APPEAL NO. 990923

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 26, 1999, a contested case hearing (CCH) was held. The issues concerned whether the appellant, who is the claimant, sustained a compensable injury on _____, and sustained disability as a result.

The hearing officer held that the claimant did not sustain a work-related injury on _____, but that she experienced a continuation of her symptoms stemming from an (prior date of injury), injury. The hearing officer held that the inability to obtain and retain employment equivalent to her preinjury average weekly wage was due to her (prior date of injury), injury. She also concluded as a matter of law that claimant had no disability (due to an _____, injury, the matter she was asked to adjudicate).

The claimant has timely appealed, arguing that it is error to consider that the injury is simply a continuation when the claimant had fully recovered from a 1996 injury and a new incident, causing exacerbation of pain, occurred a year later. The claimant argues that reversal of the determination that she did not sustain an injury in _____ will necessarily result in reversal of the decision that she had no disability. The respondent (carrier) argues that the decision is sufficiently supported and recites evidence in favor of the decision.

DECISION

Affirmed.

The claimant said she was employed for the past 11 years by (employer) as a flight attendant. She agreed that she had worked little since 1995, due to being off work for a variety of illnesses and a work-related injury that occurred in 1996. Claimant said that on (prior date of injury), a bag fell on her head from an overhead luggage carrier. She said that she was off work for this injury through November 1996, returned briefly for about 18 hours of work in December 1996, and then was off for hyperthyroidism and chronic fatigue syndrome. Claimant maintained that her 1996 injury involved her neck, mid back, and left side. She was released back to work and returned in early _____. Claimant's testimony was somewhat variable as to the extent to which she felt pain from her 1996 injury. She said that she was certified at maximum medical improvement (MMI) in mid November 1996 and received a zero percent impairment rating (IR) from her 1996 injury, but that she continued to have some discomfort off and on from this, at about one to two out of a 10 scale. However, she contended that she was not having pain when she returned in 1997.

According to claimant, on _____, she was transporting a beverage cart from the carpeted area to the galley area, and had to lift slightly. She felt pain. A few days later, she said there was another incident when a beverage cart nearly tipped over and she

was trying to brace it from doing so. Claimant contended her pain went to an eight or nine on a 10 scale, and involved her right side as well as her back down to about 12 inches above her middle back. She said she also had bad headaches after 1997. On direct testimony, she indicated that this occurred after 1997, but on cross-examination, she stated that she meant that her headaches became worse after 1997. She could not remember if she was treated for headaches for chronic fatigue, but agreed she was treated for this condition from her thyroid condition and from her 1996 injury, although it was a different type of headache.

Claimant's treating doctor for her 1996 injury, and soon after the 1997 injury, was Dr. H. Her current treating doctor is Dr. S. Claimant had also been examined, at the request of the Texas Workers' Compensation Commission, by Dr. P.

On December 8, 1997, a functional capacity evaluation performed on claimant assessed her at the sedentary level, and physical therapy was recommended for another four weeks. On January 2, 1998, Dr. S released her to full flight duty at 40-45 hours (a month). She was "not sure" if he also restricted her to certain duties while flying. Claimant had not returned to work, however, contending that she required further therapy. She said that she had not gone back until August 1998, however, because her supervisor told her she had to be released to "full flight duties" and worded that way. She returned briefly but took a company approved leave of absence in December 1998, and was not working at the time of the CCH. She believed that Dr. S had taken her off work again effective February 1999.

In September 1996, after the first injury, Dr. H diagnosed a cervical myofascial syndrome and ulnar neuritis, left upper extremity. A month later, he noted that her pain had decreased 50%. By November 1996, she reported only an occasional twinge, and he released her. In a letter dated September 15, 1997, Dr. H wrote that claimant had recently returned to see him on August 29th, and that due to her illnesses since November 1996, she had not been able to keep up with her home physical therapy, with resultant deterioration in her condition. This letter makes no mention of a new injury nor does a letter written two days later, which describes neck and left upper extremity pain and tenderness. He filed a Specific and Subsequent Medical Report (TWCC-64) in which he noted the date of injury as (prior date of injury). The carrier wrote to Dr. H asking him if her problems were a continuation of her (prior date of injury), injury or, generically, the result of a "new injury." Given this choice, Dr. H chose continuation. This letter did not describe nor ask about whether an incident occurring on _____, would have led to a new injury.

Dr. S diagnosed her injury as a grade II strain and discopathy in the cervical spine. He is of the opinion that claimant sustained a new injury on _____, based in large part on his understanding that she was symptom free for months prior to this occurrence. On December 8, 1998, Dr. P wrote that claimant's symptoms centered primarily in her thoracic spine, and his impression was degenerative cervical disc disease with a thoracic

strain. He noted that her MRI showed no structural abnormality of any consequence, and that it was likely she had an exacerbation of symptoms due to the prior injury of 1996.

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, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The claimant is correct in her argument that an aggravation can constitute a new injury, or that the fact that a region of the body was injured previously does not mean that it cannot be injured again. The fact that claimant received a zero percent IR is evidence in her favor. However, her testimony concerning the presence of pain prior to the asserted _____, incident was variable. Dr. H's treatment records after the purported _____, injury do not record that it was reported to him. If the hearing officer believed that an incident occurred on _____, she evidently did not believe that it was injurious to the extent claimed by the claimant. As she noted, her decision that any disability due to the (prior date of injury), injury does not result in payment of income benefits is correct because the claimant was certified at MMI in November 1996.

In reviewing the record, we cannot agree that the hearing officer's decision was against the great weight and preponderance of the evidence, and we affirm her decision and order. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge