APPEAL NO. 950092
FILED FEBRUARY 23, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on December 13, 1994. The issue at the CCH was whether the decedent suffered a compensable heart attack on _____. The hearing officer determined that the decedent's heart attack was not compensable finding that it was not caused by a specific event occurring in the course and scope of employment and that the preponderance of the medical evidence failed to establish that decedent's work rather than the natural progression of his pre-existing heart disease was a substantial contributing factor of the heart attack. The appellant (claimant herein) files a request for review contending evidence established that the climbing of three flights of stairs was the specific event that caused the decedent's heart attack and that the requirement of the 1989 Act requiring that a claimant prove that work rather than the natural progression of a pre-existing heart disease was a substantial contributing factor is unconstitutional. The respondent (carrier herein) replies that there is sufficient evidence to support the findings of the hearing officer and that constitutionality of the 1989 Act is outside the purview of the Appeals Panel.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

This is a claim for death benefits. At the time of his death, decedent, who was 65 years of age, had worked for the employer for 19 years, the last 10 as electrical superintendent. In a recorded statement the decedent's supervisor stated that the decedent's work involved primarily supervising other workers with very light physical requirements. The claimant (decedent's widow) testified that decedent's job was very demanding. The decedent had heart surgery (double bypass in 1981). He also suffered from diabetes and hypertension. Medical records indicate that the hypertension was well-controlled with medication. Medical records also indicate a family history of coronary artery disease.

The decedent's supervisor stated that on _____, the claimant arrived at work around 7:00 a.m. and gave his crew their work assignments. The decedent then, according to the deposition testimony of his supervisor, left the electrical shop. It is not certain exactly where the decedent went next, but later in the morning he was seen by (Mr. C), employer's director of Human Resources, going down the elevator of the administration building. There was testimony from the decedent's supervisor and Mr. C concerning the layout of the employer's facility. Mr. C testified that the administration building was 100-150 yards from the electrical shop. Mr. C also testified that the decedent was provided a golf cart and a pickup truck to travel around the employer's facility.

Mr. C testified that when he saw the decedent in the elevator decedent was traveling from the third floor of the administration building to the first floor. Mr. C testified that he did not know if the claimant had gotten to the third floor by using the elevator or the stairs. The claimant testified that the decedent was impatient and did not like to wait for elevators. She testified that it was likely that the decedent would take stairs rather than wait for an elevator. Later during the morning of _____, the decedent suffered an acute myocardial infarction at work. He was taken to an emergency room and died the next day of complications from the treatment of his heart attack.

Claimant put into evidence reports from two consulting cardiologists, (Dr. D), the former chief of cardiology at the (Hospital), and (Dr. M), a board certified cardiologist. After reviewing the decedent's medical records, both opined that the decedent's climbing three flights of stairs was a substantial contributing factor of his heart attack. Dr. D stated as follows in his report:

> It is my opinion that the physical exertion that was involved in walking up three flights of stairs resulted in a significant amount of physical stress to this individual's heart muscle and was of sufficient magnitude to cause the total obstruction of a major blood vessel to the heart, resulting in the myocardial infarction. From a legal point of view, this scenario meets the definition of the physical exertion that he expended on his job as a substantial precipitating factor for the myocardial infarction. It is also my opinion that [decedent] would not have had the myocardial infarction at the time that he did if he had not expended the effort in climbing the three flights of stairs.

The carrier put into evidence a report from (Dr. F), an internal medicine specialist, who felt that the claimant's heart attack was more likely due to the natural progression of his pre-existing heart condition rather than his work. Dr. F stated as follows:

> This man had a coronary artery bypass 13 years previously, and thus had known coronary artery disease. The patient had most of the major risk factors for coronary artery disease. He was hypertensive, and had a very strong family history of heart disease. Although he was not a smoker, he was diabetic. Hypertension, diabetes and a positive family history are known precursors of atherosclerotic heart disease, and the combination of all three factors makes the risk of heart disease ever more significant.
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> The percentage of grafted veins used in coronary artery bypass which remain patent after 10 years is only around 20%. It is highly probable that the bypass which was done in 1981 would not have been functional in 1993. The vein grafts steadily become atherosclerotic and develop plaques as a natural consequence of atherosclerotic heart disease.

> The work load on the day of his heart attack did not appear unusual based upon the information I reviewed. Furthermore, there is no reason to evoke outside factors when such a strong accretion of risks factors exists. There is no reason to infer that his myocardial infarction was work-related based upon what we know of his clinical history and about the events of his final work day.

The claimant attacks the decision of the hearing officer that the claimant's heart attack was not compensable on a number of grounds. The claimant contends that the 1989 Act does not provide an evidentiary standard for a hearing officer to make factual determinations. The hearing officer in making factual determinations is to make them on the preponderance of the evidence. This is the traditional standard on which such determinations are made by the trial courts in this state sitting without the benefit of a jury or by a jury itself when determining factual matters. Upon appeal we will review attacks made on factual determinations by a hearing officer on "no evidence" or "sufficiency of the evidence" review. This is the traditional standard of review factual determinations of trial courts and juries employed by the Texas Courts of Appeals.

The claimant argues that prior to the passage of the 1989 Act there was no specific section of the Texas workers' compensation law concerning the compensability of heart attacks. The claimant then outlined the case law under the prior act concerning the standards applied by the courts in determining compensability of heart attacks. As the claimant recognized in her request for review, the legislature in enacting the 1989 Act, and specifically in enacting Section 408.008, intended to change the standard regarding the compensability of heart attacks from that under prior law.

Section 408.008 provides as follows:

A heart attack is a compensable injury under this subtitle only if:

(1) the heart attack can be identified as:

(a) occurring at definite time and place; and

(b) caused by a specific event occurring in the course and scope of the employee's employment;

(2) the preponderance of the medical evidence regarding the attack indicates that the employee's work rather than the natural progression of a pre-existing heart condition or disease was a substantial contributing factor of the attack; and

(3) the attack was not triggered solely by emotional or mental stress factors, unless it was precipitated by a sudden stimulus.

The claimant argues that the hearing officer should not have applied Section 408.008 because it is unconstitutional for a number of reasons--including violations of the provisions of the Texas constitution guaranteeing open courts, due process and equal protection. The hearing officer did not address these issues because "the Appeals Panel has indicated, the courts are the appropriate avenue for mounting constitutional attacks against a statute." We have indeed previously held that consideration of constitutional attacks on the statute are not for the Appeals Panel, but for the courts. Texas Workers' Compensation Commission Appeal No. 91086, decided December 20, 1991. The Texas Supreme Court has recently rejected a number of arguments concerning the 1989 Act as a whole analogous to those raised by the claimant regarding Section 408.008 in Texas Workers' Compensation Commission v. Garcia, No. D-4270 (Tex.-February 9, 1995). The Amarillo Court of Appeals also recently declined to consider on procedural grounds a number of attacks on the constitutionality of Section 408.008. Allen v. Employers Casualty Company, 888 S.W.2d 219 (Tex. App.-Amarillo, 1994, n.w.h.). We will not consider the specific constitutional attacks made by the claimant in this case concerning Section 408.008.

As to whether the decision of the hearing officer was supported by sufficient evidence, we note that there was conflicting medical evidence in this case concerning the relationship of the claimant's heart attack to work. 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). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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).

We certainly cannot say that the medical evidence presented by the claimant constituted the great weight and preponderance of the evidence. We note that a key factual factor in the hearing officer's decision was his view that the evidence did not establish that the decedent climbed three flights of stairs on the morning of his death. The only evidence in the record supporting, inferentially, that the decedent climbed the stairs

was in the testimony of Mr. C and claimant. Mr. C saw the decedent on the third floor of the administration building, which would show inferentially that decedent almost certainly had either taken the elevator or the stairs (although as carrier points out the implication here would be two flights of stairs, rather than three, in reaching the third floor). The testimony of claimant was that decedent was generally impatient with elevators and would take the stairs rather than wait for one. This would only inferentially support a conclusion that decedent took the stairs on the occasion in question. This inference is somewhat countered by the fact that Mr. C saw the decedent take the elevators in going from the third to the first floor that morning. We do not believe that the evidence required the hearing officer to infer that the decedent climbed stairs on the morning in question. This could certainly be a basis for the hearing officer to discount the testimony of the claimant's medical experts who predicated their opinions regarding causality on the claimant's having climbed three flights of stairs.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge