APPEAL NO. 92715

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On October 16, 1992, a contested case hearing was held. He (hearing officer) determined that appellant, claimant herein, does not have a compensable injury. Claimant asserts that the great weight of the evidence shows that the design of her work station contributed to her back and neck problems, specifically taking exception to Findings of Fact Nos. 6 and 7 as arbitrary and capricious. Respondent, carrier herein, responded by stating the appeal was not timely, that the medical evidence supports the hearing officer, and that claimant has an ordinary disease of life.

DECISION

Finding that the decision and order are sufficiently supported by evidence of record and that the hearing officer did not act arbitrarily in making Finding of Fact Nos. 6 or 7, we affirm.

I

The appeal in this case was timely made. The decision of the hearing officer was distributed on December 10, 1992. Claimant's request for review recites that the decision was received on December 11, 1992. The appeal was postmarked December 23, 1992 and was received by the Commission on December 30, 1992. *See* Article 8308-6.41 of the 1989 Act which gives an appellant 15 days from the date the decision is received to file the appeal. Tex. W. C. Comm'n, 28 TEX ADMIN CODE §§ 143.3, then provides that so long as the appeal is mailed on or before the 15th day, the appeal will be timely if received by the Commission no later than the 20th day after receipt. The appeal met these requirements and is timely.

II

Claimant worked as a reservation clerk for a small airline approximately two years when, in _____, she first perceived that her work may be causing problems in her neck and back. Prior to that time, she had had many absences from work for various medical problems, including stomach problems, gynecological problems, and migraine headaches. She began seeing (Dr. H) in July 1991. Dr. H is board certified in internal medicine and gastroenterology. In a statement he gave in June 1992, Dr. H said that her "diagnosis was presumed to be due to colonic dysmotility, possibly aggravated by underlying back pain." (roughly defined, colonic dysmotility means spontaneous bowel movement is difficult or abnormal; *see* Dorland's Illustrated Medical Dictionary, 27th Ed).

Claimant testified that the first doctor she saw for her low back pain after "it all came to a head" in _____, was her family doctor, (Dr. L). Dr. L referred her to an Ob/Gyn, (Dr. S) and to a gastroenterologist, Dr. H (referred to above). Claimant described her

symptoms as severe lower back spasms that go around her hips to her abdomen. Dr. S recommended that she see an orthopedic surgeon, but she and her parents did not want her to do that so she began going to a chiropractor, (Dr. W). She does not state the date she began to see Dr. W, but the first record of his she offered into evidence is dated October 22, 1991. Claimant still sees Dr. W.

Since _____, claimant had an MRI in May 1992 of her lower back which showed:

> At L4-5, there is a small central posterior disc bulge impinges the thecal sac only. There is no visible nerve root compression. The discs show normal height and signal.

Claimant said that Dr. W helped her but that in March 1992, while in the first two or three hours of her shift, she couldn't get out of her chair because a spasm was so bad. She then described her spasms as a burning sensation in her neck and shoulders, which goes down her spine and around her hips, like a contraction, but also burning. Claimant also said that a second MRI addressed her neck and found a "minute disc bulge in my cervical," but that report was not introduced by either party.

Dr. W visited the work site of claimant and characterized the relationship of her work to her problems in several letters and memorandums. Claimant testified that she did not know whether Dr. W had any training or education in regard to ergonomics and no documents as to this point were offered. Dr. W's most recent letter admitted into evidence was dated September 11, 1992, and said in part that claimant:

> is forced to sit with poor posture which affects the biomechanics of her spine. This stress and improper mechanics results in micro-trauma and repetitive stress of the lower back, neck, and shoulders.

Dr. W also said on May 12, 1992, that claimant's low back problem was a:

> direct result of prolonged sitting on the job in a poorly designed work station that puts increased stresses on the spine.

Claimant did see an orthopedic surgeon, (Dr. G), apparently in August 1992. Claimant said that at first he wanted to operate, but then decided to refer her back to her chiropractor, Dr. W. Only one medical document of his, other than a bill, was admitted into evidence and it only says that claimant at work has her terminal in a high position "causing her pain in her neck, shoulders, and arm." Dr. G does not say that her chair, her work, or her position therein, caused any trauma or injury. "Pain is not compensable under the Workers' Compensation Act," Oswald v. T.E.I.A., 789 S.W.2d 636 (Tex. App.-Texarkana

1990, no writ). Oswald also indicates that disability can be affected by pain to the extent that it prevents working, but that does not address the initial question of whether an injury was caused by the employment.

The Appeals Panel has on two occasions looked at the possibility of injury through sitting in chairs. In Texas Workers' Compensation Commission Appeal No. 92272, dated August 6, 1992, an old and worn chair was alleged to contribute to a small herniated disc. The hearing officer found no compensable injury, and that decision was affirmed. That decision also involved work using a computer screen. The Appeals Panel decision stated, "(t)he opinions of the doctors in this case that it was possible that long hours sitting in a chair could contribute to or aggravate appellant's lumbar disc herniation do not show a reasonable probability of a causal connection between appellant's employment and his injury." That decision also required "expert medical testimony" to establish the causal connection by a reasonable probability because a layman's general experience and common knowledge would not be sufficient to establish causation. In Texas Workers' Compensation Commission Appeal No. 92340, dated September 3, 1992, the hearing officer's decision that claimant injured his back from repetitive sitting as a dispatcher in what was described as an "ergonomically correct chair" was reversed and rendered. The evidence did not sufficiently link the chair to the complaint. This decision also pointed out that there was no showing that sitting in the chair in question at work was something not commonly experienced in employment generally.

In the case before us, in which a finding of no compensable injury is appealed, there also is the added finding that claimant's assertion of injury is an ordinary disease of life. This finding may have been entered because the issue was described as:

> Whether the claimant's disability is a result of an injury which arose in the course and scope of her employment or is the result of a disease of life.

The definition of occupational disease in the 1989 Act states that it does not include an ordinary disease of life. *See* Article 8308-1.02(36). This definition does not require that a decision in regard to occupational disease also include a finding as to whether an ordinary disease exists. "In a workman's compensation case, as in any other case plaintiff has the burden of proving elements of her asserted claim by a preponderance of the evidence." Martinez v. Travelers Ins. Co., 543 S.W.2d 911 (Tex. Civ. App.-Waco 1976, no writ). *Also see* Abeyta v. Travelers Ins. Co., 566 S.W.2d 708 (Tex. Civ. App.-Amarillo 1978, writ dismissed).

The carrier provided two statements of doctors which recited that each had reviewed the records provided as to claimant. (No list of records reviewed was included with either statement.) Neither doctor personally examined or treated the claimant. (Dr. R) is a medical doctor specializing in internal medicine. He referred to the medical records

reviewed and concluded that claimant had a "pre-existing illness that causes her to have recurrent back and abdominal pains with associated myofascitis, constipation, and pelvic/lumbosacral dysfunction." He used the term "irritable bowel syndrome" and added, "(a)nother term for IBS is functional abdominal pain as diagnosed by Dr. H." (Dr. B), a medical doctor who is board certified in physical medicine and rehabilitation, concluded from claimant's records, "(w)ithout x-ray examination, MRI examination, and electrodiagnostic testing (EMG), I cannot support any diagnoses of Lumbosacral Plexus Disorder & Nerve Root Compression; the other diagnoses listed by the chiropractor can result from a variety (of) (sic) causes which may or may not be related to her diagnosis." (*See* the one MRI offered into evidence, *supra*, which showed no visible nerve root compression.)

Finding of Fact No. 6 stated:

> That immediately prior to claimant's claim of an injury, she was being treated medically for a gastrointestinal disorder, unrelated to her employment, which could cause many of her symptoms.

Finding of Fact No. 7 stated:

> That claimant's alleged injury and/or disability did not arise in the course and scope of her employment, but is an ordinary disease of life.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. His responsibility to judge the evidence includes medical or chiropractic evidence. He may believe one doctor's opinion over that of another doctor. Atkinson v. U.S. Fidelity & Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.). In addition, when expert opinion does address the issue, the trier of fact is not bound to accept that opinion. *See* Gregory v. T.E.I.A., 530 S.W.2d 105 (Tex. 1975), which said: "While the expert witness's testimony must be taken as true insofar as it establishes facts, the opinions of the expert as to deductions from those facts is never binding on the trier of facts, even though not contradicted by an opposing expert." *Also see* McGuffin v. Terrell, 732 S.W.2d 425 (Tex. App.-Fort Worth 1987, no writ).

Finding of Fact No. 6 is sufficiently supported by the evidence of record of claimant's medical problems, absences from work, and the opinion of Dr. R. Finding of Fact No. 7 is sufficiently supported because the hearing officer could choose to give limited weight to the opinion of the chiropractor, Dr. W, resulting in an insufficient showing that work caused the problem. In addition, the hearing officer could consider the opinions of Dr. R and Dr. B, along with that of Dr. H, as showing a basis for claimant's complaints, which did not arise in the workplace (ordinary disease of life).

Findings of Fact Nos. 6 and 7 were reasonably made by the hearing officer in the exercise of his responsibility to judge the evidence, and those findings are not arbitrary.

The decision and order are not against the great weight and preponderance of the evidence and are affirmed.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge