence establishes that the claimant suffered only symptoms of her pre-existing arthritis on _____. To support its position, the carrier relies primarily on Dr. C's use of the word "symptoms" to describe the claimant's condition when he examined her. In addition, the carrier points out that the claimant was doing nothing unusual that she had not done before when she suffered her pain and that the work, though repetitive in nature, could only fairly be described as light duty. The claimant points to the same medical evidence and to her own testimony that her specific activities at work (everting money bags) on a specific day caused injury to her hands and wrists in the nature of aggravation of her arthritis. The issue of whether a claimant has a compensable aggravation or continuation of a prior condition may be difficult to resolve. We read Findings of Fact Nos. 6 and 7 to mean that the claimant established an aggravation of her arthritis by means of a distinct new injury on _____, and not, given the compressed time in which she everted bags on _____, that she established repetitive trauma as the cause of that aggravation.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility and the inferences to be drawn therefrom. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston (14th Dist.) 1984, no writ). To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Campos, *supra*; Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 630 (Tex. 1986). Although were we fact finders in this case we may have concluded otherwise, based on our review of the record in this case, and on our reading of the hearing officer's decision as noted above, we believe that the challenged findings of an aggravation of an existing condition by a new, discrete injury have sufficient support in the evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Texas Workers' Compensation Commission Appeal No. 93422, July 12, 1993.

In concluding that there is sufficient evidence to support the decision of the hearing officer on the question of the existence of a compensable injury, we note the carrier's assertion that aggravation of a non-occupational disease does not constitute a compensable injury. The cases cited by the carrier deal with repetitive trauma. Since we have determined that the hearing officer based his finding of aggravation on a distinct new injury and not by repetitious trauma activity over a course of time, we need not address carriers' contention.

The only other issue is whether the claimant sustained disability. The claimant appeals the sufficiency of the evidence to support the decision of the hearing officer that she did not have disability from _____, to the date of the hearing. In support of her appeal, she references Dr. C's letter of August 25, 1993, which he describes as "a statement of disability" and without further explanation says claimant "was disabled at the time she was fired in December of 1992." She also reiterates her testimony at the hearing to the effect that when she was "fired" she was replaced by a non-injured worker; that the employer never offered her job back; and that no one in her city would hire her "because, most of the work that I know how to do involves the repetitive use of my hands." In response, the carrier urges that no consideration be given to Dr. C's letter of August 25,

1992, because it was improperly admitted into evidence over the carrier's objection; and that the finding of no disability "has overwhelming support in the record." In addition, in support of its position, the carrier points out that neither Dr. C nor Dr. J ever took her off work; she continued to work full time at full pay up to January 21, 1993; and the plant manager testified that she was not replaced after she was laid off. Also, the following exchange took place when the claimant testified at the hearing:

Q. Where did you apply for work?

A. In a lot of places. Nobody hires you when you have problem (sic) with your hand (sic).

* * * *

Q. And who told you they wouldn't hire you because of your hands?

A. I know it.

* * * *

Q. Who told you they won't hire you because of your hands?

A. Nobody told me. I know it myself.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury in the course and scope of her employment and is entitled under the 1989 Act to income benefits due to disability. *See*, Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Disability is defined in Section 401.011 (16) as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." It is clear, and there is no evidence to the contrary, that the claimant remained a full-time employee of the employer performing duties that did not involve everting money bags until January 21, 1993. As to the period after January 21, 1993, to the date of the hearing, the evidence shows that the claimant was speculating when she stated that no one would hire her because of her hands. Dr. C, in fact, advised that she could continue work as a seamstress. In his letter of August 25, 1993, Dr. C spoke of "disability" and the claimant's working conditions with her former employer. He did not purport to address whether the claimant's aggravation injury of _____, precluded the claimant's ability to work at pre-injury wages. Under these circumstances we believe the state of the evidence was sufficient to support the hearing officer's determination that the claimant did not establish disability arising out of the _____, injury.

Given our resolution of the issue of disability, we need not address the carrier's other contention that the introduction of the August 25, 1993, letter of Dr. C was reversible error. However, the carrier did not preserve this contention on appeal because this issue was not raised within the statutory time for appeal. The Appeals Panel will not consider an assertion of error that is not timely preserved on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92109, decided May 4, 1992.

Finding there is sufficient evidence to support the hearing officer's determinations, we affirm. Medical benefits are payable to the extent that they are attributable to the treatment of the claimant's injury of _____.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge