APPEAL NO. 92343

A contested case hearing was held in (city), Texas, on June 22, 1992, (hearing officer) presiding, to determine the two disputed issues namely, whether appellant sustained a repetitive trauma injury which arose out of and in the course and scope of her employment with (employer) on (date of injury), and whether appellant is entitled to income and medical benefits as the result of her alleged repetitive trauma injury on (date of injury). The hearing officer, finding no causal connection between appellant's medical problems and her employment, concluded appellant did not have a repetitive trauma injury arising from the course and scope of her employment with employer on (date of injury), wasn't entitled to income and medical benefits in that she did not have a compensable injury, and had failed to prove by a preponderance of the evidence that the relief she sought was allowable under the applicable statutes and rules. Appellant has requested our review pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). She challenges the sufficiency of the evidence to support the finding on lack of causation, as well as the three related conclusions of law mentioned above. In this regard, appellant has attached a written opinion from one of her medical experts which was prepared after the decision and order below. Appellant also attacks a factual finding stating a doctor's diagnoses for omitting a reference to appellant's cervical spondylosis and progressive arthritis. Appellant also urges as error the hearing officer's failure to find that respondent had represented it would pay her income and medical benefits without contesting the compensability of her claim. In its response, respondent urges support for the challenged findings and conclusions. Regarding the matter of its misrepresentation about paying appellant benefits without contesting her claim, respondent urges that such was not a disputed issue before the hearing officer.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

Appellant, the sole witness below, testified that she was employed by employer from May 1983 until May 1991 when employer filed a petition in bankruptcy. She was a "ticket tacker" who operated a machine which sewed the four corner tacks on cardboard size labels affixed to the waistbands of apparel. In 1989 appellant experienced a number of what she termed "spells," which involved dizziness, headaches, neck and shoulder pain, loss of speech, and fatigue, and for which she saw several doctors in that period including (Dr. L). She missed work from time to time in 1989 because of her spells, including a six month period. On August 28, 1990, she arose from her machine, turned her head, became dizzy, and started to pass out. She was caught by coworkers as she began to fall and no part of her body struck any object. She then left work, went to her sister's house and laid down. She did not see a doctor but stayed off work for six or seven days. She subsequently experienced approximately 10 to 15 spells throughout the remainder of 1990. In late January or early (date), appellant saw (Dr. W), D.C., who examined and treated her, and first advised her that her physical problems were job related.

(Dr. W's) records state that appellant first saw him on (date of injury) "for examination and treatment for injuries sustained in an industrial accident which occurred on 8-28-90." Her symptoms were neck pain and headaches. (Dr. W's) records stated diagnoses of "cervical radiculitis accompanied by a lumbosacral plexus lesion which is complicated by idiopathic muscular atrophy." (Dr. W) also stated appellant had sustained "acute sprains to the cervical and thoracic spine, secondary to spondylogenic compression of the cervical spinal cord . . ." He took her off work and treated her weekly. In his April 22, 1991 letter, he stated "[i]t is my opinion that these conditions are related to [appellant's] employment."

Appellant took the position at the hearing that she had sustained two, separate, work-related injuries, the first of which she settled and the second being the subject of her disputed claim. She articulated her first injury as that of August 28, 1990 when she nearly passed out at work and her second injury as being a repetitive trauma injury in the nature of the aggravation of her prior injury. She assigned the date of (date of injury) to her second injury because that was the date (Dr. W) first made her aware that her physical problems were work related.

Appellant said that (Dr. L), who had treated her in 1989 and who she again saw after seeing (Dr. W), advised her she required spinal surgery. According to appellant, she was sent by both employer's workers' compensation carriers (employer changed carriers on November 1, 1990), to see (Dr. S), a neurosurgeon, on November 18, 1991, for a second surgical opinion. He concurred that she required surgery and as soon as possible. Appellant said the carriers had her obtain still another opinion from (Dr. L), who also concurred. Appellant ultimately underwent a cervical decompression laminectomy operation in May 1992.

Appellant testified that employer's worker's compensation carrier in 1990 was (Carrier A) and that respondent was employer's carrier in 1991. According to the benefit review conference report in evidence, respondent took over the coverage in November 1990. Appellant said she attended several "prehearing conferences" conducted by (Mr. Sl), a benefit review officer (BRO) of the Texas Workers' Compensation Commission (Commission), and that representatives of both carriers were present. She said that the carriers' representatives agreed with the opinion of (Mr. Sl) that both had liability exposure in that both the August 1990 and (date) injuries were involved. Appellant said she reached an agreement with both carriers at one of the conferences whereby she was to be paid $15,500.00 by Carrier A, $500.00 by respondent, and respondent was to pay for her future surgery. Further, respondent led her to believe it would not contest the compensability of her (date of injury) injury. She and Carrier A signed a Compromise Settlement Agreement on March 9, 1992 under the terms of which Carrier A paid her $15,500.00 for "indemnity," Carrier A agreed, as to "past medical benefits," it would pay or has paid her medical expenses "except medical incurred 11-1-90 and thereafter," and that appellant would pay her own future medical expenses. She acknowledged receiving $15,500.00 from Carrier A, as well as $500.00 from respondent as a part of that agreement. Her check from

respondent for $500.00 was dated January 13, 1992, and contained the notations "Advance on TIBS," and "loss date (date of injury)." Appellant argued below that this check showed respondent to be assuming liability for and not disputing her claim well before the Compromise Settlement Agreement was signed for her August 28th injury. Appellant testified that respondent subsequently did contest her (date of injury) claim and refused to pay for her surgery, thus delaying it from late 1991 to May 1992.

The hearing officer introduced a report of a Benefit Review Conference (BRC) conducted by (Mr. Sl), on April 27, 1992. This report mentioned there had been a previous conference with both carriers in attendance though no report of that conference was part of the record. The BRC report stated that the disputed issue between the parties was whether appellant was injured in the course and scope of her employment on or about (date of injury) and is entitled to temporary income benefits (TIBS). It stated respondent's position to be that respondent "does not contend the injury is not compensable, only that claimant is not entitled to be paid twice for the same injury." It said that appellant had settled with Carrier A but wanted respondent to pay TIBS and provide medical benefits, including surgery, and, that respondent did authorize the surgery but was reluctant to pay TIBS. The BRO entered an interlocutory order requiring respondent to pay TIBS retroactive to July 31, 1991 when appellant's unemployment compensation stopped. A payment of compensation form (TWCC-21), dated March 16, 1992, showed that appellant was paid $4870.20 on March 11, 1992, for 33 weeks of TIBS for the period "07/31/91" to "03/18/92", pursuant to the BRO's interlocutory order. The report went on to state that respondent insisted on a contested case hearing because it contended that appellant wasn't entitled to TIBS since she had settled with Carrier A.

We disagree with appellant's appealed issue to the effect that the hearing officer erred in omitting the conditions of progressive arthritis and cervical spondylosis from his Finding of Fact 4. That finding stated that (Dr. S) diagnosed appellant as having "carpal tunnel syndrome, degeneration cervical disc and cervicalgia and recommended a cervical decompression laminectomy." The finding did not state, contrary to appellant's assertion, that these were the only conditions appellant had. While (Dr. S's) letter of November 29, 1991 stated that appellant was under his care "for cervical spondylosis with myelopathy," his Initial Medical Report (TWCC-61), dated November 26, 1991, recited the three conditions contained in the challenged finding, as did his report of November 18, 1991. There is no evidence that the term "degeneration cervical disc and cervicalgia" did not include progressive arthritis and cervical spondylosis. Further, the hearing officer's conclusions did not turn on the presence or absence of those particular conditions among (Dr. S's) diagnoses, and we find sufficient evidence to support that particular finding as stated.

Another appealed issue contends the hearing officer erred in not finding that respondent represented at the benefit review conferences, in the process of reaching a settlement with Carrier A and appellant, that it would pay appellant income and medical benefits without contesting the compensability of her claimed injury of (date of injury). We

disagree. Such was not a disputed issue. The parties agreed at the outset of the hearing with the hearing officer's framing of the two disputed issues for the hearing. Respondent did introduce its letter of June 15, 1992 stating it disagreed with the BRC report and interlocutory order and took the position that this case involved only an "old law" injury already settled. There was no evidence that respondent sought to add additional disputed issues pursuant to the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §142.7 (TWCC Rules).

Appellant's remaining appealed issues assert the hearing officer erred in Finding of Fact 5 that there was no causal connection between her medical problems and her employment; and challenge his conclusions that she did not have a compensable repetitive trauma injury on (date of injury), wasn't entitled to income and medical benefits, and failed to prove by a preponderance of the evidence that she was entitled to relief under the 1989 Act and TWCC rules. Appellant urges that the challenged finding and conclusions are against the great weight and preponderance of the evidence and cites (Dr. W's) opinion that her conditions were "related" to her employment and (Dr. S's) statement that her condition was "strongly aggravated" by her job. In its response, respondent contends that while appellant sustained a job related injury on August 28, 1990, for which she was compensated by her settlement, she did not prove a compensable injury on (date of injury). The 1989 Act does include repetitive trauma injuries in the definition of occupational disease. Article 8308-1.03(36). Repetitive trauma injury is defined to mean "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). The date of injury for an occupational disease is "the date on which the employee knew or should have known that the disease may be related to the employment." Article 8308-4.14.

We view the medical and other evidence on the issues to be in conflict and it was, of course, for the hearing officer, as the trier of fact, to resolve such evidentiary conflicts and inconsistencies. The 1989 Act makes the hearing officer the sole judge of not only the relevance and materiality of the evidence, but also the weight and credibility it is to be given. Article 8308-6.34(e). Appellant testified that her injury on August 28, 1990 was caused "from me bending my head over work" eight hours a day, six days a week." She repeatedly testified that it was (Dr. W) who, on (date of injury), first made her aware her physical problems were related to her work, and that was the first time she knew her job caused her injury. However, she agreed that (Dr. W's) records reflecting her (date of injury) visit stated she had then come to his office for "examination and treatment for injuries sustained in an industrial accident which occurred on 8-28-90." She also agreed that the records of (Drs. L) and (S) also reflected an injury date of August 28th. At one point in her testimony, appellant said that (Drs. W) and (S) treated both her August 28, 1990 and (date of injury) injuries at the same time. She later testified that the doctors were examining her for her (date of injury) injury and never mentioned her 1989 injury. She agreed that (Dr. S's) Initial Medical Report (TWCC-61), dated November 26, 1991, reflected her date of injury as "8/28/90." She said she signed an "Employee's Notice of Injury or Occupational Disease

and Claim for Compensation" (TWCC-41) on "1/13/92," at the suggestion of the BRO, which stated her date of injury as "(date of injury)" and asserted that "[b]ecause I have worked as a ticket-taker (sic) in a leaning over position for the last 8 years, I injured my neck, back, and body generally from performing the same task in the same position over time." She testified she suffered an injury on August 28, 1990 (the claim for which she settled), continued to work and thereby aggravated her condition resulting in her second injury (repetitive trauma) of (date of injury). She also testified that (Dr. S) told her that her work had aggravated her injuries.

(Dr. W's) letter of April 22, 1991, stated his opinion that appellant's "conditions are related to [her] employment." In his letter of June 7, 1991, (Dr. W) said he "stated in a previous letter that her condition is exacerbated if not caused by her physical job requirements." In (Dr. S's) letter of November 29, 1991, he said "I feel that her condition has been strongly aggravated by her job. It has lead (sic) to the aggrivation (sic) and condition of her spinal cord." However, in a previous report of November 18, 1991, (Dr. S) stated: "I have difficulty relating this lady's neck problems to her work. There is no history of an injury and she simply is alleging that over the years the discs have gone bad and now she has a pinched nerve which (Dr. L) feels should be operated on. First of all, I think she may have a progressive arthritis but I think this would have occurred regardless of her employment. . . ."

Appellant attached to her request for review a post-hearing letter from (Dr. S), dated July 10, 1992, and obviously not a part of the record developed below. According to this letter, (Dr. S), having reviewed "the records and the decision" regarding appellant, wished to clarify his "position on this case" and agrees with appellant "that her problem is work related and is a result of repeated and constant minor trauma in the course of her job." We have noted in prior decisions that our review is limited to the record developed at the hearing (Article 8308-6.42(a)), and we have rejected exhibits offered for the first time on appeal. *See, e.g*. Texas Workers' Compensation Commission Appeal No. 92154 (Docket No. redacted) decided June 4, 1992. Appellant did not show, nor could she, that she could only have acquired such document after the hearing, or that it was not a want of diligence which prevented her from earlier learning of or obtaining it.

Appellant had the burden to prove by a preponderance of the evidence that she sustained a compensable repetitive trauma injury on (date of injury). Reed v. Casualty & Surety Company, 535 S.W.2d 377, 378 (Tex. Civ. App. - Beaumont 1976, writ ref'd n.r.e.). An injury that aggravates a preexisting bodily infirmity (appellant's theory) is compensable provided overexertion or an accident arising out of the employment contributed to the incapacity. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App. -Houston [lst Dist.] 1988, no writ.). While appellant's testimony alone could create a fact issue as to the existence of her claimed injury, the hearing officer was not bound to accept her testimony at face value, even if not specifically contradicted by other evidence. Garza v. Commercial Insurance Company of Newark, N. J., 508 S.W.2d 701, 702 (Tex. Civ. App. - Amarillo 1974, no writ.); Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621, 625 (Tex. Civ.

App. - Amarillo 1980, no writ). A claimant must link the contended physical injury to the work place. Johnson v. Employers' Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App. - Texarkana 1961, no writ.). While no medical opinions were offered to the effect that appellant's claimed injury of (date of injury) was not a compensable (Article 8308-1.03(10)) repetitive trauma injury, the hearing officer could consider the substance and relative specificity of the opinions of (Drs. W) and (S), as well as the contradictory opinions of (Dr. S). In particular, the hearing officer could consider the extent to which these opinions failed to distinguish between appellants August 28th and (date of injury) injuries. Generally, opinion evidence of expert medical witnesses is but evidentiary and is not binding on the trier of fact. Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 494 (Tex. Civ. App. - Texarkana 1974, writ ref'd n.r.e). The hearing officer was not bound by those opinions and, as the trier of fact, had to judge their weight and resolve any conflicts and inconsistencies. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App. - Houston [14th Dist.] 1984, no writ); Atkinson v. United States Fidelity Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App. - San Antonio 1950, writ ref'd n.r.e.). The hearing officer also had to weigh the sometimes confused and contradictory testimony of appellant herself. Not being the trier of fact, we are not free to pass on the credibility of the evidence or substitute our judgment for that of the hearing officer, even if the evidence would support a different result. Clancy v. Zale Corporation, 705 S.W.2d 820, 826 (Tex. App. - Dallas 1986, writ ref'd n.r.e.).

The findings of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W. 2d 660 (1951); Pool v. Ford Motor Co., 715 S.W. 2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Joe Sebesta
Appeals Judge