APPEAL NO. 92533

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act). On July 31 and August 31, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine whether respondent (claimant), suffered a repetitive trauma, bilateral carpal tunnel syndrome injury which arose out of and in the course and scope of her employment and which she became aware was work-related on (date of injury). Based upon certain pertinent factual findings, the hearing officer concluded that claimant had suffered such an injury and ordered appellant (carrier) to pay medical benefits and accrued temporary income benefits (TIBS) as of (date of injury). Carrier, in challenging the hearing officer's decision, as well as certain specific factual findings and legal conclusions, maintains that the hearing officer's total disregard of carrier's far more extensive, qualified and credible expert evidence was "distinctly arbitrary and capricious and clearly an unwarranted exercise of discretion." Carrier also faults the absence of discussion by the hearing officer in reaching her conclusions, and asserts that her order for payment of TIBS beyond February 1991 (sic) is erroneous in the absence of evidence of claimant's "total incapacitation" beyond that period. Because claimant's response was not timely filed, it has not been considered.

DECISION

Finding no reversible error and the evidence sufficient to support the findings and conclusions, the decision of the hearing officer is affirmed.

Claimant testified she worked for (employer) from 1977 to 1981 on an assembly line, and from 1981 to April 1992 as a frozen foods order selector. She worked eight to ten hour shifts, five days a week. Her order selector duties involved the obtaining of a computer generated order from the office, then driving a powered pallet jack up and down 12 aisles in the frozen foods area of employer's food distribution center selecting boxes of frozen food products to fill the order. She would drive the pallet jack to the location of a product required by the order, stop and dismount the pallet jack, manually pick up the number of boxes required by the order, load them onto the pallet, and arrange the boxes on the pallet for stability of the load. She would proceed on to the locations of the others items on the order and repeat that process until the order was filled. She then drove the loaded pallet to the dock where it was dropped for loading onto trucks by others after which she would obtain another order and repeat the process. While the size of the orders varied, approximately 200 to 250 cases were loaded on a pallet per order, and claimant handled approximately 1100 to 1300 cases of frozen food items per shift. She had to pick up the cases from three different height levels, and the weight varied with some being very heavy. The order filling process was a timed process, tracked by computer, and claimant had to work swiftly to meet employer's time standards. For example, she might have 60 minutes to pull 260 cases. Claimant wore heavy gloves in doing her work and had to grip the steering handles of the pallet jack and squeeze on levers with her hands to start and stop the jack. She said steering was difficult with heavy loads and damp floors, and that the heavier the load the more force she exerted, particularly in stopping the jack. She estimated that she used her

hands approximately 400 times per shift to start and stop the pallet jack while picking up and loading 1100 to 1300 cases.

Claimant testified that in 1989 she began to experience pain, numbness, and tingling in her hands and wrists which even disturbed her sleep. She is right handed and her right hand and wrist were worse than the left. She thought it was arthritis, began to wear wrist bands beneath her gloves, and used Tylenol. She engaged in no hobbies or other off the job activities which involved repetitive motions with her hands. On (date), she had worked about two and one-half hours and, while picking up 32 boxes of turkey and meat with weight varying between 30 and 50 pounds, claimant experienced pain in both hands and wrists which radiated up her arms to her chest, and she felt weak. She went to a hospital where she was checked for a possible heart attack. After her release, she visited her family doctor, (Dr. H), who referred her for electrodiagnostic testing by (Dr. R). Dr. R's nerve conduction studies were consistent with "more or less moderate bilateral carpal tunnel syndrome (CTS)" and she was referred to (Dr. C), a plastic surgeon. In his letter to Dr. H of December 3rd, Dr. C stated that claimant did have bilateral CTS and that he planned to perform a right carpal tunnel release to be followed by a left carpal tunnel release in a second operation. Dr. C performed the first operation on December 16th. On February 19, 1992, claimant was seen by (Dr. E), a board certified orthopedic surgeon, apparently at carrier's request, and he recommended against surgery on her left wrist finding her asymptomatic at that time. However, she continued to experience pain, numbness and tingling in her left hand and wrist, and on June 9, 1992, Dr. C performed a left CTS release. At the time of the hearing, claimant's right hand was back to normal but her left was still healing.

On December 4, 1991, claimant signed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) which stated her date of injury as "(date)" and the nature of her injury as "carpal tunnel syndrome." It was on (date) that she had the pain episode at work and went to the hospital. However, the Employer's First Report of Injury or Illness (TWCC-1), dated December 4, 1991, stated the date of injury as "(date of injury)." The hearing officer, in framing the disputed issue at the hearing, referred to the injury date as (date of injury), and that date was not objected to by either party.

In a letter dated January 17, 1992, Dr. H stated: "[CTS] is a problem which can be caused by several conditions or illnesses and can result from repetitive hand and wrist motion or trauma. The latter can be associated with job performance at times. Someone with knowledge of [claimant's] job duties will have to decide if this applies to her case." In his letter of January 10, 1992, Dr. C, a diplomate of the American Board of Plastic & Reconstructive Surgery, stated: "With the history that you have given me, working on the line, lifting heavy weights and using a gear lever, carpal tunnel syndrome is consistent with your employment. I personally think that the possibility of your employment causing this is very high." Claimant testified that when she obtained this letter from Dr. C, she had described her job to him. In a subsequent deposition upon written questions answered in August 1992, Dr. C said he based his causation opinion on what he was told by claimant,

that he had no reason to disbelieve what she told him, that he had not viewed a videotape depicting her job duties, that she did have bilateral CTS which had been relieved by her operations, and that he could not rule out that claimant's CTS was preexisting.

In his report of February 19, 1992, Dr. E recommended further electrodiagnostic studies by another examiner if claimant's symptoms returned with significant numbness and tingling or night paresthesias, and stated that after reviewing employer's management guide for medical exams, he would not find claimant fit for work based upon her job description and medical requirements. He went on to state he did not find a causal relationship between her work activities and the CTS for which she had been treated. In his later affidavit of July 29, 1992, Dr. E qualified his earlier opinion about claimant's unfitness for her work by stating he had reference to her lack of the necessary grip strength. He further opined that claimant is not and was not suffering from CTS, and that there is no causal relationship between her work activities and such an injury. However, in his deposition upon written questions on August 25, 1992, Dr. E stated that claimant's complaints of numbness and tingling in the fingers was consistent with a diagnosis of CTS. In his affidavit, Dr. E stated that Dr. R's nerve conduction studies represented slightly abnormal findings which were not consistent with a diagnosis of CTS. However, in his deposition Dr. E said the objective findings contained in Dr. R's report were consistent with a diagnosis of CTS. He also stated he found no evidence of CTS in either of claimant's hands when he examined her on February 19th--a date obviously subsequent to her December 16th right CTS release--although it was possible that at one point in time she had CTS. Based on his review of Dr. R's and Dr. C's records, his opinion was that Dr. C's surgical intervention on claimant's right CTS was reasonable and necessary.

Dr. E's affidavit also stated he had requested a videotape of claimant's work activities, had viewed such videotape, and had based his opinion on causation upon that videotape which he found to be "informative and fair." Dr. E's deposition stated that based on his examination of claimant, and on his review of the videotape including the operation of the pallet jack and the lifting and loading activities, there was no causal connection between the alleged CTS and claimant's work activities. Employer's safety and training manager, (Mr. P), testified to authenticate the videotape which showed various personnel performing the several food distribution center tasks for employer, including an order selector performing the work done by claimant. (Mr. P) said the videotape accurately depicted how claimant's job was performed and that it was provided to Dr. E. (Mr. P) conceded that the videotape did not focus on the operation of the pallet jack actuating levers, nor did it provide data on the amount of force and repetitiveness involved in operating the jack. A coworker, (Mr. S), testified that the videotape was an inaccurate portrayal of claimant's job performance because it did not show the speed with which employees such as claimant were required to work, nor did it show the frequency with which the pallet jack had to be started and stopped while filling orders.

Carrier introduced the deposition of (Dr. S), the head of an occupational medicine consultant firm, who testified he had neither practiced medicine nor treated CTS since

finishing medical school. Employer has been a client of Dr. S's company since late 1988. Dr. S was familiar with a food order selector's job activities having personally observed such, though he had not examined claimant. In his opinion, there are no risk factors for CTS in the job tasks of a frozen food order selector. He described the mechanism for actuating one type of pallet jack as a rounded bar upon which the operator's hands rest with two levers to pull or squeeze in order to both start and stop the jack. He said the operator's wrists are in a neutral position, not deviated or flexed, and that the job time spent performing that motion is not continuous. He also described the thumb and forefinger movements used in operating another type of pallet jack actuated by the movement of a dial, and opined that such movement could not cause CTS. In his opinion, claimant's job did not involve the continuous type of repetitive motions which produce CTS. Dr. S conceded, however, that he did not know how many times claimant had to perform the hand movements required to actuate the jacks she drove in filling orders. He further stated that in his opinion the pulling and stacking of the food cases would not be associated with CTS essentially because of the variety of movements, forces and repetitions involved.

(Dr. S), Ph.D, an industrial engineer, testified for carrier concerning the results of an ergonomic evaluation he did for employer on claimant's job. (Dr. S) visited employer's facility, videotaped selectors and loaders, and performed force measurements on the operation of pallet jacks, as well as time and motion studies. He observed the repetitious movements, force exertions, and wrist deviations or postures required to operate the two types of pallet jacks which claimant had operated, as well as the selecting and handling of cases of food. According to (Dr. S's) study, an average of 36.80% of order selection time was involved with the actual operation of the pallet jack while 63.80% of selection time involved retrieving cases of products, retrieving pallets, and other activities. In his opinion, the duties of order selectors do not expose them "to activities of duration consistent with CTS hazards." He did not believe that sufficient force and wrist deviations were required to cause CTS. He did agree, however, that operating the jack levers did involve some repetitious movements and the application of some force.

Repetitive trauma injuries are included within the definition of "occupational disease" in Article 8308-1.03(36) and CTS has been held to be a compensable occupational disease under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92032, decided March 16, 1992. We have previously observed that these terms were similarly defined under the prior worker's compensation law, and that the type of proof required to establish repetitive trauma injuries has been discussed in Texas court decisions as well as decisions of the Texas Workers' Compensation Commission Appeals Panel. *See e.g*. Texas Workers' Compensation Commission Appeal No. 92025, decided March 16, 1992. Carrier asserts that the hearing officer's determination that claimant had an occupational disease (repetitive trauma injury) was "based only on the claimant's testimony and the testimony of her plastic surgeon," and contrasted such evidence with carrier's "mountain of probative evidence." Pursuant to Article 8308-6.34(e), the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of its weight and credibility. The hearing officer, as the trier of fact, has the right to believe a claimant's testimony, and

believing it, the corresponding right to find that the claimant suffered a compensable injury. Further, the hearing officer must judge the weight to be given expert medical testimony and resolve conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Workers' Compensation Commission Appeal No. 92072, decided April 9, 1992. The opinion of medical experts is evidentiary and not binding upon the trier of fact, and such expert opinions are not conclusive even when uncontradicted by other medical evidence. Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 494 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). There was voluminous but conflicting expert evidence in this case for the hearing officer to consider, and even though different conclusions and inferences might have been drawn therefrom, such is not a sufficient basis to reverse the hearing officer's decision. Texas Workers' Compensation Commission Appeal No. 92105, decided April 30, 1992. We do not substitute our judgment for that of the hearing officer where, as here the challenged findings are supported by sufficient evidence. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The hearing officer's findings and conclusions were 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 carrier faults the hearing officer's decision for the absence of "discussion" in reaching her findings and conclusions. Article 8308-6.34(g) requires the hearing officer to issue a written decision which includes findings of fact and conclusions of law, a determination of whether benefits are due, and an award of benefits due. The hearing officer's Decision and Order in this case contained those elements and the factual findings were quite detailed.

The carrier further asserts that the hearing officer's decision requiring payment of TIBS beyond February 1991 (sic) is erroneous absent a showing of claimant's "total incapacitation." Carrier maintains that since claimant had her right hand operated on in December 1991 and recovered in six weeks, an additional six weeks of recovery for the June 9th surgery on her left hand would amount to a total of three months for which she would be eligible for TIBs, but that the hearing officer's decision exposes carrier to payment of TIBS for nearly twelve months. Carrier says that the hearing officer "overstepped her bounds" because although maximum medical improvement (MMI) was not an issue, the hearing officer nonetheless arbitrarily decided that claimant is entitled to TIBS beginning on (date of injury), and ending on August 30, 1992 without evidence as to claimant's "total incapacitation" for that period or for any parts of that period. Not only was MMI not a disputed issue but neither was the period of claimant's disability. *See* article 8308-1.03(16) for the definition of disability. The hearing officer's decision provides that claimant is entitled to medical benefits effective (date of injury), to unpaid TIBS accrued to the date of the decision in a lump sum with interest, and to weekly income benefits from the date of the decision "as and when accrued." Articles 8308-4.23(a) and (b) provide, in part, that an employee who has disability and who has not attained MMI is entitled to TIBS, which accrue on the eighth day of disability and are paid weekly; and that TIBS continue until the employee

has reached MMI. Article 8308-4.22 addresses the accrual of the right to income benefits and Article 8308-4.13 addresses the payment of accrued, unpaid income benefits with interest and in a lump sum. We have examined the decision and order respecting the payment of TIBS and find such consistent with the statutory provisions.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge