APPEALS PANEL NO. 94005

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 September 9, 1993, in (city), Texas, with the record closing on September 13, 1993. (hearing officer)., presided as the hearing officer. The issues at the hearing were whether the appellant/cross-respondent (claimant) was injured in the course and scope of her employment on (date of injury); whether she gave timely notice of her injury, or had good cause for failing to give timely notice; whether she had disability as a result of this injury; and whether a prior injury in (year) was the sole cause of her present condition. The hearing officer concluded that the claimant sustained the injury as claimed; that she timely reported it; that a pre-existing condition was not the sole cause of her present "infirmities" and that she did not have disability as a result of the claimed injury of (date of injury). Claimant appeals the determination of no disability arguing that it is inconsistent with the other findings and conclusions. The respondent/cross-appellant (carrier) replies that the decision of the hearing officer as to disability is supported by sufficient evidence and appeals his other determinations alleging that there was insufficient evidence to establish the injury and timely reporting; that the hearing officer improperly applied Section 409.001(a) the 1989 Act to his determination of timely notice; and that he erred in not admitting and considering certain evidence proffered by the carrier. No response was filed to the cross-appeal.

DECISION

The decision and order of the hearing officer are affirmed in part and reversed and remanded in part.

Every aspect of this case was disputed. The claimant testified that she was a traveling pharmaceutical salesperson for (employer). In the performance of her duties she traveled to doctors' offices with product samples. She stated that late in the afternoon on (date of injury), she was reaching into the far back trunk of her employer-furnished car to look for and retrieve a box of samples to give to a potential doctor/customer. The samples weighed about five pounds, but to get to them she said she had to move about 40 pounds of pamphlets out of the way. When she tried to straighten up, she said she felt extreme pain in her lower back and was unable to stand erect for a few minutes. The pain resolved itself enough for her to return to the doctor's office (this doctor, according to the claimant, was not a treating doctor, only a potential customer) and tell him she did not have the samples in which he was interested. She admitted that she did not tell this doctor or anyone at his office what she had just experienced in her lower back. She then went home and rested over the weekend. No one witnessed the incident.

When this incident happened on (date of injury), claimant stated she experienced immediate pain but "assumed it was just an aggravation" of a previous back problem and "that it would go away as it had in past years." She stated that she has lived with chronic pain, but this time it was more than usual. The pain continued to get worse and she was seen by (Dr. D), her family doctor and an internist, on (date), his first available appointment date. She admitted that at this appointment she told Dr. D how the injury occurred, but did

not tell him that this was a workers' compensation claim ("I just told him that my back pain was worse.") Medical records of Dr. D for this visit do not mention any incident in (month, year) as the cause of her pain. Dr. D referred her to (Dr A), a neurosurgeon. His first available appointment was January 5th. Meanwhile an MRI was done on December 10, 1992, which disclosed an annular disc bulge at L4-5 with mild anterior indentation of the thecal sac. Dr. A recounts in his report of this examination that the claimant had a laminectomy discectomy at L5-S1 in (year) and a motor vehicle accident in (year) which resulted in 11 total fractures including three hip fractures. He diagnosed a herniated lumbar disc at the L4-5 level and epidural fibrosis at the L5-S1 level with complaints of severe radicular pain. In her testimony, the claimant insisted that, although the medication for her low back pain remained the same before and after the (month) incident, the pain she felt after the incident was worse than before. Neither Dr. A nor Dr. D ever advised her not to go back to work.

Except for a 21 day vacation period, she testified she continued working for the employer until she was terminated on January 4, 1993, for what she described as a "restructuring." Dr. A wanted to do a myelogram for further evaluation, but the claimant declined since she was still upset from her termination the day before and from a "bad reaction" (extreme headaches and meningitis) to a myelogram done in (year). Dr. A released her from his care at the end of (month, year) because according to the claimant she refused the myelogram and there was nothing else Dr. A could do for her. Since then she has been under conservative care by Dr. D which the claimant described as mostly bedrest. He continued to prescribe the same medication he had previous to the (month, year) incident.

With regard to reporting the accident, the claimant contends that within a week of her visit with Dr. A (date, year) she reported her injury to a receptionist for a supervisor at the local office of her former employer and, since she was no longer employed, was told to call the employer's headquarters in (city). After two days of trying, she got through to a (Mr. B) who told her someone would call her about filing a report. On January 14, 1993, she reports that she was called by a (Ms. T), the workers' compensation administrator for the employer in (city), who took down her information about the accident. The Employer's First Report of Injury or Illness (TWCC-1) lists (date, year), as the date the accident was reported. Claimant testified that she did not report her injury to (Mr. N), her immediate supervisor at the time, because she did not have a good relationship with him and suspected that he was trying to take over her job, or have her fired, in a rumored restructuring. Other reasons for not reporting the injury to Mr. N included her belief that her job was in jeopardy and that at this time the employer had a poor management structure. She also contended that she had problems communicating with Mr. N by car phone or electronic mail. Claimant admitted to having filed other workers' compensation claims with her employer and that in her opinion she was not terminated because of those other injuries. On cross-examination, the following exchange took place:

Q.Is it safe to assume that within 24 hours or 48 hours after the incident that you were aware that your radiating pains, your severe pain, your muscle spasms were all related to that incident on (date of injury)?

A.I thought so.

* * * *

Q.By the time you went to see [Dr. D], you were concerned that you had done something that had caused additional injury to your body.

A.I thought I had, yes.

* * * *

A.I knew it was a new injury, but I didn't know that it was going to be a permanent injury at the time.

She also testified that on January 5, 1993, only after her appointment with Dr. A, there was no doubt in her mind that she had a new injury. At that time she admitted that there was nothing physically preventing her from reporting her injury. Dr. A's report of this visit refers to October 1992 as the date of her injury.

Claimant also asserts that she has not been able to work since January 4, 1993, because of back spasms and leg pain that prevented her from driving, standing or sitting for long periods of time. Because the pain medication she takes is a narcotic, she cannot work while medicated. She has not applied for any jobs since her termination. Her condition has remained unchanged since January 4, 1993, but any activity, even simple things, exacerbates her pain. Neither Dr. D nor Dr. A ever took her off work because of this injury.

She stated that she had worked for her employer for 19 years before the termination and is now on an early retirement. She was the only one out of 11 people in her department who was terminated. Her 1984 back surgery was the result of on-the job injuries in 1980 and 1982 to her lower back caused again by picking up samples of her employer's product. Since then she has had chronic back pain, but never enough to keep her from working. Her 1986 car accident left her with fractured ribs, a fractured hip and a crushed pelvis, and she was off work from it for six months. A CAT scan on June 23, 1984, introduced to show the difference in her lumbar spine before and after the alleged (date of injury), accident, reveals a bulging disc at L4-5 without herniation and the L3-4 disc as normal. A lumbar myelogram report of August 27, 1984, introduced for the same purpose, shows a mild bulge of the disc annulus posteriorly at L4-L5 and a likely herniated disc at L5-S1.

The claimant also testified that she reported her 1980 and 1982 injuries to her employer on the day they happened or within two days. She also reported an on-the-job car accident in 1986, within one day of its happening.

Mr. N, the employer's district manager, testified that he was the claimant's supervisor at the time of the alleged injury. As a result of the January 1993 restructuring he was demoted to be a sales representative and took over at least part of the claimant's former sales territory. He was not aware of any incident or injury to the claimant in (month year). The claimant continued working up until the time she was terminated. She never mentioned to him that she was having new back problems, but he was aware of her existing lower back problems and that she was given an upgrade in the company car she was furnished to accommodate her back problems. He confirmed the sales job required some lifting of samples, but they were not considered by Mr. N to be heavy. He believes the claimant was terminated for low sales performance. He testified that in the past he routinely handled the claimant's job concerns, complaints and problems. He believes he had a comfortable working relationship with the claimant and that she would have come to him if she had a problem with her back. He testified that he had no advance knowledge that the claimant was to be terminated in January 1993. He did not find out he was taking over her territory until the middle of January.

In a transcript of a telephone conversation introduced into evidence, Ms. T stated she was called by the claimant on January 14, 1993, who related to her the incident of (date of injury). This is the first she knew of the incident and the claimed injury.

The carrier appeals the decision of the hearing officer not to admit three exhibits objected to by the claimant on the grounds that they were not timely exchanged. The exhibits consisted of Commission records of three previous workers' compensation claims filed by the claimant. Section 410.161 provides that a party who fails to disclose information known to that party or documents which are in the possession, custody and control of that party at the time disclosure is required, may not introduce such evidence at a contested case hearing "unless good cause is shown" for failure to timely disclose. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)), such exchange shall take place no later than 15 days after the Benefit Review Conference (BRC) (with an exception in the case of expedited hearings.) Additional documentary evidence is to be exchanged as it becomes available. Rule 142.13(c) also requires a hearing officer to find good cause as a precondition to the admission of documentary evidence not previously exchanged.

According to the carrier's attorney, the documents in question were not received from the Commission until the day of the hearing when they were given to the claimant. There is no evidence when the carrier requested the information or when it knew of the existence of these previous claims; however, the carrier's attorney represented that he timely advised the claimant the he intended to introduce "official records" without specifically identifying these records. The hearing officer refused to find good cause for the untimely exchange and denied the admission of these documents. *See* Texas Workers' Compensation Commission Appeal No. 91064, decided December 12, 1991. We assume for purposes of this appeal that the hearing officer determined that these documents were previously available. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 931004, decided December 14, 1993. By the carrier's own

admission, it was aware sometime shortly after the BRC (which took place on July 21, 1993) that it would use official documents in its contest of this case. The only official Commission documents offered by the carrier were a TWCC-21 dealing with the claimant's current injury and the three documents dealing with past claims. Thus, we believe it was reasonable for the hearing officer to conclude that the carrier knew almost two months before the hearing that it would likely use these previous claims documents. Carrier, nonetheless, offered no evidence as to what steps it took to secure them, when it first learned of their existence or why they were only, and perhaps fortuitously, received on the day of the hearing. Absent such a showing, they cannot automatically be considered newly available or newly discovered. Under these circumstances we decline to hold that the hearing officer abused his discretion in denying the admission of these three exhibits. In so holding, we note that the claimant used these documents to refresh her memory on cross-examination about the matters contained in the documents and admitted the essential facts in the documents (that she has made previous workers' compensation claims). Furthermore, in his Statement of Evidence, the hearing officer references the information contained in these documents as discussed by the claimant in her testimony. Thus, we would be hard-pressed to conclude that, even if the documents were admissible (which we do not hold), that any reversible error resulted from the exclusion. *See* Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992, for a discussion of reversal of a hearing officer based on the erroneous exclusion of evidence.

The carrier also urges error in the conclusion and supporting findings of the hearing officer that the claimant was injured in the course and scope of her employment on (date of injury). The nature of the injury was found to be an aggravation of a pre-existing back condition. The claimant testified extensively about how specific activity on a specific day caused immediate pain much more severe than she typically experienced from chronic back problems extending over a decade. She sought and underwent further medical testing and consulted with two doctors to confirm for her that she re-injured or aggravated a previous back condition. These medical records tend to indicate some changed condition in the lumbar vertebrae before and after the accident. In its appeal, carrier describes these medical findings as "consistent" with chronic low back pain both before and after the injury[1] and asserts that her complaints are the same.

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. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Section 401.011(26) defines "injury," in part, as "damage or harm to the physical structure of the body. . . ." It is well established that an aggravation of a pre-existing injury or condition can give rise to and become a compensable new injury. *See* Texas Workers' Compensation Commission Appeal No.

[1]Carrier in its appeal also invites the Appeals Panel to compare its Exhibits 3, 4, and 5 with its other exhibits as evidence of its position on this issue. We observe that Carrier's Exhibits 3, 4, and 5 were not admitted at the hearing, a decision we affirm today, and we do not consider them on this appeal.

93577, decided August 18, 1993. Whether a compensable injury is an aggravation of a previous injury and an injury in its own right or merely the continued manifestation of the original injury is a question of fact. Texas Workers' Compensation Commission Appeal No. 92654/92655, decided January 22, 1993.[2] Injury of the type claimed in this case may be proven by the testimony of the claimant alone. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. 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. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); 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 (Tex. 1986). The hearing officer found the testimony of the claimant credible as to how she was injured and that her injury was a compensable aggravation of a pre-existing condition. This was corroborated by medical evidence pointing to lumbar damage. It was up to the hearing officer to determine whether the claimant sustained an injury at all. Where there is sufficient evidence, which we find in this case, to support the hearing officer's determination, we affirm that determination.

The claimant appeals the determination of the hearing officer that she does not have disability as a result of her (date of injury), injury. Section 401.011(16) defines disability as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." A claimant has the burden of proving disability, Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993, and a decision finding disability may be based on the testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. The unrebutted testimony of the claimant was that she continued to work after the injury on (date of injury), until she was terminated. She explains this by saying November and December were light work months and over this time she had holidays and 21 days of

[2]Sole cause of the injury was an issue at the hearing, and instructions were given that the carrier, not the claimant, has the burden of proving the "sole cause" of an injury or aggravation if it intends to rely on this defense to liability. *See* Texas Workers' Compensation Commission Appeal No. 931117, decided January 21, 1994. Carrier's position on appeal is that the claimant did not sustain an injury on (date of injury), but only "a continued manifestation of her prior compensable injuries." Appellant's Request for Review, and Supporting Brief, p. 8-9.

vacation. Since her termination, she has not sought employment. In response to this evidence, the hearing officer made what appear to us to be inconsistent findings of fact. Finding of Fact No. 25 states that the claimant "has been unable to work due to the chronic pain related to her pre-existing low back condition as aggravated by (date of injury) injury." (Emphasis added). Finding of Fact No. 28, on the other hand states the claimant "would have been unable to find and keep work at a pay rate equivalent to her pre-injury wage due to her pre-existing back condition regardless of whether or not she had been injured on (date of injury)."

In the past, the Appeals Panel has affirmed decisions of hearing officers which could be sustained on any reasonable theory supported by the evidence and has disregarded unnecessary or superfluous findings. Texas Workers' Compensation Commission Appeal No. 93502, decided August 4, 1993; Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992. In this case, the findings of fact supporting the hearing officer's conclusion of law as to disability are contradictory. To affirm his decision on the ultimate issue of disability would, therefore, require us not to reconcile findings or select among consistent findings, but to elect a finding of fact from either of two irreconcilable findings. To do so would usurp the authority of the fact finder. We reverse the decision of the hearing officer that disability was not established and remand for further review of the evidence and, if necessary, the development of further evidence, and for consistent fact findings and conclusions of law on the issue of disability.

We also find merit in carrier's appeal of the hearing officer's conclusion that the claimant reported her injury in a timely manner. Section 409.001 provides in pertinent part that an employee is to notify the employer or a person who holds a supervisory or management position with the employer of an injury not later than 30 days after the injury occurs, or if the injury is an occupational disease not later than 30 days after the employee knew or should have known that the injury may be related to the employment. The hearing officer made the following conclusions of law:

CONCLUSIONS OF LAW

3.The Claimant knew or should have known she had sustained an aggravation to her pre-existing chronic back condition no earlier than January 5, 1993.

4.The Claimant reported her injury in a timely manner.

As the carrier points out in its appeal, the hearing officer applied the wrong legal standard to the issue of timely notice. The alleged injury, an aggravation of a pre-existing condition, was claimed to have occurred as a result of an accident on (date of injury). It was never claimed to be an occupational disease. The hearing officer found the injury to have occurred on this date as a result of a specific incident and we affirmed this determination. Therefore, to be effective, notice of the injury would have had to be given no later than December 13, 1992, or a determination would have to be made by the hearing officer that good cause existed for untimely notice. The hearing officer mistakenly concluded that the time for calculating timely notice did not begin to run until January 5,

1993, when he determined the claimant knew or should have known that the injury was job related. Since he found notice on January 14, 1993, he considered it timely.[3]

Finding that the hearing officer incorrectly applied the law in his conclusion that the claimant gave timely notice of her injury to her employer, we reverse that portion of the decision of the hearing officer which states that the claimant timely reported her injury and remand the case for further proceedings, including the taking of additional evidence if necessary, to make findings of fact and conclusions of law whether the claimant had continuing good cause for not timely reporting her injury and whether such good cause existed up to the time she actually reported the injury. *See* Texas Workers' Compensation Commission Appeal No. 93677, decided September 21, 1993, for a discussion of the test for the existence of good cause.

Finally, we make the following observations on the 27 separate findings of fact made in this case to assist the hearing officer in his findings of fact and conclusions of law on remand:

1.No. 4 should read 1982.

2.No. 12 presently reads "The Claimant did not report her injury the Employer (sic) because she her (sic) supervisor intended to take her job if he was displaced as a supervisor." A word is missing between "she her" which is essential to the meaning of the sentence.

3.No. 13 should read (date of injury).

4.No. 23 is more properly a conclusion of law, not a finding of fact. We question whether any of the listed reasons, as a matter of law, constitute good cause for failure to give timely notice. *See* Texas Workers' Compensation Commission Appeal No. 92694, decided February 8, 1993.

We affirm the decision of the hearing officer on the issue of the existence of an injury in the course and scope of employment on (date of injury), and on the exclusion of Carrier's Exhibits 3, 4 and 5. We reverse and remand on the issues of disability and timely notice.

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[3]Alternatively, the hearing officer may have found that the claimant trivialized her injury up to her appointment with Dr. A on January 5, 1993, and continued to have good cause up to her actual report of the injury on January 14, 1993. This analysis is clearly inconsistent with the hearing officer's analysis of the case. For us to adopt it in order to affirm the decision, *see* Texas Workers' Compensation Commission Appeal No. 93502, decided August 4, 1993, would require us to affirmatively find no notice before January 14, 1993, and good cause for delaying notice until January 14, 1993. This we decline to do on the record before us.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 19, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge