APPEAL NO. 010027

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 December 4, 2000. The issues at the CCH involved two claim numbers, but the essence of the issue was the nature of a _____, injury--whether it was a continuation of an earlier _____, injury, or a new injury through repetitive trauma on _____.

The respondent's (claimant) employer at the time of the October 1999 injury was the (Employer #1), who was insured through the (Carrier #1). The claimant's employer at the time of her disputed injury in these CCHs was (Employer #2), who was insured by the appellant, (Carrier #2). The hearing officer held that the claimant sustained a new injury on _____, for which Carrier #2 was liable for benefits, and that, as the _____, injury was not a producing cause of that injury, Carrier #1 was not liable for benefits.

Carrier #2 has appealed and argues that the claimant sustained no new injury and that the problem she experienced at Employer #2 was a continuation of her previous problem. Carrier #2 also argues that the hearing officer erred in failing to grant a motion for continuance. The claimant responds that the "last injurious exposure" rule applies, and that the decision is otherwise supported by the evidence. Carrier #1 responds that the decision is supported by the evidence.

DECISION

We affirm the hearing officer's decision.

The claimant sustained a left wrist sprain on _____, while employed by Employer #1. She said that, as a manager, she primarily did paperwork for this employer, but was injured while pulling boxes of records. The claimant was certified to be at maximum medical improvement from this injury on December 27, 1999, with a zero percent impairment rating. At this time, her doctor declared her wrist sprain "resolved." She worked for Employer #1 until March 10, 2000. The claimant said that her wrist was no longer being treated.

The claimant began working for Employer #2 on _____. The extent of testimony about the claimant's activities on her first day of work for Employer #2 was: (1) there were ten bundles of wooden shutters that were of different lengths, sizes and widths; (2) they would be viewed from various angles and sanded or scraped if needed to remove defects or damage; (3) they would be rebundled and rubber bands put on either end; (4) the bundles were loaded on a cart; and (5) the cart was pulled to another location. The claimant was asked to show the movements involved and this was apparently done but without cogent description on the record beyond "like this" and "this way" for the benefit of the Appeals Panel. The claimant was asked how many shutters were processed in a day and did not know; she only said that there were "a lot" and the work "was fast pace." She said she was "constantly moving." At the end of this first day, her hands were swollen and

she had thumb-to-wrist pain. In questions from her attorney, she was also asked if her pain resulted from "the incident" at Employer #2.

Evidence in the file indicated that the claimant continued to experience these problems and reported this on _____, thereafter seeking medical help from Dr. R. The report form noted that the claimant agreed she had a history of arthritis. On _____, Dr. R noted that the claimant's pain had begun in her right hand as well, as she transferred her sorting duties from her left to right hand. He noted that she had de Quervain's tenosynovitis. Dr. R's understanding of the tasks performed by the claimant was that she was bundling four (rather than ten) shutters at a time. A witness for Employer #2 affirmed that the claimant bundled ten shutters at a time.

Dr. R responded to questions from the claimant's attorney as to whether the injury was from repetitive trauma. Dr. R said that while the claimant's presentation was one of repetitive strain, he was less certain that her problems were caused by bundling shutters. Dr. R stated that he understood that the claimant had a previous wrist injury and that it was more likely that she had an aggravation of that injury as she performed her duties over a limited period of time for Employer #2.

The claimant was terminated because she did not show up for work and did not present a doctor's excuse. There was conflicting evidence about whether the injury was reported before June 21. A memo made on June 26 by Ms. B stated that the claimant asserted in a phone call that her doctor had "faxed" an excuse and that the claimant also said that this was an old problem and that Employer #2 should not have to pay for the claim. Apparently, the "fax" number to whom the doctor sent the report was not that of Employer #2. Ms. B, who was a nurse, testified that the claimant was at first unsure whether the pain in her hands, which she told Ms. B went back to her first day of work, was due to her arthritis or the work. The claimant agreed that an answer she had given on a preemployment physical for Employer #2, stating that she had no prior hand injuries, was wrong.

First, the matter of denial of a continuance was not preserved for appeal in the record of this CCH, and we therefore decline to address this issue for the first time on appeal.

Second, we do not agree with the claimant that this case involves a "last injurious exposure," as the _____ injury was a specific injury, not repetitive trauma. The issue is purely whether the claimant sustained an injury while working for Employer #2, or whether her symptoms represented a continuation of the _____ specific injury. 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." To recover for an occupational disease of this type, one must not only prove that repetitious, physically traumatic activities occurred on the job, but also must prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must

be inherent in that type of employment as compared with employment generally. Davis v. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). Where there is some variety in the activities asserted as injurious, the trier of fact should be persuaded, through a preponderance of the evidence, that there was a "cumulative" trauma.[1]

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). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The evidence in this case was interpreted by the hearing officer as proving complete resolution of the _____ wrist injury in December 1999 and this is supported by sufficient evidence. Even were this not the case, it is axiomatic that the employer accepts the employee as he is when he enters employment. Gill v. Transamerica Insurance Company, 417 S.W.2d 720, 723 (Tex. Civ. App.-Dallas 1967, no writ). An incident may indeed cause injury where there is preexisting infirmity where no injury might result in a sound employee, and a predisposing bodily infirmity will not preclude compensation. Sowell v. Travelers Insurance Company, 374 S.W.2d 412 (Tex. 1963). However, the compensable injury includes these enhanced effects, and, unless a first condition is one for which compensation is payable under the act, a subsequent carrier's liability is not reduced by reason of the prior condition. St. Paul Fire & Marine Insurance Company v. Murphree, 357 S.W.2d 744 (Tex. 1962). If the prior condition is compensable, the appropriate reduction for a prior compensable injury must be allowed through contribution determined in accordance with Section 408.084.

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[1]It is worth noting that a claim of injury over the course of a single day need not necessarily be analyzed as a repetitive trauma injury. Proof of a specific injury does not depend upon being able to identify the precise item that caused a strain. *See* Hartford Accident & Indemnity Co. v. Contreras, 498 S.W.2d 419 (Tex. Civ. App.-Houston [1st Dist.] 1973, writ ref'd n.r.e.), which affirmed a compensable injury when a worker sustained a back injury after lifting 50-pound sacks throughout a workday but could not remember when during that day he injured himself; he first felt pain that night after work. The opinion said, in effect, that attributing the injury to some work on a particular day was adequate to identify the time and place of injury.

Having reviewed the evidence in this matter, we affirm the hearing officer's resolution of conflicting evidence as not against the great weight and preponderance of the evidence. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We accordingly affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Robert W. Potts
Appeals Judge