APPEAL NO. 950125

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held in_____, Texas, on December 27, 1994, _____presiding as hearing officer. She determined that the respondent (claimant) sustained a compensable injury on _____, and that she had disability from July 22, 1994, to October 17, 1994. The appellant (carrier) urges error in that the overwhelming evidence is against the hearing officer's determination of an injury on _____, and that the claimant's disability, if any, results from an injury of _____. No response has been filed.

DECISION

We reverse and render a new decision.

It is uncontroverted that the claimant sustained an injury to her back on _____, and has, according to her treating doctor's report dated December 13, 1994, continued to be "treated all along with conservative symptomatic treatment with excellent results through all the following years." According to the claimant's testimony, she received temporary income benefits (TIBS) until she returned to work in March 1992, with some restrictions that are ongoing to this date. Medical records also indicate that she has had ongoing treatment for the _____, injury and that appointments with her treating doctor, Dr. P (Dr. P), including one on _____, continued to show an injury date of _____. The claimant testified that she had intermittent pain, particularly when it was cloudy and cold, associated with her _____, injury and that she had complained to Dr. P before_____. The claimant's testimony did not indicate there was any specific incident or occurrence during that time other than that she was having problems. She stated that Dr. P took her off work effective July 22, 1994, and told her that her condition was "aggravated" and gave her therapy and rest at home. (The claimant returned to work in October 1994).

Sometime after the appointment with Dr. P on _____, the claimant contacted the Texas Employment Commission about unemployment benefits but was determined not to be eligible. She states she talked with someone at the Texas Workers' Compensation Commission (Commission) and was told that this would be considered an aggravation. She had an appointment with Dr. P on August 8, 1994, and was advised to file a new injury. On_____, she filed a notice of injury listing an injury date of _____.

An affidavit from the adjuster, Ms. MR (Ms. R), handling the case was admitted into evidence since she could not attend the hearing for health reasons. Ms. R indicated that the claimant has been continuously treated by Dr. P for the _____, injury, that she was released to work in May 1992 with restrictions, and that appointments had been made for the claimant, including the July and August 1994 appointments, for treatment arising out

of the _____, back injury. Ms. R stated that the claimant contacted her in early August 1994 to see about getting TIBS resumed and was advised that they had expired for the _____, injury. The claimant indicated that she did not agree with the impairment rating for the _____, injury and Ms. R advised her to contact the Commission about that. Ms. R stated that on_____, the claimant filed a notice of injury with the employer indicating that she sustained an aggravation of her previous injury on _____.

Several medical reports by Dr. P were introduced showing treatment over a period of time. His report of the _____, visit indicates the claimant came in due to acute aggravation of lumbosacral pain with bilateral irritative radiculitis at the L5-S1. He indicated that this "has been mostly noted in the last two weeks especially after working overtime in a standing position, for 10 hours." He goes on to say that "as a result of this, her well known condition has suffered an acute aggravation of the low back and leg pain" although there is no objective neurological dysfunction. Dr. P's report of the August 8, 1994, visit states that the claimant's visit was "for a recent acute aggravation of her lumbosacral pain, due to her overdoing her occupational activities, without any new fall or direct injuries" and indicates continued conservative treatment and physical therapy and notes that she was "placed out of work on _____ for 4 weeks."

In his report dated December 13, 1994, Dr. P notes that the claimant "has been suffering of a chronic long-standing post-traumatic lumbosacral pain and previously associated, especially in the initial months of her evaluation and treatment, of a mild radicular pain entering the right lower extremity following the posterior aspect of the right leg." Noting this complaint goes back to July 1991, that the condition is mainly a result of a chronic post-traumatic lumbosacral facet joint pain, and that she has been treated conservatively with excellent result, Dr.P's goes on to state the claimant had been able to work up until _____, when she suffered an acute aggravation of these chronic lumbosacral conditions with bilateral pain entering both lower extremities. He goes on to state:

> This acute episode is documented in the report of _____, in which the patient describes for the first time the radiation of the pain in the contralateral right lower extremity as well as recurrent pain of the left leg. She did not have any injuries to account for however, this type of chronic condition of lumbosacral facet pain and as one can expect with these type of patients, they may suffer intermittent aggravations of this chronic conditions especially that she reported that when in a prolonged standing position for certain hours was most likely the cause of this transient aggravation of the low back and both legs.

* * * *

I felt that even so that she did not have any new injuries, she definitely had an acute aggravation of this chronic low back condition which is common to see in this type of condition and even so, one cannot rule out in the future, the possibilities of acute aggravations of this type of low back and leg pains as a result of overworking activities, or as a result of very significant prolonged sitting or standing.

The hearing officer, in determining there was a compensable injury sustained on _____, indicates that she was bothered by Dr. P's use of the term "chronic" but did not believe it incompatible with the concept of "aggravation" at least not enough so as to defeat a claim of new injury. Although this might be taken as an indication that the hearing office was shifting the burden to one of a requirement to defeat a claim rather than the burden being on the claimant to prove the claim by a preponderance of the evidence, we conclude that regardless, her determination of a compensable injury occurring on _____, cannot be sustained as being against the great weight and preponderance of the evidence and an incorrect application of law.

We have stated a number of times, whether a claimant sustained a new injury or merely suffered a continuation of an original injury is normally a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93515, decided July 26, 1993; Texas Workers' Compensation Commission Appeal No. 92681, decided February 3, 1993. We have also held that to be considered to be a new injury, there must be evidence that an injury as defined in the 1989 Act has occurred. Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. We have also recognized that an aggravation of a previous condition or injury can rise to the level of a new injury. Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991. However, we have repeatedly held that "[a]n `aggravation' to be compensable must be a new injury and not merely a transient [as indicated in Dr. P's December 13, 1994, letter] increase in pain from an existing condition." Texas Workers' Compensation Commission Appeal No. 94107, decided March 10, 1994. *See also* Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, where the Appeals Panel stated that "[w]e believe that what must be proven is not a mere recurrence of symptoms inherent in the etiology of the pre-existing condition that has not been completely resolved [citation omitted] but that there has been some enhancement, acceleration, or worsening of the underlying condition from an injury." In Texas Workers' Compensation Commission Appeal No. 94280, decided April 22, 1994, the Appeals Panel observed that a return to work after an injury does not automatically transform an original injury into a new injury and stated "[t]his is particularly true 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." Texas Workers' Compensation Commission Appeal No. 94876, decided August 16, 1994; Texas Workers' Compensation Commission

Appeal No. 94128, decided March 15, 1994; Texas Workers' Compensation Commission Appeal No. 94610, decided June 24, 1994. Texas Workers' Compensation Commission Appeal No. 93515, decided July 26, 1993, is somewhat factually analogous to the present case in that it involved a prior back injury, prolonged treatment therefore, a return to light duty work and a recurrence of back pain after driving a bus on a trip followed by being taken off work. The Appeals Panel upheld a determination that this involved a continuation of the old injury and did not establish a new injury. *Compare* Texas Workers' Compensation Commission Appeal No. 93478, decided July 29, 1993, a case involving a specific incident aggravating a prior back condition.

In Appeal No. 92463, *supra*, a claimant sustained a compensable injury of her knee, underwent surgery and therapy and ultimately returned to work with the claimant stating she did not feel she was 100% recovered. The claimant stated that her work as a cleaning lady was somewhat more strenuous upon her return to work and that after several days her knee pain and swelling increased and that she eventually had to stop work. In upholding a determination that a new injury was not established and that the claimant's condition was merely a continuation of the original knee injury, we indicated that a release to return to work does not mean that the injury is completely resolved or that it necessarily ends disability. And, we stated a bare assertion that an aggravation has occurred (aggravation was also mentioned in the medical reports in that case) does not relieve the proponent of the burden of proving that an injury, as defined, has been sustained. We also stated:

> An injury may result from an accident or from an occupational disease, which includes repetitive trauma. An accident is an undesigned, untoward event, traceable to a definite time, place and cause. [Citation omitted.] To recover for repetitive trauma, it must be proven that repetitious physical activities occurred on the job and that such activities cased an injury; the disease must be inherent in that type of employment as opposed to employment generally.

The claimant did not testify as to any accident or occupational disease in July 1994, and the medical records only refer to some prolonged standing and some overtime. This reference in Dr. P's medical report apparently refers to a history provided by the claimant. Although a doctor's recitation of a patient's history may be germane for the basis of his opinion, it is not competent evidence that an injury in fact occurred (Presley v. Royal Indemnity Insurance Co,., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). However, regardless of its competency, this statement, together with the remainder of the report, does not establish a new injury. *See* Texas Workers' Compensation Commission Appeal No. 92518, decided November 16, 1992, a case involving an assertion of an aggravation of an earlier injury caused by standing on the job, where the Appeals Panel reversed the determination that an occupational disease had been sustained.

The evidence in this case does not establish a new injury. To the contrary, the determination that a new injury, through aggravation, occurred on or about _____, is so against the great weight and preponderance of the evidence as to clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Further, based upon the Appeals Panel decisions on this issue, it is an incorrect application of the law to the facts as developed in this case. Dr. P's records do not factually or legally establish a new injury through aggravation occurring on or about _____. Not only is there an absence of any specific incident or accident, there is a totally insufficient basis to show an injury through repetitive trauma activity. In fact, Dr. P's write-ups establish that what is involved is a continuation of the injury of _____. He describes this as a "transient aggravation of the low back and both legs," states that the claimant has had "chronic long-standing post-traumatic lumbosacral pain," had been treated all along "with conservative symptomatic treatment" which is continuing, and that she did not have any new injuries although "she definitely had an acute aggravation of this chronic low back condition which is common to see in this type of condition" and that such acute aggravations cannot be ruled out in the future. The evidence compellingly shows no more than a continuation of the original injury even though the claimant's pain and symptoms became more acute in July 1994. This clearly does not, under our previous decisions, establish a new injury under the 1989 Act.

For the reasons set out above, the decision and order of the hearing officer are reversed and a new decision rendered that the claimant did not sustain a compensable injury on _____. Because of our determination on this issue, it is not necessary to address the matter of whether the claimant had disability for the period of _____, to October 17, 1994. This decision does not affect the claimant's entitlement to medical benefits based upon her injury of _____.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge