APPEAL NO. 950237

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was convened in (city), Texas, on January 3, 1995, with the record closing on January 20th. With regard to the two issues before him the hearing officer, (hearing officer), determined that the respondent (claimant) sustained a repetitive trauma injury on (date of injury), and that she had disability from August 30 to October 10, 1994. The appellant (carrier) appeals this decision, contending that the hearing officer erred in these determinations and in relying upon claimant's testimony and a physical therapy report. The appeals file does not contain a response by the claimant.

DECISION

Affirmed.

The claimant was employed by (employer) and had worked for that employer and its predecessor for 31 years. Her testimony was that beginning in June of 1994 (all dates herein are in 1994 unless otherwise indicated) she worked as a material handler, a job that required her to lift boxes weighing approximately 25 to 30 pounds throughout the day (she estimated 20 or 30 times daily). On Friday, (date of injury), she went home with low back pain which persisted throughout the weekend although she said she did no work on those days. The following Monday, August 29th, she said she returned to work but could not work more than three hours. On that day she called her doctor, (Dr. L). Dr. L prescribed physical therapy which caused claimant to be off work until October 4th. He also ordered an MRI which disclosed a possible significant disc bulge at L4-5; a follow up MRI or CT myelogram was recommended if the claimant did not respond to conservative treatment. On October 4th claimant returned to the work she had previously done, building harnesses, which she said requires working with her hands and arms but no lifting or stooping.

The claimant had been off work earlier in the same year, from approximately March to June, due to an onset of pain in her left hip and down her leg, as well as numbness in the leg. The claimant did not contend this pain was caused by her work, and stated that she did not know what caused it. She underwent physical therapy and had an x-ray which showed a narrowed disc space at L4. At that time she treated with (Dr. HS), who she said had since left the area. The claimant also filed for non-workers' compensation disability benefits during the period of time she was off work.

No issue was raised as to whether claimant timely notified her employer of the August injury; in evidence was her workers' compensation claim dated September 1st. However, she also applied for, and received, non-occupational group accident and disability benefits for the period August 30th through October 10th. She stated at the hearing that she had been instructed to file for these benefits by a union representative. Dr. L signed the form, which indicated that claimant's problems were not due to work.

At the hearing the claimant stated she was currently seeing (Dr. HG), who had recommended a referral to a neurosurgeon. Patient notes from a January 1995 visit state claimant was experiencing low back pain which started in March 1994. Also in evidence was an August 29th telephone record from Dr. L's office, recording claimant's call regarding "back pain possible workers' comp." Patient notes from the same day state claimant was complaining of back pain "since yesterday" and stated, "lower back pain as before;" the diagnosis was "Recurrenc [sic] low back strain. Poss. HNP." However, physical therapy notes of August 31st report claimant stating that her job required continuous lifting and that she experienced severe low back pain when working; it concluded that the claimant "will be subject to re-injury if she continues to go back to this type of strenuous work."

The hearing officer stated in his decision that he found credible claimant's testimony along with the physical therapy evidence. The carrier counters in its appeal that a physical therapist's report should not carry more weight than that of a doctor, citing to notations in the various medical reports which it says indicate the claimant was suffering from a continuous problem.

A claimant has the burden of proof to show by a preponderance of the evidence that his or her injury was sustained in the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). Unless expert testimony is required (which the carrier does not argue, and we do not find), a claimant's own testimony can establish the fact of an injury, even where contradicted by medical evidence. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). Further, the work-related exacerbation or aggravation of a prior injury can constitute a separate injury in its own right. Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992. In this case, the claimant testified, and medical records reflect, that she suffered severe back pain in the spring of 1994, for which she was off work and underwent therapy; that after she returned to work she was given new and different job duties which involved daily repetitive lifting of heavy items; that she again began to suffer back pain, for which she was treated and a possible herniation diagnosed. The fact that Drs. L and HG documented earlier pain, or that Dr. L signed claimant's request for non-occupational benefits, does not necessarily contradict the claimant's statement of events. In any event, the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility, Section 410.165(a); he is entitled to reconcile conflicts in the testimony and evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

As an appellate body, we will overturn the fact finder's decision only where it is so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Our review of the record in this case does not convince us that we should do so. Having found no error in the hearing officer's finding that claimant's injury was compensable, we also affirm the determination

that she had disability for the period of time she was off work due to treatment of this injury. Section 401.011(16).

The hearing officer's decision and order are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge