APPEAL NO. 94645

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 14, 1994. In response to the single issue before him, the hearing officer held that the claimant did not suffer a repetitious trauma injury in the course and scope of his employment on or about (date of injury). In his appeal the claimant essentially states that the evidence does not support the hearing officer's decision nor certain of his findings. In its response the respondent, a self-insured governmental entity (hereinafter "city"), states that the evidence fully supports each of the hearing officer's findings of fact and conclusions of law. The city also alleges that the claimant's appeal was not timely filed.

Records of the Texas Workers' Compensation Commission (Commission) show that the hearing officer's decision was distributed to the parties on April 29, 1994, by cover letter dated April 28th. Pursuant to Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 102.5 (Rule 102.5), the claimant's receipt date is deemed to be five days after the date the decision was mailed, or May 4th. Rule 143.3(c) provides that a request for review is presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision and is received by the Commission not later than the 20th day after the date of receipt. In this case the claimant's request for review was dated and mailed on the 15th day, May 19th, and received by the Commission on May 23rd. The claimant's request for review is thus timely.

DECISION

We affirm.

The claimant was a police officer for the city. He contended he suffered an injury in the form of a back strain from using a police car that had been equipped with cages between the front and back seats; he said that this prevented him from reclining the driver's seat or moving it back as far as it normally would go. He also said the steering wheel did not tilt and he experienced discomfort while driving and while getting in and out of the car. To further illustrate the car's cramped front seat, he stated that his equipment (such as a portable antenna and his duty belt and holster) had suffered increased wear and tear from his getting in and out. Photographs of the car were offered into evidence, showing a yardstick measuring a three-foot distance between the back of the seat and the dashboard. Claimant said he is 6'2" and weighs 223 pounds. His personally owned vehicles (two Mustangs and a Firebird) are smaller than the unit he drove at work, but he said those cars have tilted steering wheels and seats that would recline; he said he has also moved the seats back in those cars. He said he began suffering physical problems as soon as he was put into a "caged" unit (approximately two or three months before (date of injury), and that he immediately complained to his supervisors to no avail. At the time of the hearing he was driving a unit which had a tilted steering wheel.

The claimant filed a workers' compensation claim with the city on (date of injury), and thereafter saw (Dr. P). Dr. P's initial medical report showed claimant's complaints of

having to drive in a hunched over position and diagnosed cervical, thoracic, and lumbar sprain/strain. Dr. P also wrote that the claimant's x-rays showed altered curvature in the cervical, thoracic, and lumbar spine, possibly due to prolonged postural displacement. (Dr. A), Dr. P's associate, took the claimant off work for two weeks.

(Mr. G), a commander in the police department, stated that the cages had been installed more than one year before (date of injury), and that they do not restrict the sliding motion of the seats. He also said that no other employees who drove the units with cages had had a problem. (Mr. C), the city's patrol division commander, stated that the cages were installed near the end of 1992 and that he gave specific instructions that the seats were to be extended all the way back before the cages were put in. He also said he did not know of any other complaints about the cages, and mentioned a 6'11" officer who drove one of the units.

In finding the claimant's injury to be noncompensable, the hearing officer wrote as follows:

> Claimant states that his claim is for a repetitive trauma injury caused by having to sit for long hours in the cramped police car in which the seat is prevented from being extended back far enough to accommodate his size. He provided no evidence of any repetitious, physically traumatic activities occurring over time other than sitting in the slumped over, cramped position in the police car. Claimant also provided no evidence that sitting in a cramped position while in the police car was inherent in his type of employment as compared to employment generally, nor did he provide any authority for the proposition that sitting, without more, constitutes repetitious, physically traumatic activities as contemplated by the Act.

We find the hearing officer's reasoning sound in light of prior decisions of this panel. In Texas Workers' Compensation Commission Appeal No. 92314, decided August 28, 1992, we affirmed a hearing officer's determination that a truck driver did not sustain a repetitive trauma injury, stating that ". . . we view the hearing officer's position to be that, under the particular circumstances of this case, the level of any physical trauma to the back from driving the truck was not appreciably different from that level of trauma to which the general public is exposed in driving various motor vehicles." *And see* Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992, which involved a claimant's contention that sitting in a worn out chair at work caused a low back problem. The Appeals Panel found that the facts of the case contained a distinct lack of evidence of repetitious, physically traumatic activities. (*Compare* Texas Workers' Compensation Commission Appeal No. 92171, decided June 17, 1992, in which it was found that the poor condition of a truck's shocks and suspension resulted in a claimant's back being continuously beaten and vibrated over a period of several months.) In Appeal No. 92272, the panel also wrote that even if it were to conclude that sitting constitutes repetitious, physically traumatic activities, the claimant would still have the burden to show that a causal connection existed between his employment and the injury, and that causation in

this type of case would have to be proven through expert medical testimony.

We believe the facts of the instant case fit squarely within those of Appeal No. 92314 and Appeal No. 92272, *supra*. The claimant in this case basically asserted that, as a big man, he was required to slump forward to accommodate the size of the car's interior, without demonstrating that this condition was more indigenous to work than to countless other conditions of ordinary life. In addition, the medical evidence did not connect claimant's back strain to his work with any degree of medical probability (Dr. P wrote that it was "possibly" due to prolonged postural displacement).

The claimant in his appeal disagrees with certain of the hearing officer's findings of fact. However, the hearing officer as sole judge of the relevance and materiality of the evidence and of its weight and credibility (Section 410.165(a)) is entitled to resolve conflicts and inconsistencies in the evidence. Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203 (Tex. Civ. App.-Austin 1967, no writ). The hearing officer's decision will be set aside only if the evidence supporting the determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). There being sufficient probative evidence to support the hearing officer's decision and order, we affirm.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge