APPEAL NO. 92231

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On May 1, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that the claimant, appellant herein, is not entitled to any benefits based on symptoms of a stroke that were first manifest on (date of injury). Appellant takes issue with findings of fact and conclusions of law that do not indicate that his stroke was a compensable injury.

DECISION

Finding that the evidence sufficiently supports the decision, we affirm.

Appellant, aged 38, had worked for (employer) since November 1990 as a sales representative when he suffered a stroke while at work on (date of injury). He apparently had come to work at approximately 7:00 a.m. and was unobserved for a period. At approximately 7:30 or 8:00 a.m. another sales representative, (RC), saw appellant on the phone. RC also saw him later at the paint mixer (used to mix one gallon containers) beginning at approximately 10:00 a.m. for about 20 to 25 minutes before he started feeling sick. He saw nothing wrong with appellant prior to his first signs of sickness in the store and did not see him load approximately 15 to 20 five gallon containers of paint into his pickup that morning as was found by the hearing officer. He had not heard appellant complain about the job, but did say that appellant was a little "aggressive" or "high strung" or "nervous." Appellant did not testify.

(CL) is the store manager at the location where appellant was injured and was acting store manager on (date of injury). He first saw appellant at about 10:00 a.m. and saw him in the store for about 30 to 45 minutes prior to the onset of sickness. He was in his office but remembers appellant asking him several times about color tinting that appellant was doing in mixing some paint. (The testimony was that a color was created by mixing a gallon can of base with various tints on a mixer, and when it was as wanted, the formula would be used in the warehouse to mix five gallon size containers if a large quantity were desired.) He observed appellant's speech and other functions, such as walking, become impaired, but had seen no indication of this in the 30 minutes or so before it began. At some time after the event, he recalls appellant's wife telling him that appellant had had high blood pressure but had not been on medication since he went to work for employer. He said that she did not say appellant was supposed to take medication but had not.

(LR) hired appellant. Appellant had been a car salesman before and LR opined that a good salesman can sell anything. Appellant was in a period of training and was under no pressure to sell a quantity of paint. His base salary was about $25,000.00 and he had been given a territory that belonged to a prior salesman. The business was approximately 90% sales to contractors and institutions and 10% to walk-in consumers. The chief function of the sales representative was to contact contractor and institution customers to maintain an

account or to receive a new account. The sales representatives were not delivery people--a delivery service was under contract to get the bulk of the paint to the job site--but they were known to bring a brush or can(s) of paint along on a planned visit to a site if they knew the client needed it at that time. He was familiar with appellant's preemployment physical examination which showed a blood pressure reading during that examination of 128/72, which contained appellant's reference to "slightly high blood pressure" in the past (150/90), and which also indicated that he had not seen his doctor in three years.

Appellant's wife testified that they were married in 1986. She knew of no medication that he took for blood pressure or that he was supposed to take. Aside from some high blood pressure that he had in college, she did not know that he had such a condition. She acknowledged some history in his family of hypertension, but could not remember whether she told (Dr. C) or (Dr. N) about his history of hypertension and did not think hypertension came up in her conversation with (Dr. H). She did remember telling (Dr. R) that appellant lifted up to 200 five gallon containers of paint, but agreed that she did not know what appellant lifted that day. She described appellant as excited about the job at that time because he was doing well on a sale. She said he had talked of lifting five gallon containers. At the time of the stroke, appellant weighed about 173 and stood five feet, eight inches tall. He did not smoke and rarely drank any alcohol.

(Dr. R) is a medical doctor, board certified in physical medicine and rehabilitation, who was called by the appellant to testify. He testified to the severe effect of the stroke upon appellant's ability to function normally and to work. He offered his opinion that since the medical records showed no defective vessels (no preexisting reason to have a stroke) then the stroke was related to the exercise appellant underwent that day. He described exercise as capable of increasing the blood pressure and agreed that high blood pressure can cause a stroke. He added that many factors enter into the occurrence of a stroke and believes that exercise over an extended period, such as 45 minutes to an hour, could elevate the blood pressure for such a period and therefore be a problem in regard to stroke. He said the risk would go down if the time of exercise were only five to 10 minutes, but blood pressure can rise substantially in a short time. He had understood that appellant had moved 100 to 200 five gallon paint containers weighing 52 to 60 pounds with some degree of dispatch. He agreed that five to 10 minutes of exercise would generally not be a problem. He described the type of stroke appellant had as based upon a hemorrhage and said it could happen suddenly and massively or it could be a slow leak that occurred over a period of up to 24 hours. He is not familiar with any study that compared the incidence of stroke while at rest as opposed to while exercising.

(Dr. Z) is a medical doctor, board certified in cardiology, who testified on behalf of the respondent. He did not treat the appellant but reviewed medical records and depositions admitted in evidence. He said that there was no way to know what caused the hemorrhage that appellant underwent, but added that there was no relationship between appellant's work and his stroke. He stated that hypertension is "likely" to be an underlying condition to the stroke. He described most hemorrhages as due to an abnormality induced in a vessel by

longstanding hypertension. He alluded to the routine inducement of high blood pressure through exercise (treadmill) to check a patient and said that such exercise produces no strokes. He has never seen a medical article or study that indicated that sports induced a stroke. He acknowledged that moving 15 five gallon containers of paint weighing 52 to 60 pounds can increase blood pressure and said the amount of increase could vary between a little and a lot, but said that the increased blood pressure from such work would not be a factor in this event. There was "no relationship" between the work of moving the 15 cans and the stroke. He did state that over a period of years chronic exercise "might" be a factor in a stroke. No short period of exercise causes a stroke. In terms of "medical probability," after being told to assume that appellant had longstanding untreated hypertension, he said that there was no probability that moving the 10 to 15 containers of paint "triggered" the stroke. When asked if it were possible, he said anything is possible, but it would be speculation. He agreed that it is possible for a person with longstanding untreated hypertension to never have a stroke and it is possible for a person to have a stroke without having high blood pressure. In his opinion two causes of stroke are hypertension and vascular abnormalities. He acknowledged that the medical records of the surgeon, who operated to relieve the pressure of the clot and to assure no further bleeding, observed no aneurysm or arteriovenous malformation, but he pointed out that just because the surgeon did not identify a vascular problem does not mean one does not exist. (He described the operative field as not lending itself to absolute conclusions in identifying vascular problems.) He admitted that appellant's normal blood pressure reading in November 1990 during the preemployment examination did not support his testimony about the long term harm done by hypertension, but also said that blood pressure varies and a normal reading does not deny his theory.

Questions were raised as to how the information in the addendum to (Dr. W) emergency room doctor's report of (date of injury), was obtained. It showed that the patient contacted the emergency department at 2:45 p.m. and related a history of hypertension "but has not been taking his medications." At 2:00 p.m. an "emergency nursing flow sheet" indicates that appellant was taken back to emergency after the completion of the CT scan but at 2:20 p.m. indicates he was taken to the "floor." He was described as drowsy "but will grip hand and say hi." Dr. W was not called to testify nor was any statement offered from that physician.

Dr. W had also reported that the EMS reported his blood pressure to be 220/170; his initial blood pressure at the ER was 260/160. (Dr. V) discharge summary states that the attending physicians (including himself) believed that appellant probably had preexisting hypertension and that was the cause of the hemorrhage. (Dr. Re), in his nephrology consult indicated that his impression was primarily hypertension. (Dr. H), reviewed records of the appellant and concluded that his working conditions had nothing to do with the onset of stroke.

The 1989 Act in defining "injury," Article 8308-1.03 (27), is substantially the same as the prior article found in TEX. REV. CIV. STAT. ANN. art. 8306 § 20 (repealed 1989). The

1989 Act substantially changed the criteria for recovery for heart attack injuries through Article 8308-4.15. The appeals panel has held that strokes do not fall under the current criteria for heart attacks, however. *See* Texas Workers' Compensation Commission Appeal No. 91064 (Docket No. redacted) decided December 12, 1991. As a result, a stroke considered under the 1989 Act will be viewed under the same criteria as was used under prior law. *See* Walker v. Money, 120 S.W.2d 428 (Tex. 1938).

Cases under prior law often considered whether the work was the "producing" cause or the "precipitating" cause of the hemorrhage in stroke cases. *See* Texas Workers' Compensation Commission Appeal No. 92076 (Docket No. redacted) decided April 3, 1992. While cases appear to vary in their determinations as to whether the work was a producing cause, the decisions were generally viewed as having raised a fact question for the trier of fact. *See* Mountain States Mutual Casualty Company v. Redd, 397 S.W.2d 321 (Tex. Civ. App.-Amarillo 1965, writ ref'd n.r.e.). The court in Charter Oak Fire Ins. Co. v. Morales, 733 S.W.2d 273 (Tex. App.-El Paso 1987, no writ) acknowledged the question to be one of fact by remanding a jury determination for the claimant after finding that it was against the great weight and preponderance of the evidence. Only one doctor testified in that case and while he testified generally that a small event could trigger a hemorrhage, his opinion was that the blow to claimant's head in a vehicle accident while on the job did not render the stroke work related. The autopsy found cirrhosis of the liver and the physician opined that the hemorrhage began several days before.

Appellant takes issue with Finding of Fact No. 5 by questioning whether there is any evidence that showed high blood pressure within the last three years. That finding reads:

5.That prior to (date of injury), claimant had a history of high blood pressure.

The only relevant document in evidence predating the incident was a pre-employment physical examination of November 1990 in which appellant admitted he had a history of "slightly high blood pressure" approximately three years before. The medical records of (date of injury), do indicate that appellant admitted that his history of high blood pressure was more recent. While the entry to this effect was strongly attacked, the medical records of (date of injury) could be regarded by the hearing officer as unimpeached. Even without the (date of injury) entry, appellant's own admission on the November 1990 physical examination is sufficient to reach the finding as written.

Appellant agreed with Finding of Fact No. 6, but explained that appellant's reference to having seen a doctor three years previously, mentioned in his November 1990 physical examination, meant that his doctor at that time saw no need to prescribe medicine for blood pressure. This finding reads as follows:

6.That claimant had not seen a doctor with regard to his high blood pressure for at least three years and was not taking medication for his high blood pressure as of (date of injury).

Appellant disagreed with Finding of Fact No. 7 which said:

7.That on or about (date of injury), claimant was not under any stress caused by his employment.

Appellant cites appellant's wife's testimony that appellant was excited. The hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34 (e) of the 1989 Act. He could believe RC and LR who described the work and the way each observed the appellant. It was clear that appellant was in training and under no quota as a salesman at this time, and he was paid a base salary of approximately $25,000.00. While appellant's wife described his excitement, she did not add how such excitement affected appellant.

Appellant also objects to Finding of Fact No. 8 which reads as follows:

8.That some time during the morning of (date of injury), the claimant placed approximately 15 five gallon containers of paint, weighing between 52 and 60 pounds, upon a cart and moved them, no more than three at a time, approximately 40 to 50 feet, and then placed them in the bed of his pickup truck.

Appellant attacks that part of the finding that refers to the usage of a cart in moving the containers. He correctly says that there is no evidence that claimant used a cart. There also is no direct evidence that appellant loaded the containers or even helped in the loading of them. However, the evidence contained no testimony or statements of any employee at this store who loaded or helped to load the containers, and they were found in appellant's pickup. A trier of fact can make reasonable inferences from the evidence. *See* Harrison v. Harrison, 597 S.W.2d 477 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.). While the inference that appellant moved the containers may be stronger, the testimony that the cart was in place and was used by employees in loading paint is sufficient to make the inference, as to the cart, a reasonable one also.

Appellant asserts that Finding of Fact No. 9 is erroneous. That finding read as follows:

9.That the medical evidence does not support that claimant's stroke was caused by his handling of the five gallon containers of paint on (date of injury).

There was some medical evidence in the opinion of Dr. R who said that he thought the moving of the paint containers caused the stroke. He added, though, that he had formed his opinion prior to the hearing based on the movement of more containers than were actually moved. Nevertheless he believed that since no other reason was shown at surgery for the hemorrhage in appellant's brain, the work must have caused the stroke. The hearing officer did not find that there was no evidence. In deciding that the medical evidence did

not support causation by movement of containers, the hearing officer could give more weight to the opinion of Dr. Z than to that of Dr. R. Atkinson v. U.S. Fidelity & Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.). Dr. Z, as related herein, was emphatic in his opinion that the work did not cause appellant's stroke. Medical records of the treatment of appellant do not indicate that Dr. Z was wrong. On the contrary, they too point to the history of hypertension as the basis for the hemorrhage. This finding is sufficiently supported by evidence of record.

Appellant also denies that appellant's stroke was caused by the natural progression of preexisting hypertension as was found in Finding of Fact No. 10. That finding is supported by sufficient evidence of record as found in the testimony of Dr. Z, and not contradicted by the testimony of Dr. R, that hypertension is a cause of strokes. Dr. R recited that there are many factors involved in the causation of stroke and hypertension is one of them. Dr. Z stated that hypertension over a period of years causes stroke, although not in everyone who has hypertension. While these opinions are viewed as supportive of this finding, appellant had the burden to prove that work was the cause. While there was evidence that appellant had admitted that his hypertension was more recent than three years in the past, there was no evidence that hypertension could not progress without exhibiting symptoms during the last three years.

The findings support Conclusion of Law No. 3 that said the appellant had not proved by a preponderance of the evidence that work caused his stroke. Conclusion of Law No. 4 states that appellant did not prove that a specific event caused the stroke and Conclusion of Law No. 5 says appellant did not prove that a sudden stimulus caused the stroke. The evidence was clear that appellant was observed for a substantial period immediately before the first symptoms of stroke. No one alluded to a sudden stimulus; appellant was mixing paint in one gallon containers. The finding that appellant loaded 15 containers in his pickup at some time is the only event that could support either a specific event or sudden stimulus. No one observed and testified as to the effect such loading had at the time on appellant. The only testimony that the loading had any effect was that contained in the expert opinion of Dr. R but he too did not observe what happened at the time. There was no evidence that appellant had complained to anyone about the effect of the loading upon him or about any other event or stimulus that day or the day before. All conclusions of law are sufficiently supported by evidence of record.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm.

Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge