APPEAL NO. 001341

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 May 22, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and did not have disability. The claimant appeals, contending that these determinations are against the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant sustained a compensable low back injury (herniation at L5-S1) on _____. Dr. L performed surgery on July 7, 1998. The claimant returned to work at her regular duties in March 1999. Her job involved operating lines that produced plastic film for bags. She said in her testimony that she still had some residual soreness when she returned to work. On _____, she said, she had to reach and pull material out of an air horn. During this episode, she said, she felt back pain more severe than in the past. She saw Dr. L on August 16, 1999, and contends that the incident on _____, constituted a new injury. The claimant testified that she commuted her impairment income benefits from the _____, injury.

An MRI on January 28, 1998, revealed herniation at L5-S1. No mention is made in this report of pathology at L4-5. An MRI on September 9, 1999, disclosed the post-operative changes at L5-S1 and degeneration and bulge at L4-5. In a report of an examination on September 13, 1999, Dr. L concluded that the claimant's "symptoms are related to the original injury; there is scar tissue that has built up." The claimant then changed treating doctors to Dr. M. In a report of October 15, 1999, Dr. M commented that from the MRIs, "it appears that the initial MRI report as well as the film gives no indication of a disc bulge at L4-5 whereas since the most recent injury, we now have a disc bulge at L4-5." Dr. ML examined the claimant on January 31, 2000, at the request of the carrier. In his report of this examination, Dr. ML commented that the claimant told him that she returned to work and "was pain free until her second work related injury on _____." Because he believed she was asymptomatic between February and _____, he felt she sustained a new injury on the later date "as well as an aggravation of pre-existing lumbar degenerative disc disease."

The claimant had the burden of proving she sustained a compensable injury on _____. Section 401.011(26) defines an injury as "damage or harm to the physical structure of the body." The aggravation of a preexisting, nonwork-related 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." Whether a compensable aggravation injury occurred as claimed is a question of fact for the hearing officer to decide. Appeal No. 93866.

The hearing officer considered the evidence and determined that the claimant did not sustain a new injury on _____. The hearing officer explained that, in her view of the evidence, the act that allegedly caused the new injury "did not require much force at all" and that Dr. L's medical reports were credible and persuasive on the issue before her for reasons set out in her decision and order. She also said that she was not persuaded by Dr. ML's report because it relied heavily on the claimant's history of being pain free after her return to work. The claimant testified to the contrary at the CCH. The claimant appeals this determination, arguing that the hearing officer "improperly discounted" Dr. ML's report and that the claimant's admitted pain before the second incident was "not strong enough to cause her to seek medical treatment." Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. In her role as fact finder, she could assign the weight and credibility to the evidence that she deemed appropriate. 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). Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination that the claimant did not sustain a compensable injury on _____.

The claimant's appeal of the disability determination was premised on the success of her appeal of the compensability determination. Having affirmed the latter, we affirm the former.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge