APPEAL NO. 94093

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On November 23, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The hearing was continued for the addition of an issue and the record was closed on December 14, 1993. The issues agreed upon and presented to the hearing officer for resolution were:

•Whether the claimant injured her back in the course and scope of employment; and
•Whether the Claimant had disability resulting from the alleged injury of (date of injury); and
•Whether the Claimant timely reported her alleged injury to the Employer?

The hearing officer determined that the appellant, claimant herein, had timely reported an injury to her employer, but that claimant had not sustained a compensable injury to her back in the course and scope of her employment on (date of injury), and that claimant has not had disability based on her alleged injury of (date of injury).

Claimant requests "reconsideration" of various of the hearing officer's determinations, reurging many of the contentions she made at the CCH and basically contending insufficiency of the evidence. Claimant requests "full reconsideration" of the hearing officer's decision which we will consider as a request to reverse the hearing officer's decision and render a decision in her favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed as reformed to correct a typographical error.

Claimant was employed as a "DART ABOUT driver" (driving a specially equipped van or minibus to transport handicapped clients) by (employer), employer herein, which apparently had a contract to provide vehicles and drivers to DART. It is undisputed that claimant sustained a back injury in (month year), and was off work until December 4, 1991, during which time, claimant's husband testified, claimant gave birth to a baby in September 1991. Claimant testified she was released for light duty and returned to work for the employer December 4, 1991. Claimant testified that her return to duty was "totally on light duty" which claimant apparently interpreted as meaning no lifting or exertion whatsoever. Claimant testified that the duties she was required to perform for the employer, involving transporting clients in wheel chairs, exceeded the light duty restriction placed on her. Nonetheless, claimant proceeded to work the following year. During early 1992, claimant variously testified she "felt great," wasn't having "any type of pain," she had some pain ". . . like when the weather changes," and that she "experienced some pain." One of the exhibits admitted into evidence indicated claimant was receiving therapy three times a week during 1992 for back pain. At a date subsequently established to be (date of injury), claimant testified that as she was loading a wheel chair client onto the ramp of the van she was

driving, the ramp jammed. Claimant testified that she "lifted" the wheel chair into the van to keep the client from falling. Subsequent testimony from both the claimant and (Mr. SR), employer's field supervisor, made clear that the "lifting" was only over a rise in the ramp and not physically lifting a wheel chair and client into the van. Claimant testified she contacted employer by radio and they sent out a field supervisor. Although claimant testified she told the field supervisor and/or the radio dispatcher she had injured her back, claimant did not seek medical attention. Apparently on December 28, 1992, an incident took place where claimant inhaled some exhaust fumes from the vehicle she was driving (the fume case). There is considerable testimony in the record about the fume case but it appears only relevant as a point of reference in that the ramp incident occurred before the fume case.

The first documentation of medical care after (date of injury), was an Initial Medical Report dated 12/29/92, documenting the fume case showing a date of injury of (date). There was testimony, although no record is in evidence, that claimant saw (Dr. S), on (date), complaining of neck and back pain in addition to residual effects of the fume case. A report dated February 9, 1993, from Dr. S, indicates a date of injury "(date)" and that claimant was evaluated on February 9, 1993. The February 9, 1993, report is marked "mistake" and the date "(date)" is written in. Claimant is noted as "complaining of neck and back pain" in addition to headaches from the fume case. Massage, ultra sound and muscle stimulation were prescribed for the back. A report dated April 29, 1993, shows a "DOA: (date), which has been marked "mistake . . . should be ((date) THUR – (date))." This report stated: "Please be advised that [claimant's] back injury is a reoccurrence of a previous injury which occurred (date). This injury is due to the fact she was not put on light duty when she returned to work from this injury as prescribed by doctor. In addition, she also has a new injury which corresponds with the old injury." In an unsigned note, dated November 4, 1993, purportedly, Dr. S stated "[o]n [date], [claimant] injured her neck and back lifting a patient into a wheel chair."

Claimant was also seen by (Dr. W), who on a Report of Medical Evaluation and narrative dated September 8, 1993, certified MMI on September 8, 1993, with 0% impairment. In his narrative, Dr. W records that claimant "said she was first hurt (date) when working for [employer]." Dr. W did a comprehensive evaluation including range of motion (ROM). In commenting on claimant's restricted ROM Dr. W stated:

> In my opinion, these are grossly exaggerated restrictions and do not reflect the presence of any significant underlying abnormality, but rather reflect the presence of deconditioning and inactivity. In my opinion, it is not appropriate that this patient be rated based upon these restricted demonstrated ranges of motion which have no relationship to the patient's objective findings on physical exam and in the presence of no demonstrated abnormality on various studies which have been obtained down through the years related to her complaints of neck and back pain.

Claimant is claiming disability beginning on December 28, 1992. Claimant submitted statements from a number of individuals, however none of the statements

establish an incident, much less injury, on (date of injury). One of the statements is from the client claimant testified she was assisting on (date of injury). The client notes she is 80 years old, rode with claimant a number of times, and "several times [claimant] had trouble with the wheelchair lift, it wasn't working right . . . [claimant] was always pleasant and made sure that my wheelchair was always secure."

As indicated at the beginning of this decision the hearing officer determined that the claimant was not injured in the course and scope of the employment on (date of injury) (instead of 1993 as stated in the hearing officer's decision and order) and has not had disability based on the alleged injury. The claimant, in essence, appeals that determination contending it is incorrect.

The claimant in a workers' compensation case has the burden to prove by the 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). Claimant attempts to meet this burden, principally based on her own testimony. That an injured party is the only witness to an injury does not defeat an otherwise valid claim and a claimant's testimony alone may establish that a compensable injury occurred. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). However, when the claimant's testimony is that of an interested party, her testimony only raises an issue of fact for the trier of fact. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The hearing officer, as the trier of fact is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). The hearing officer heard claimant's testimony and observed her demeanor. The hearing officer could have found claimant's testimony vague and internally inconsistent, however, it is the duty of the hearing officer as the trier of fact, to resolve any conflicts and inconsistence in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 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 would note, again, that only claimant's testimony and Dr. S's unsigned note dated November 4, 1993, establish a (date of injury), incident and date of injury.

Claimant argues that her (date of injury), injury "was indeed a new injury . . . and certainly not a continuation of an old injury." (Emphasis in the original appeal.) As indicated the hearing officer determined that claimant's present back problems are the result of a prior injury, presumably meaning the (month year) injury. Whether a claimant sustained a new injury through aggravation or merely sustained a continuation of an original injury is a question of fact for the fact finder, which is the hearing officer. Texas Workers' Compensation Commission Appeal No. 93317, decided June 4, 1993; Texas Workers' Compensation Commission Appeal No. 92681, decided February 3, 1993; and Texas Workers' Compensation Commission Appeal No. 92654 & 92655, decided January 22, 1993. A return to work does not automatically transfer an original injury into a new injury

when symptoms recur. Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. This can arise particularly where a claimant returns to work and is not 100% over the effects of an injury and experiences subsequent pain or medical problems related to an original injury. Appeal No. 93317, *supra*. *See also* Texas Workers' Compensation Commission Appeal No. 92518, decided November 16, 1992. Claimant clearly stated she was not entirely over the effects of the prior injury and in fact was very adamant, as was Dr. S, that her duties did not conform to what she believed her light duty restrictions to have been. We find the hearing officer's determinations to be supported by sufficient evidence.

Claimant also contends that the hearing officer "was in error" in admitting the statement of (FG) into evidence "as neither [FG and others] appeared for the finalization of the BCCH, therefore claimant was unduly denied her right to cross-examine. . . . " However, we note that this particular statement, was offered and admitted without objection by the claimant. Specifically, at page 30 of the December 14, 1993, transcript, claimant was asked if she had seen the statement and answered "yes" and the ombudsman said "no objection." The hearing officer admitted the exhibit without objection and claimant cannot now, on appeal, object to evidence which was not objected to at the CCH. Absent some type of objection to the admission of the statement at the CCH we will not consider its admissibility now. Parkview General Hospital, Inc. v. Waco Construction Co., 531 S.W.2d 224 (Tex. Civ. App-Corpus Christi 1975, no writ); Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992.

We do note that in the Decision and Order portion of the hearing officer's decision that there is an obvious typographical error in referring to the alleged date of injury as (date), and we reform that date to conform with the evidence and the rest of the decision as being 1992.

Having reviewed the record, we find no reversible error and sufficient evidence to support the hearing officer's factual determination. In considering all the evidence in the record, we find that the decision of the hearing officer is not so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

The decision and order of the hearing officer as reformed, are affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge