APPEAL NO. 93462

On April 29, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The hearing officer determined that the appellant (claimant herein) did not suffer a repetitive trauma injury while working for his employer, that the claimant timely notified his employer of his claimed injury; and that the claimant does not have disability because he did not sustain a compensable injury. The hearing officer decided that the claimant is not entitled to workers' compensation benefits under the 1989 Act. The claimant disputes the hearing officer's decision and requests that the decision be reversed.

DECISION

The decision of the hearing officer is affirmed.

The claimant, who is 43 years of age, began working for his employer, a large department store chain, as an automotive salesman in 1988. The claimant's duties included inspecting cars, selling auto repairs, and pulling automotive parts and tires. He spent one to two hours per day in the basement of the store getting parts. The claimant testified that several months before May 1992 he began having pain and weakness in both legs. He was taken off work by M.D., (Dr. N), his HMO doctor, in May 1992. The claimant claims that the pain and weakness in his legs was caused by walking at work. He said he walked on hard, wet surfaces at work and walked up and down basement steps. He said the basement floor got wet when it rained and that there were chemicals and oil on the floor of the automotive center area. The claimant said that he is not claiming a back injury nor an injury from chemical exposure. The claimant said that the pain and weakness in his legs developed gradually over the several months preceding May 1992.

On (date of injury), Dr. N diagnosed the claimant as having severe arthritis. A radiology report dated June 2, 1992, revealed no significant abnormalities of the cervical spine or lumbosacral spine. On June 5, 1992, Dr. N diagnosed diffuse muscle weakness and possible degenerative muscle disease. Electromyography studies and nerve conduction velocity studies of the claimant's right leg and right lumbosacral paraspinous musculature done on June 24, 1992, were reported as normal. In a letter dated August 4, 1992, Dr. N stated that the claimant was to be seen by a rheumatologist and that the claimant has a "potentially serious degenerative muscle disease and is too weak to perform many of his normal daily activities, much less his work responsibilities." On September 29, 1992, Dr. N released the claimant to return to work with restrictions on the amount of climbing (three hours per day) and walking (six hours per day) he could do. Dr. N referred the claimant to (Dr. H), a rheumatologist and internal medicine specialist, who examined the claimant in August 1992, and reported to Dr. N on September 28, 1992, that the claimant's chief complaint was "weakness of the legs, shoulder and back muscles and also pain in the

legs, neck, back and some sharp pain, cramps and muscle spasms, with twitching in the leg muscles and tingling." After examining the claimant and reviewing the claimant's work history, medical reports, and diagnostic tests, Dr. H stated that the claimant "may well have had a self-limiting inflammatory or viral disease. He may also have a non-specific elevation of his sed rate." Dr. H then stated that "I am not able at this time to tie in specific physical activities which on repetition, could cause these pains and muscle spasms." In a letter dated November 4, 1992, Dr. N stated, in relation to the claimant's leg pain and weakness, that "[t]he pain seems to have been exacerbated and possibly precipitated by [the claimant's] occupation, which requires constant walking and standing on hard surfaces." On January 15, 1993, Dr. N assessed the claimant's condition as "muscle wasting of legs." On January 29, 1993, Dr. N wrote that a firm diagnosis of the claimant's condition had been elusive, but that Dr. H felt that the claimant might have "atypical myofacial syndrome" and Dr. N concurred with that diagnosis. On March 31, 1993, Dr. A, reported that an MRI of the claimant's lumbar spine showed mild disc degeneration with no disc herniation, and that a neurological examination was normal.

The hearing officer found that the claimant's walking at work did not cause his symptoms of pain and weakness in his legs, and concluded that the claimant failed to show that he suffered a repetitive trauma injury in the course and scope of his employment.

It is clear that the claimant is claiming a repetitive trauma injury which is defined 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." Article 8308-1.03(39). Case law holds that to recover for a repetitive trauma injury, one must not only prove that repetitious, physically traumatic activities occurred on the job, but must also prove that 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 with employment generally. *See* Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). In the instant case the claimant testified that his symptoms of leg pain and weakness occurred over the course of several months while he was employed by the employer. We note that in Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ), which is an occupational disease case (a repetitive trauma injury is classified as an occupational disease under Article 8308-1.03(36)), the court observed that the fact that symptoms occur during a period of employment does not mandate the conclusion that the employment was the cause of the ailments. The medical evidence in this case is somewhat conflicting in that Dr. N opined that the claimant's leg pain seemed to be exacerbated and "possibly" precipitated by his occupation, while Dr. H was unable to tie the claimant's complaints of leg pain to any specific, repetitious, physical activities. Of course, in order to prevail it was necessary for the claimant to show that the claimed injury resulted from repetitious, physically traumatic activities that occurred on the job. The hearing officer is the trier of fact in a contested case hearing and is the sole judge of the weight and credibility to be given to the evidence. Article 8308-6.34(e) and (g). The trier of fact resolves conflicts in the medical evidence.

Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Having reviewed the record, we conclude that there is sufficient evidence to support the hearing officer's determination that the claimant did not sustain a repetitive trauma injury in the course and scope of his employment, and further conclude that such determination is not against the great weight and preponderance of the evidence.

The hearing officer also determined that the claimant does not have disability because he does not have a compensable injury. "Disability" means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). Consequently, in order to have disability, an employee must have a compensable injury. Since the claimant does not have a compensable injury, the hearing officer was correct in determining that he does not have disability as defined by the 1989 Act. The hearing officer further found that the claimant gave timely notice of his claimed injury to his employer, which finding has not been appealed.

In his appeal, the claimant asserts that he doesn't believe that all of the documents submitted at the hearing were reviewed and that some documents were not given enough consideration. He also states that he feels that some of the documents are incorrectly listed in the hearing officer's decision and that some documents were deleted from the list of exhibits. We have carefully reviewed the record and determined that all documents which were offered by the parties were admitted into evidence and that all exhibits are correctly listed in the hearing officer's decision. The hearing officer's decision reflects that he reviewed the evidence presented at the hearing. The hearing officer had the responsibility to assign the weight to be given the evidence. Article 8308-6.34(e).

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge