

APPEAL NO. 931142  
FILED JANUARY 31, 1994

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq.*). On November 22, 1993, a contested case hearing (CCH) was held in [City], Texas, with [hearing officer] presiding. The issues to be resolved were:

1. Whether Claimant sustained a repetitive trauma injury in the course and scope of her employment on or about [date of injury].
2. Whether Claimant notified Employer not later than 30 days after she either knew or should have known she had suffered a repetitive trauma injury.
3. Whether Claimant filed a claim with the Texas Workers' Compensation Commission [Commission] not later than one year after she knew or should have known she suffered a repetitive trauma injury.
4. Whether Claimant has suffered disability as the result of a compensable repetitive trauma injury on [date of injury].
5. What is the date Claimant either knew or should have known that her repetitive trauma injury was due to her employment?
6. Whether Claimant made an election of remedies when she applied for and accepted benefits under Employer's Short-Term Disability Program.

The hearing officer determined that the appellant, claimant herein, did not suffer a repetitive trauma injury in the course and scope of her employment on or about [date of injury] (all dates are for 1993 unless otherwise noted), that claimant failed to timely notify her employer of the alleged injury within 30 days of [two days after date of injury], the date she reasonably knew the injury was work related and that claimant did not make an election of remedies which would bar a workers' compensation claim. Claimant appealed, contesting the determinations regarding the failure to prove a repetitive trauma injury and the failure to give timely notice. Respondent, carrier herein, objects to claimant's appeal because it is in Spanish and therefore is not clear and concise. Otherwise, carrier responds that the decision is supported by the evidence and request that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Carrier objects that claimant's request for review is in Spanish and alleges that therefore it does not meet the requirement of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(2) (Rule 143.3(a)(2)) which requires a party who requests review to "clearly and concisely rebut each issue [the party] wants reviewed. . . ." We believe the claimant has done so. Nothing in Rule 143.3 or the 1989 Act requires an appeal be in English and carrier has cited no authority for its position other than Rule 143.3. Carrier after participating in the CCH was well aware that claimant did not speak, read or write English and that the forms claimant completed were in Spanish. Consequently, carrier should not have been surprised, and was not prejudiced, by having the appeal in Spanish. If carrier did not have a translator available, the Commission would have provided a translation if requested. Carrier's objection is without merit.

Regarding the merits of the case, it is undisputed that claimant had worked for [Employer], employer herein, for some 15 years, the last four of which were sewing bands in pants. Claimant testified through an interpreter, and it is unrefuted, that claimant sat at a sewing machine 10 hours a day (four days a week) sewing bands in pants and that she was required to sew one and a half pants per minute. Claimant also testified she would have to lift bands for 42 and 50 pairs of pants and had to push bands into or through the sewing machine. It was claimant's position at the CCH, and on appeal, that this described activity constituted a repetitive trauma injury to her back. Claimant testified she knew of no accident, fall or specific incident that caused her injury and that the injury was caused by prolonged sitting (10 hour shifts) in an uncomfortable chair.

Claimant testified that she first began having back pain in early 1992 but that she thought it was her kidneys or ovaries. According to claimant, some time in 1992 she saw a doctor in Mexico who apparently gave her injections for inflammation of her leg but did no testing. Claimant stated she went to employer's company nurse, (Ms. LP), for pain medication for her back, claimant still believing the problem was her kidneys or bladder. Claimant testified that by February 1993, the pain had become so severe that she asked Ms. LP, the nurse, to send her to a doctor. Ms. LP referred claimant to (Dr. Re) who, on February 22nd, after negative tests of the bladder and kidneys, ordered a myelogram which revealed a suspected herniated disc at L4-5. Claimant was referred by Dr. Re to (Dr. K) on a consultation basis. After stating that he spoke with claimant in Spanish, by report dated March 1, 1993, Dr. K stated that: "The patient denies any relationship to work or something that she can blame, like bending, lifting, pushing, falling, etc." Dr. K stated that the claimant had a normal range of motion but a review of the myelogram showed ". . . a definite large defect in L4-L5, focal, to the left side" and that claimant was "a potential candidate for surgery."

Claimant also saw (Dr. Ra), who apparently became claimant's treating physician, and who by report dated April 6th, notes that claimant blames her condition on ". . . the fact that she is sitting about ten hours a day at work." In a subsequent note dated April 16th, Dr. Ra stated claimant "should return to light duty type of work when symptoms subside." Dr. Ra by note dated July 16th took claimant off work. Dr. Ra, in a report dated September 30th, stated: "My impression is that her condition may have a relationship to the sitting position for prolonged periods of time which aggravates disc herniations." Dr. Re, in a May 13th note, stated that Dr. Ra "does not think [claimant] needs surgery." But, Dr. K, by report dated August 3rd, still believes the claimant should have surgery and refers claimant to another doctor "to consider surgery."

A substantial portion of the testimony and evidence concerned the completion of certain "short term disability claim" (STD) forms. The hearing officer, in the statement of evidence, noted "[b]ecause of Claimant's difficulty with English language forms, it is far from clear whether she clearly understood the import of filing for [STD] benefits instead of workers' compensation benefits." (Ms. DM) testified that she was the secretary that gave out forms and that when someone tells her they are going to be out sick, she would give them a STD form. She said that if the illness or injury was work related the employee was referred to Ms. LP, the company nurse. Apparently, when claimant went to the doctor (Dr. Re) in latter February, she requested a STD form. Both Ms. LP and Ms. DM testified that the form requires the top portion to be completed by the employee, the middle portion by the doctor and the bottom portion by the employer, usually Ms. DM. Claimant took the form, dated March 8, 1993, to Dr. Re, who noted on the form in answer to the question "[d]id this sickness or injury arise out of patient's employment-- No." Claimant took the form back to Ms. DM, who apparently, according to claimant, referred claimant to Ms. LP for assistance in completing the top portion. Claimant maintains she told Ms. LP that the injury was work related but Ms. LP said the doctor said it wasn't. Ms. LP disputes claimant's testimony and states she (Ms. LP) carefully went over the form and explained it in Spanish to claimant. Ms. LP testified if claimant had said it was work related she would have filed out the proper workers' compensation incident report. A subsequent STD form dated April 19, 1993, shows, in response to the question to the doctor regarding relationship to the patient's employment as "Yes X NO .

The hearing officer noted, in the discussion, that ". . . since the `yes' box check is typed, it appears to have been entered when the doctor had his portion of the form typed and dated April 8, 1993." We also note that Dr. Ra completed the doctor portion of the April 19, 1993, STD form where Dr. Re had completed the March 8, 1993, form. A subsequent STD form dated June 10, 1993, with Dr. Ra completing the doctor's portion shows the injury arising out of patient's employment.

Claimant testified, and the hearing officer found, that claimant realized that her back pain was caused by a possible herniated disc, rather than kidney problems, on

[two days after date of injury], when she discussed the results of the myelogram with Dr. Re. Claimant did not dispute the hearing officer's finding that claimant knew no later than [two days after date of injury], that she believed her back problem was due to prolonged sitting while at work for the employer, as alleged.

Claimant disputed the following determinations:

### **FINDINGS OF FACT**

10. The expert medical evidence in the case is insufficient to establish a causal connection between Claimant's back problem and her prolonged sitting while at work.
11. Claimant did not suffer a repetitive trauma injury to her back while on the job with Employer.
13. Claimant notified Employer not earlier than April 8, 1993, that her back problem arose out of her employment, more than 30 days after she knew or should have known that her back condition was allegedly work related.

### **CONCLUSIONS OF LAW**

3. Claimant failed to show by a preponderance of the evidence that she suffered a repetitive trauma injury which arose out of and in the course and scope of her employment.
4. Claimant failed to notify Employer of the claimed repetitive trauma injury not later than 30 days after she reasonably knew on or about [two days after date of injury], that she had suffered the claimed injury.

The claimant in a workers' compensation case has the burden of establishing by a preponderance of the evidence that an injury occurred in the course and scope of his or her employment. Parker v. Employers Mutual Liability Insurance Co. of Wisconsin, 440 S.W.2d 43 (Tex. 1969). The term "injury" is defined to include occupational disease which in turn is defined to include repetitive trauma. Section 401.011(26), (34). "Repetitive trauma injury" is defined by the act 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." Section 401.011(36). To recover for an injury of this type the claimant must prove not only that repetitious, physically traumatic activities occurred on the job, but must also

show that a causal link existed between the traumatic activities and the incapacity. Texas Employers Insurance Association v. Ramirez, 770 S.W.2d 896 (Tex. App.-Corpus Christi 1989, writ denied). See Texas Workers' Compensation Commission Appeal No. 92544, decided November 30, 1992. Claimant, when claiming benefits for a repetitive trauma injury, however, is not required to prove that the injury was caused by an event occurring at a definite time and place. Aranda v. Insurance Co. of North America, 748 S.W.2d 210, 213 (Tex. 1988). Section 408.007 provides that 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.

In the present case claimant, both at the CCH and on appeal, alleges that she sustained a cumulative or repetitious type of injury having worked four years, 10 hours a day, 40 hours a week sewing bands at a sewing machine at the rate of one and a half pants per minute. Texas Workers' Compensation Commission Appeal No. 92272, decided August 5, 1992, and which carrier cites, cited Davis v. Employers Insurance of Wausau, 694 S.W.2d 105, 107 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.) for the proposition that in order to recover for a repetitive trauma injury one must not only prove that repetitious, physically traumatic activities occurred on the job, but also prove a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared to employment generally. The hearing officer found that expert medical evidence in this case was insufficient to establish a causal connection (Finding of Fact No. 10 quoted above). Claimant argues that the letters of Dr. Ra state that her injury "certainly can be caused by work." Claimant's contention is only supported by Dr. Ra's comment on the STD form dated June 10, 1993, stating "[l]ow back syndrome due to working in sitting position X long time" and Dr. Ra's letter of September 30th stating "[m]y impression is that her condition may have a relationship to the sitting position for prolonged periods of time which aggravates disc herniations" (emphasis added). The Appeals Panel in Appeal No. 92272 held "[t]he opinions of the doctors . . . that it is possible that long hours sitting in a chair could contribute to or aggravate [claimant's] lumbar disc herniation do not show a reasonable probability of a causal connection between [claimant's] employment and his injury. . . ." citing Parker v. Employers Mutual Liability Insurance Company of Wisconsin, 440 S.W.2d 43, 45 (Tex. 1969). Similarly, we hold here that Dr. Ra's statement that there may be a relationship which would aggravate disc herniations, falls short of establishing a reasonable probability of a causal connection between claimant's employment and her injury.

As we stated in Appeal No. 92272, and considering Finding of Fact No. 10 that there was no causal evidence to show that claimant's work caused her back problems, together with the hearing officer's statement that the evidence did not rise to the level of preponderance, it is apparent that from the evidence that was presented at hearing, the

hearing officer determined that it was insufficient to show a causal connection between claimant's disc herniation and her employment. We affirm the hearing officer's determination the claimant was not injured in the course and scope of her employment. We conclude that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

In that affirming the hearing officer's decision that claimant had failed to show she suffered a repetitive trauma injury which arose out of and in the course of employment is dispositive of the case, we will however briefly address the notice issue. Claimant states that she reported the injury to Ms. DM, the secretary, shortly after claimant became aware that she had a disc problem which she believed was work related, and that Ms. DM sent her to Ms. LP to "help me make the report." Claimant specifically asked Ms. DM "what would have led to the referral of [claimant] to [Ms. LP] if this was not work related?" The answer was that Ms. LP sometimes helps people fill out forms. Further, it appears that claimant did not read English and that she went to Ms. LP who obviously was bilingual and was able to translate the STD form for claimant. Claimant apparently went, or was referred to, Ms. LP for assistance in translation of the form. In any event, what various individuals put on the different STD forms was very confusing. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer obviously believed that claimant had not reported her injury to Ms. DM when she asked for the STD form and that Ms. LP only helped claimant with the translation. The hearing officer found, as fact, that claimant believed her back problem was work related no later than [two days after date of injury] and that she failed to report her injury to the employer until April 8th which is more than 30 days after claimant believed her back condition was work related.

We would further note that in Texas Workers' Compensation Commission Appeal No. 931067, decided December 31, 1993, we stated, generally, that standing, walking or sitting are ordinary functions of life and that activity, without anything more, and without specific medical evidence establishing that the activity, during the course of employment, caused the complained of injury would generally not be compensable.

An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if

the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Finding sufficient evidence to support the hearing officer, that decision is affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge