APPEAL NO. 001512

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 6, 2000. With regard to the two issues before him, the hearing officer determined that the appellant (claimant) had not sustained a (new) work-related injury in the form of a repetitive trauma occupational disease but, rather, had a recurrence of a prior injury through the natural progress of that prior injury and that the date of injury of the claimed occupational disease was _____.

The claimant appealed, reciting evidence in her favor, asserting an aggravation of the prior injury and renewing her objection to an unassigned "anonymous" peer review report. The claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The respondent (carrier) responds to the points raised by the claimant and urges affirmance.

DECISION

Affirmed.

It is undisputed that the claimant sustained a low back and right leg injury in _____. The claimant's treating doctor, both for the _____ and present claimed _____, injury, is Dr. D. One of the medical reports and the hearing officer's Statement of the Evidence indicate that the claimant was diagnosed as having right sciatic piriformis entrapment for the _____ injury. It is undisputed that the claimant received conservative treatment without surgery and returned to work on May 13, 1996. Medical records indicate the claimant continued to receive treatment for this injury through May 1997.

The claimant had previously been employed in the toy department of (employer) but when she returned to work in May 1996, she began working in the employer's accounting office. The claimant described her duties in some detail but they were general clerical-type duties of collecting returned checks, occasionally getting items out of a safe, working at a desk, and getting up to perform various other duties. The claimant testified that she continued to have some intermittent problems (and some missed time) but that in April or May 1999 the pain in her low back and legs began to intensify and that she started to have pain and numbness in her right foot and ankle. The claimant returned to Dr. D in April 1999. In a chart note dated April 20, 1999, Dr. D comments that it has been "a year and a half" since he saw the claimant, that the claimant was having difficulty "in walking any distances," and that he suspected "neurogenic claudication symptoms." Dr. D ordered another MRI (although an MRI was performed for the _____ injury it was not in evidence). In a letter dated May 21, 1999, Dr. D wrote:

> This letter is in reference to [the claimant]. She has been seen in the past for her back and her right lower extremity problems. Recently she's had a

> flare-up of that condition and her pain has worsened and she has more sciatic type problems in the right leg. This is identical to the problem she had previously that I was seeing her for and should be considered a reaggravation of her prior problem.

Dr. D referred the claimant to Dr. W, who, in a report dated July 23, 1999, confirmed the _____ diagnosis of mild right sciatic piriformis entrapment and commented that "[e]arlier this year without incident, she had significant worsening of her problem and actually a little difference in her problem." The claimant was prescribed continued conservative treatment.

The claimant testified that she believed her problems at the time were related to her _____ injury. The claimant also testified that on _____, her attorney suggested that her current condition might be a new injury. The claimant saw Dr. D on November 1, 1999, and asked him whether her problems could be a new injury. In response, Dr. D wrote in a report dated November 1, 1999, that he had seen the claimant "numerous times throughout the last 3 years or so" and that

> . . . given the nature of her job and the frequent position changes - bending, stooping, and that sort of thing that's required - she started having increased symptoms in her right leg and increased back symptoms. Subsequent work-ups have shown that she has an S1 radiculopathy now, per [Dr. W's] new EMG done earlier in 1999. At this stage, since this is a new injury and a new and different diagnosis, I think that this needs to be acknowledged so that she can get the proper treatment and care for her back.

Dr. D referred the claimant to Dr. G, who, in a letter dated March 27, 2000, addressed to the claimant's attorney, wrote "that, in my opinion [the claimant] has internal disc disruption L4-5, L5-S1 from a work injury of _____. However, she also has lumbar radiculopathy from a second injury of _____." Dr. G proposed "an anterior lumbar interbody fusion at L4-5, L5-S1 and a right L2-3 hemilaminotomy at the same time."

The carrier contends that the claimant's current problems are a continuation of her _____ injury and that it was the claimant's attorney who suggested that she might have sustained a new injury on _____. In Carrier's Exhibit No. 3, labeled as a "Medical Report, [Dr. F]," is an unsigned peer review by "Physician Reviewer #21068" dated April 6, 2000. The report does not have a letterhead or signature block. That report states that there was "no new intervening injury" and concludes:

> The mild to moderate right S1 radiculopathy is a development of the natural progression of the patient's documented degenerative disc disease. It is not a result of a new injury. It is a development of a disease of life stemming from the original injury.

The hearing officer summarizes the claimant's duties in the accounting office in some detail and concludes:

> Claimant did not, however, prove that the actions were endemic to the employment, or even that they were truly repetitive motions. The Hearing Officer is of the opinion that sitting in a chair, and standing up from the sitting position are actions to which the general populace is exposed to at least the same degree as Claimant, bending approximately eight times per day to retrieve items from the safe does not constitute a repetitive trauma, and that walking, without more, cannot support a claim of a work related injury.
>
> The actions identified by Claimant could, however, become increasingly more difficult as her low back injury progressed. The Hearing Officer finds the physician reviewer's determination that Claimant's current condition is a result of the natural progression of the degenerative disc disease triggered by her _____ injury is reasonable, persuasive, and within reasonable medical probability.

The claimant appealed the hearing officer's findings, citing reports by Dr. D, Dr. W, and Dr. G and argued that the claimant had not seen a doctor for her back "for a year and a half prior to experiencing the new symptoms." The claimant cites an Appeals Panel decision that purports to advance the proposition that "bending and lifting can denote an aggravation injury caused by repetitive trauma." The injured employee in the case the claimant cites was a route representative/salesman who "would routinely carry 70 to 100 pounds of linens to and from his van." We find the case the claimant cites clearly distinguishable on the facts. The Appeals Panel has held that whether a claimant sustained a new injury or merely suffered a continuation of an original injury is normally a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 93515, decided July 26, 1993. We have also held that an aggravation of a previous condition can be an injury in its own right. Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991. However, the new injury must produce more than a mere recurrence of symptoms inherent in the etiology of the preexisting condition that has not been completely resolved and there must be some enhancement, acceleration, or worsening of the underlying condition from the second injury. Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994. The hearing officer in this case determined that the claimant had a recurrence of symptoms from her _____ injury and which were the "natural progression" of the disease process. The hearing officer further found that the claimant's actions of sitting, standing, walking, and occasionally bending over to retrieve items from the safe are normal actions which everyone does and are "not repetitive in nature" (as opposed to the route salesman that routinely carries linens weighing 70 to 100 pounds). We find the hearing officer's determinations on this point supported by the evidence, including the claimant's testimony, Dr. D's earlier reports, and the peer review report.

The claimant also appeals the hearing officer's reference to the "peer review doctor's conclusions." The claimant objected to the admission of Carrier's Exhibit No. 3, which, as noted, was marked as Dr. F's medical report. The carrier responded, representing that Dr. F had been identified when the report was exchanged and referred to a handwritten copy of a facsimile cover sheet identifying Dr. F. (That facsimile cover sheet, however, was never admitted into evidence and was not part of the record, although it was attached to the carrier's response.) The hearing officer commented that the unsigned report dealt more with the weight to be given to the evidence than admissibility and admitted the report. The Appeals Panel, on several occasions, has considered "unsigned peer review" reports that were apparently admitted without objection. Texas Workers' Compensation Commission Appeal No. 991458, decided August 19, 1999 (Unpublished). In Texas Workers' Compensation Commission Appeal No. 94795, decided August 3, 1994, the Appeals Panel held that a hearing officer had not abused his discretion in excluding a peer review report where the author's name had been "redacted (i.e., blacked out)." In affirming the hearing officer's decision, we held that it was not unreasonable to consider such a report "an unsigned statement" and the hearing officer had not abused his discretion in excluding it. In this case, the author doctor had been identified, at least on the carrier's exhibit list, if not on the document, and the carrier's attorney represented she had shown the claimant's attorney a copy of a handwritten statement from the doctor regarding his identity and opinion. Consequently, we are unwilling to say that the admission of that document constituted reversible error or was an abuse of discretion, particularly where there was other evidence to support the hearing officer's decision.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

Upon review of the record submitted, we find no reversible error. We will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and

order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge