APPEAL NO. 92105
FILED APRIL 30, 1992

A contested case hearing was held on January 10 and 13, 1992, at (city), Texas, (hearing officer) presiding as hearing officer. He determined that the appellant did not suffer an occupational disease in the course and scope of his employment and, if he had, he failed to give timely notice of such injury. Accordingly, benefits under the Texas Workers' Compensation Act were denied. TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant urges that "the hearing officer's finding that the appellant's disability was unrelated to the employment is against the preponderance of the evidence," that the appellant did give timely notice of the injury once he was aware that it was job related and that the finding of fact that the appellant's work did not aggravate the medical problems is also against the preponderance of the evidence.

DECISION

Finding the evidence sufficient to support the decision of the hearing officer and not finding his determinations to be so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, we affirm. In re King's Estate, 150 Tex. 622, 244 S.W.2d 660, 661 (1951).

The appellant worked for a law firm as a word processor and claims he suffered an occupational disease (carpal tunnel syndrome) as a result of his employment. The respondent is the workers' compensation carrier for the employer's law firm. The date the appellant claims he first knew that his injury was work-related was about (date of injury) after he had a doctor's appointment on February 20, 1991 and was advised his condition was carpal tunnel syndrome. He advised his employer that his condition was work-related on (date of injury).

Both parties to this contested case hearing presented considerable medical evidence. The appellant testified in his own behalf and respondent called two supervisory personnel as witnesses. The evidence admitted at the hearing and considered by the hearing officer is fairly and succinctly set out in his report of "Decision and Order" and is adopted by us on this appeal:

"The Claimant had polio at about seven months of age. The Claimant now suffers from a variety of physical ailments, including his right hand, right arm, right shoulder, and left leg.

The Claimant began work as a word processor at [Employer] on September 1, 1988. The Claimant received notification of probation in August of 1990 and again in February of 1991.

Unfortunately, the list of medical providers to the Claimant increased arithmetically, with diametrically different opinions. The Claimant saw 10 different doctors over a period of three years.

The opinions of the medical providers are so numerous and voluminous that it would serve no useful purpose to list each of them here. Rather, suffice it to say that the hearing officer has considered all of the medical records carefully and it would be more helpful to give a summary of the positions of the two groups of medical providers.

The first group of medical providers asserts that the Claimant suffers from carpal tunnel syndrome caused by his work on the computer as a word processor.

The second group contends that the Claimant suffers from post-polio syndrome, that the post-polio syndrome is of several years' standing and that the results of the post-polio syndrome would have occurred regardless of the work the Claimant did on the computer.

All persons concerned with this case agree that the Claimant has serious physical problems. His right shoulder has atrophied almost to the point of not being usable; one respected doctor has recommended fusing the shoulder into a fixed position. The Claimant's right arm and right hand have reduced functional use and much weakness.

There is no dispute that the Claimant's condition is serious. The dispute is about when the Claimant's problems began, and did the Claimant's work for the Employer cause or aggravate them.

The medical records begin on January 8, 1989, two years before the Claimant's alleged date of injury, with a visit by the Claimant to Dr. S with a complaint of `right hand trouble.' Dr. S's record showed that `last year noted onset of a cold feeling in hand, weak and trembling'; Dr. S also noted that the Claimant had `atrophy muscles rt shoulder (sic).'

Dr. S referred the Claimant to Dr. C who saw the Claimant on January 16, 1989. During that visit Dr. C noted that the Claimant `complains of numbness and cramping of his right hand. This was not noted before 1988' (emphasis added). Dr. C also noted atrophy of the right shoulder girdle (emphasis added). These are the same problems which Dr. S had earlier identified on January 8, 1989, and again identified later on February 20, 1991, the date given as the date of injury.

On February 20, 1991, immediately before the Claimant was to be terminated for cause, he went to see Dr. S. The Claimant complained to Dr. S of pain in the right hand. Dr. S diagnosed the Claimant's problem as one of classic carpal tunnel syndrome.

Dr. S referred the Claimant to Dr. A, who disagreed with Dr. S's diagnosis and said that the Claimant did not suffer from carpal tunnel syndrome.

The Claimant sought various other medical opinions throughout the remainder of 1991. The opinions fell into the two camps indicated above: the hand problem was due to the Claimant's work, or the hand problem was due to post-polio syndrome and would have occurred regardless of whether the Claimant had worked for the Employer in word processing or not.

Dr. MH, of the (clinic), on January 7, 1992, provided the most comprehensive review of the Claimant's medical condition after conducting an independent medical examination of the Claimant. Dr. MH reviewed the medical records of the previous medical providers. He also examined the Claimant. Dr. MH found that the Claimant's problems were most convoluted and complicated, both medically and legally.

After giving a lengthy and detailed summary of the Claimant's medical history relating to the issues in this matter, Dr. MH wrote:

> Fourth and finally, I feel that it is somewhat unclear whether [Appellant's] employment as a keyboard operator had any direct relationship to his complaints of pain in his right upper extremity.
>
> With post-polio syndrome, one would certainly expect progressive weakness in the previously involved muscles. There could also be unaccustomed fatigue in previously uninvolved muscles or involved muscles, as defined in the criteria for diagnosis or post-polio muscular atrophy.
>
> Repetitive flexion and extension movements in his right hand across the wrist using the forearm muscles could <u>possibly</u> cause excessive fatigue in these muscles that had been previously uninvolved, and therefore, been "forced" into overuse. However, I could see no evidence on examination of spasm or contracture in the muscles in the forearm.
>
> Therefore, after much consideration, I feel that [Appellant] fits most closely into a post-polio syndrome with pain without demonstrable cause. I feel that this is "without demonstrable cause" because of several factors, including the multiple conflicting opinions, and because of my own findings on examination.
>
> I honestly feel that there is no way that one could say that his job specifically aggravated or caused the symptoms of fatigue and pain in his right upper extremity. Basically, I feel that this is all <u>most likely</u> due to post-polio syndrome, per se (emphasis in original; paragraphing added for readability).

The Claimant saw Dr. S and Dr. C in January of 1989 with the same symptoms the Claimant had on February 20, 1991, after doing the same type of work for the same Employer. In 1989 there was no discussion of termination of the Claimant and no notice or

claim of injury for workers' compensation purposes."

Clearly, there was not only voluminous, but also conflicting evidence before the hearing officer in this case. This was for him, in his fact finding capacity, to resolve. *See* Burlesmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ); Texas Workers' Compensation Commission Appeal No. 92106 (Docket No. AU/92-001308-01-CC-AU41) decided April 27, 1992; and Texas Workers' Compensation Commission Appeal No. 92047 (Docket No. FW-00063-91-CC-6) decided March 25, 1992. And, even though different conclusions and inferences might be drawn from the evidence before the finder of fact, or the evidence gives equal support to inconsistent inferences, this is not a sufficient basis to reverse a decision. *See* Garza v. Commercial Life Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We do not find any basis to disturb his findings, conclusions and decision in this case.

Carpal tunnel syndrome has been held to be a compensable occupational disease under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92032 (Docket No. HO/91-093128/01-CC-HO41) decided March 16, 1992. The term "occupational disease" includes repetitive trauma injuries (Article 8308-1.03(36)) which is defined 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." Article 8308-1.03(39). Here, after considering the evidence of record and the myriad medical reports mentioned above, the hearing officer found that:

9.The preponderance of the medical evidence showed that the [appellant's] medical problems resulted from post-polio syndrome.

10.The preponderance of the medical evidence showed that the [appellant's] work did not cause or aggravate his medical problems.

and concluded that:

2.The [appellant] did not suffer an occupational disease in the course and scope of his employment.

The hearing officer found the comprehensive medical report of Dr. MH particularly probative. And, this report finds support in earlier medical evaluations by other physicians. To be sure, there was significant conflicting medical evidence which concluded that the appellant suffered a job-related repetitive trauma injury. However, as the sole judge of the weight and credibility to be given the evidence (Article 8308-6.34(e)), the hearing officer can believe one or more witnesses and disbelieve others. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). His findings and conclusions are supported by probative evidence. *See* Texas Workers' Compensation Commission Appeal No. 92025 (Docket No. WF/91137937/01-CC-WF31) decided March 16, 1992.

The hearing officer also determined that even if the appellant's medical problems were to be found to be work-related, he failed to timely report them in 1989 when he knew or should have known that his medical problems were work-related (Article 8308-4.14 and 5-01(a)). Although not necessary for the disposition of this case in view of the determination that there was no compensable injury, there is evidence found in the medical reports to support this finding and conclusion. The medical reports relating to the 1989, 1990 time frame show the appellant experiencing the same or similar symptoms as the 1991 medical reports. Exhibit 8 contains a reference to the history of the appellant's medical problems and notes that the pain has increased over the last few years which the "patient" feels is related to his mode of employment. The appellant claims he did not realize the work related nature of his physical condition until after his February 20, 1991 visit to Dr. S. The hearing officer apparently did not give any weight to this testimony. The appellant's testimony is that of an interested party and raises an issue of fact. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The issue of whether he knew or should have known being a factual matter, the burden of establishing timely notice of an occupational disease was on the appellant. *See generally*, Houston General Insurance Co. v. Vera, 638 S.W.2d 102 (Tex. App.-Corpus Christi 1982, writ ref'd n.r.e.). This the hearing officer found he failed to do. There is probative evidence sufficient to support this determination.

Finding the evidence sufficient to support the decision, the case is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Robert W. Potts
Appeals Judge