APPEAL NO. 951123
FILED AUGUST 24, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 8, 1995. The issue at the CCH was whether the appellant, who is the claimant, sustained a compensable repetitive trauma injury on (alleged date of injury). On the date alleged as the date of injury, the claimant was employed by a self-insured political subdivision, which shall be referred to in this decision as the carrier or the employer, depending upon the context of the reference.

The hearing officer determined that claimant's condition was a continuation of her compensable injury of _____, rather than a new injury. As the theory argued for recovery was that the claimant had sustained an aggravation of her preexisting condition, the hearing officer impliedly found that claimant had not sustained an aggravation.

The claimant appeals the decision, arguing why she believes that the evidence supported her claim. She argues that her carpal tunnel syndrome (CTS) had been treated before by surgery, and that her current CTS and Pronator Teres Syndrome occurred as a result of returning to work and being re-exposed to the repetitive trauma. There is no response from the carrier.

DECISION

We affirm the hearing officer's decision and order.

Facts relating to the previous compensable injury were admitted into the record of the case and must necessarily be summarized here. The claimant had worked for the employer for 18 years. She stated that throughout that time, she had done typing and data entry. A few months prior to _____, claimant began to experience tingling and weakness in her right wrist and forearm. There was no dispute that this was ultimately determined to be a compensable repetitive trauma injury, and was diagnosed by claimant's first treating doctor for that injury, Dr. S, as CTS combined with chronic, moderate-to-severe pronator teres syndrome in the right upper extremity. This was confirmed by an abnormal EMG, conducted by referral doctor Dr. M. She changed to Dr. Z as her treating doctor, and he performed CTS release surgery in April 1992.

The claimant stated that she returned to work on July 5, 1992. She agreed that no doctor had ever released her to more than light duty work, but that her employer demanded more than light duty work of her. Claimant agreed that when she returned to work she was still having some pain, and received injections from Dr. Z, but that these injections caused more pain than they relieved. Accordingly, she asked for a change in treating doctors to Dr. B, who saw her first on April 21, 1993.

Before this, claimant had been evaluated by a designated doctor appointed by the

Texas Workers' Compensation Commission (Commission), who certified that she reached MMI on March 23, 1993, with a five percent impairment rating (IR). This was assigned for her right extremity, including her forearm, due to sensory and motor strength losses.

Claimant said she continued to be treated by Dr. B, but her discomfort and weakness in her right arm started again and became so bad that by September 1994 she was unable to use her right hand. In claimant's words, her arm "gave out." Claimant said that (alleged date of injury), was her date of injury because it was on that date that Dr. B diagnosed a new injury.

Dr. B's treatment notes for claimant are in the record, and state:

- 8/31/94: Claimant has "reinjured old surgery" and should change jobs "or else." Claimant still has pronator syndrome.

- 9/26/94: Claimant has reinjured the site of her right failed carpal tunnel syndrome surgery. Suggests that her case should be considered a different case because it is a re-injury.

- 10/27/94: Reference made again to re-injury and "additional" pronator syndrome. Reference that repeat surgery is usually more successful.

- Next significant reference is 1/20/95: States that this is a new injury as of (alleged date of injury), caused by return to work.

A medical narrative report by Dr. B dated January 20, 1995, noted that claimant had been advised after her prior CTS that continuous engagement in her employment would worsen her symptoms and perhaps result in the need for surgery. This report also noted that claimant was treated for her condition with nonsteroidal anti-inflammatory medication, which resulted in a gastroesophageal problem (GERD). Dr. B noted that the carrier had disputed coverage for the GERD arguing that it was an ordinary disease of life.

Claimant was examined in an independent medical examination by a doctor appointed by the Commission. This was Dr. G, an orthopedic surgeon, who examined claimant on February 17, 1995, and reviewed her records. Dr. G concluded that claimant had a partial recovery from her prior CTS and pronator injury, but that her symptoms continued. He stated that the symptoms and signs claimant had were not due to re-injury, but represented a continuation of the same problem that occurred in 1992. He stated that one level of claimant's nerve compression had been surgically treated, and it was beginning to look like the second level of median nerve compression would require surgical treatment.

A letter written May 10, 1995, by Dr. B to the executive director of the Commission

states that he can find no fault with Dr. G's assessment, but reiterates that "the point is that the patient was injured on the job and deserves consideration for reopening her case."

This is a case that could be easily resolved if there were a statute in the 1989 Act allowing for a reopening of a claim at the agency level when further problems occur as a result of an occupational disease. However, although Section 410.307 sets out a process whereby a court may broaden the inquiry of the extent of impairment where there has been a substantial change of condition, the only issue before the hearing officer, and the Appeals Panel, was whether claimant had a new injury, not whether the IR assigned to the prior injury could be set aside. We note that claimant has a right to lifetime medical treatment (and the carrier did not dispute that it was liable for medical benefits stemming from claimant's _____, CTS and Pronator Teres Syndrome).

While it is true that a carrier is not absolved of liability because a claimant had a preexisting condition, and an aggravation of that condition is an injury in its own right, Mountain States Mutual Casualty Co. v. Redd, 397 S.W.2d 321 (Tex. Civ. App.-Amarillo 1965, writ ref'd n.r.e.), a bare assertion that aggravation has occurred does not relieve the claimant of the burden that proving an injury has occurred. The fact that a previously injured employee returns to work and experiences a flare-up of a prior injury does not necessarily mean that there has been an aggravation, as opposed to a recurrence of symptoms of that injury. *See* Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. The party asserting aggravation must prove that there has been an enhancement or worsening of the prior condition. Texas Workers' Compensation Commission Appeal No. 94280, decided April 22, 1994. While it may sometimes be a close call to determine whether a condition represents a continuation or aggravation of an old injury, the issue is one 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. 950600, decided May 31, 1995. A return to work will not automatically transfer an old injury into a new one when symptoms recur. Texas Workers' Compensation Commission Appeal No. 94541, decided June 9, 1994.

Section 401.011(36) defines repetitive trauma injury as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Such an injury is by definition one which by its nature occurs incrementally and over time and defining the point at which the continuing manifestation of symptoms crosses into the area of a new injury will not always be clear. That problem is indicated within the medical records here, in which various conflicting medical opinions, even in different writings of Dr. B, are included in the record. The fact that proof may be hard, however, does not relieve the claimant from the burden to prove that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). It was for the hearing officer, as trier of fact, to resolve the

inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701, 702 (Tex. Civ. App.- Amarillo 1974, no writ).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). That is not the case here, and the record sufficiently supports the hearing officer's decision and order, which we affirm.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge