APPEAL NO. 991077

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 April 21, 1999, with the record closing on April 28, 1999. He (hearing officer) determined that the respondent/cross-appellant (claimant) sustained a compensable bilateral arm injury on _____, in the form of an occupational disease due to repetitive trauma and that the claimant had various periods of disability. The appellant/cross-respondent (carrier) appeals the injury determination, contending that the claimant did not sustain a new injury, but merely experienced the recurrence of symptoms from a prior right hand and arm injury on October 14, 1996. The claimant has not responded to this appeal, but appeals the disability determination, requesting that additional disability be found. The carrier has not responded to the claimant's appeal.

DECISION

Affirmed.

The CCH addressed two cases, each with a different docket number. One case dealt with issues related to the 1996 injury, which involved a separate carrier (carrier 2). The other dealt with the 1998 injury and the issues set out above. Two decisions were issued. Carrier 2 supported the position of the claimant that there was a new injury in 1998 and filed a document in response to both appeals in which it urges that the decision of the hearing officer be affirmed. Because carrier 2 was not a party in the case under the docket number being considered in this opinion, we will not consider its response. The claimant attached to her appeal documents not offered or admitted into evidence at the CCH. We will not consider those documents submitted for the first time on appeal. Section 410.203(a).

The claimant worked in 1996 as a billing representative. The job involved keyboard data entry activities. Carrier 2 accepted liability for a right hand and forearm injury described as right carpal tunnel syndrome (CTS), mild pronator tunnel syndrome, and lateral epicondylitis, although electrodiagnostic studies in November 1996 were normal. Dr. P apparently became the treating doctor for this injury. The claimant remained off work until November 27, 1996. She said she last saw Dr. P in January 1997 for the 1996 injury. She returned to a job with the employer that required less data entry. In April 1997, she said, her job changed back to one requiring a substantial amount of data entry. Over the summer of 1997, she testified, she began experiencing bilateral hand pain. By the end of September, she said, the pain became severe and she returned to Dr. P. She worked off and on thereafter until the end of March 1999 when she began a new job with a different employer and has not missed work since because of an injury.

Although the claimant said that she had not seen Dr. P since January 1997 for the 1996 injury, there was in evidence an August 4, 1997, letter from Dr. P to the claimant in which he refers to a "recent" injection treatment for her "hand problems." In a report of an

office visit on October 20, 1998, Dr. P includes a date of injury of October 14, 1996, and states that her symptoms "are probably new injuries" and that they are "recurrent injuries." An EMG of the upper extremities on November 18, 1998, showed minimal right CTS. On December 11, 1998, the ombudsman wrote Dr. P for his opinion whether "it is only symptoms that are aggravated or does the aggravation rise to the level of a new injury." It is not clear whether Dr. P responded to this letter, but in a report of an office visit of January 20, 1999, he wrote:

> When [claimant] was subsequently evaluated in October, 1998 she had evidence of recurrent symptoms of [CTS] but pain was also referred up into her shoulder and neck. The symptoms were so dramatically different and such an increase in symptoms and abnormal EMGs which indicated a significant [CTS] with dramatic changes and marked enhancement of symptoms, it falls under a category of a new injury because of the dramatic change in nature and even subjective findings classify this as a new injury.

Dr. T examined the claimant on March 11, 1999, at the request of the carrier. He concluded:

> Because of the fact that she had no pathology in 1996 and because she did well for almost a year and a half, [claimant] has a new injury. Although the complaints maybe similar in nature and although they may be due to the fact that she develops the pain and problems due to performing repetitive tasks, she did not have any pathology in 1996 and her symptoms had cleared completely.

The claimant had the burden of proving she sustained a new compensable injury on _____.[1] Section 410.011(26) defines injury as "damage or harm to the physical structure of the body." The aggravation of a preexisting condition may be a compensable injury in its own right. In Texas Workers' Compensation Commission Appeal No. 93866, decided November 8, 1993, we stated that the concept of a compensable aggravation injury has a somewhat technical meaning and that, to be compensable, the aggravation "must be a new and distinct injury in its own right with a reasonably identifiable cause. . . ." The mere recurrence or remanifestation of symptoms of the prior condition does not equate to a new compensable injury. Rather, there must be evidence of "some enhancement, acceleration or worsening of the underlying condition." Appeal No. 93866. This case reflects the difficulties inherent in determining whether there has been a new compensable aggravation injury, based on repetitive trauma, when the prior injury was also a repetitive trauma injury. *See* concurring opinion in Texas Workers' Compensation Commission Appeal No. 93696, decided September 22, 1993. Whether a claimant has sustained an aggravation injury or merely the continuance of symptoms from a prior injury is a question of fact for the hearing officer to decide. Appeal No. 93866, *supra*. The hearing officer found the opinions of Dr. P and Dr. T persuasive that the claimant did sustain a new injury,

[1] The date of the claimed injury was not an issue.

largely because the symptoms from the prior injury had resolved. The carrier appeals this determination, contending that Dr. P's opinion reflects more his concern that the claimant again be entitled to benefits than an objective medical judgment and suggests that the claimant's current test findings are "minimal," thus showing no new injury. We note that the first injury was to the right upper extremity only, while the claimed new injury was to both upper extremities. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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, 635 (Tex. 1986). We believe that the testimony of the claimant and near unanimous medical evidence in this case provide sufficient evidentiary support for the determination that the claimant sustained a compensable repetitive trauma injury on _____, and affirm that determination.

The hearing officer found disability from October 14 through October 20, 1998; from November 6 though 8, and 12, 13, 18, 20 and 21, 1998; from December 10 through December 13, 1998; and from March 1 through 3, and 11, 1999. The claimant appeals, contending that she also had disability from October 20 to November 9, 1998; November 19, 1998; November 23, 1998; and December 14, 1998. The claimant had the burden of proving periods of disability at the CCH with some reasonable certainty as to the dates or periods she was claiming. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. She was repeatedly asked what these periods were. At one point, she said that she "had not sat down and worked out the dates." At another point, she said she could not say "specifically what date she missed since October 14, 1998." The hearing officer determined disability on the basis of documentary evidence, particularly work excuses. As pointed out above, we will not consider new evidence for the first time on appeal and, thus, do not permit the claimant to shore up her case now when she should have done so at the CCH. Under our standard of review, we find the evidence sufficient to support the disability determinations of the hearing officer.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge