

APPEAL NO. 950816  
FILED JULY 5, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 20, 1995, with (hearing officer) presiding as hearing officer. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury to her lumbar spine, neck, or shoulders in the course and scope of her employment on December 7, 1993, and that since she did not sustain a compensable injury she has no disability. The claimant appealed urging that the hearing officer erred in making findings of fact that are conclusions of law and that the determinations of the hearing officer that the claimant did not sustain compensable injuries and does not have disability are directly contradictory to the preponderance of the evidence. The respondent (carrier) replies that the complained of findings of fact could be either findings of fact or conclusions of law, and that if they were improperly called findings of fact it would not be reversible error. The carrier also responds that the determinations of the hearing officer are supported by sufficient evidence and requests that we affirm the decision and order of the hearing officer.

DECISION

We affirm.

The claimant testified that she worked for the employer making airline reservations. She said that the work involved talking on a telephone and using a computer in a cubicle. She said that when she started working for the employer the keyboard and the screen could not be adjusted. She said that one adjustable work station was acquired and then more adjustable work stations were acquired so that at times she worked at an adjustable station and at times she did not. The claimant testified that she is five feet four inches tall, that the chairs could be adjusted up and down but that the arms of the chair would interfere with the keyboard shelf, that she could not sit with her back against the back of the chair and use the computer, that her feet would dangle from the chair, and that after working an eight-hour shift she had pain in her hands, arms, shoulders, neck, and back. She testified that she did not have problems with her neck or back before she began working for the employer, that the problems did not happen on a particular day but that she noticed increasing pain as time passed, and that she did not have an accident outside of work that could have caused her problems. She first saw Dr. G who treated her with medication that was not effective. The claimant said that she was referred to Dr. P for her hand problems and that he diagnosed bilateral carpal tunnel syndrome (CTS). She said that Dr. P referred her to Dr. H, a neck and back specialist. She said that Dr. H scheduled her for another visit two weeks later, that she was in too much pain to wait that long, and that she went to Dr. B who was recommended by a friend. She said that physical therapy was prescribed but that she only had four sessions of physical therapy because the carrier refused to pay for more.

On cross-examination the claimant testified that a study was done by the employer

and that in early 1993 significant changes were made in the work place. She said that she was examined by Dr. H in April 1994 and that he agreed with the two percent impairment rating that Dr. P had assigned for her CTS. The claimant testified that she had a headset at work and could stand while working. She said that in addition to the problems with her hands, arms, shoulders, neck and back she has tingling in her legs and spasms in different parts of her body. She opined that it was not only the chair that caused her problems but also the way she had to sit and look at the computer. She said that at first employees were not permitted to move terminals, that later employees were permitted to move terminals and to put them on telephone books and boxes, and that after ergonomic changes were made in 1993 there was still no way to adjust the height of the terminal. The claimant stated that she did mention neck and shoulder pain to Dr. P. She testified that the Texas Workers' Compensation Commission (Commission) told her to send a letter to the employer notifying it that she had a new injury of immune dysfunction diagnosed by Dr. C, that she has not filed a claim for that injury, and that another attorney represents her on that claim.

The claimant called Ms. W who also works as a reservationist for the employer. She described a work station and said that a reservationist had to turn one's neck and head to the right and down to type. She testified that she is five feet three inches tall and that when she elevated the chair to use the keyboard her feet would dangle. She identified pictures of work stations of the employer, said that she took the pictures in late 1993, and that the modifications were not all made at once but were made over a period of time. She testified that because of her size she could not sit so that the chair would support her back. She testified that the employer purchased about 25 or 50 new chairs but that there were not enough new chairs for the 600 employees. She said that she and other employees of the employer sustained injuries to their backs, shoulders, and necks as a result of the working conditions. She said that a receptionist could stand up at work but could not stand up straight and use the computer. On cross-examination she stated that terminals could be moved. She said that her doctor said that she required a footrest as an accommodation, that the employer denied the request for a footrest, but that she could have brought in a footrest. She said that as a result of their problems, she and the claimant have become friends. She testified that some of the terminals could be tilted.

A report from Dr. K indicates that his impression from an MRI of the lumbar spine was "FINDINGS CONSISTENT WITH MILD DISC DESICCATION AT L4-L5. NO EVIDENCE OF SPINAL STENOSIS OR DISC HERNIATION" and that his impression of an MRI of the cervical spine was:

1. MINIMAL DIFFUSE POSTERIOR DISC BULGES AT C5-C6 AND C6-C7.
2. SLIGHT POSTERIOR BODY OVERGROWTH AND CORRESPONDING DISC BULGE AT C3-C4 SUGGESTING EARLY

SPONDYLOTHIC CHANGE.

3. NO EVIDENCE OF CORD COMPRESSION OR INTRINSIC CORD ABNORMALITY.

In a report dated October 4, 1994, Dr. B reported that his impression was:

FIBROMYALGIA OR MYOFASCIAL PAIN SYNDROME.  
TMJ SYNDROME BILATERALLY SYMPTOMATIC.  
CTS BILATERALLY- SYMPTOMATIC.  
CERVICAL SPONDYLOSIS/CERVICAL DISC DISEASE,  
R/O CERVICAL HERNIATED DISC.  
CUMULATIVE TRAUMA DISORDER.

and that "[t]hese were mostly work related - Secondary to Cumulative Trauma Disorder." Dr. B also reported that the claimant stated that on December 7, 1993, she was at work, had pain in her neck, was unable to straighten up, was taken to a hospital, and was diagnosed with muscle spasms. Dr. B prescribed physical therapy and medications and indicated that the claimant should work only four hours a day so that she could take physical therapy treatments. In a report dated October 11, 1994, Dr. B reported that on October 4, 1994, he saw the claimant for a painful condition she relates to a work-related injury; that the mechanism of injury based on the history she provided is consistent with a cumulative trauma disorder affecting her spine; that the claimant's pain in her neck and spasm in her back were progressively worsening, that the carrier had denied her physical therapy, and that the claimant was depressed and in tears. On October 11, 1994, he wrote to the carrier stating that physical therapy was medically necessary and requesting approval for physical therapy. On that same day he took the claimant off work. In a report dated December 5, 1994, Dr. B reported that the carrier had approved four physical therapy treatments and that the treatments resulted in some improvement in her neck pain and spasms.

The claimant introduced a work site evaluation dated September 16, 1992, that included evaluation of the work site for the claimant. Six risks related to this claim were identified. The first was that the keyboard was too high for the claimant and could result in CTS. The second was that a forward head or round shoulders posture results in numerous risk factors for cumulative trauma disorders and that the monitor's low height encouraged forward head posture. The third risk factor was a lack of support for the forearms while keying increases the load or torque on the neck and shoulder muscles and that this risk was present for the claimant. The next risk noted was poor lighting which can lead to awkward head and neck postures which can increase the risk of cumulative trauma disorders. The fifth risk identified was that an incorrectly designed chair or an improperly adjusted chair can significantly contribute to cumulative trauma disorders of both the neck-arm unit and of the back and that the claimant was instructed in how to properly adjust the

chair and should be encouraged to continue to properly adjust the chair. The final risk factor identified was that sustained sitting creates a risk of lower back, neck, and arm-hand CTDs and that people who sit for their jobs have a significantly higher risk of lower back injury compared to other workers. The evaluation went on to state that forward bending or rounding of the low back tends to increase forward head or round shoulders posture and that the sedentary nature of sustained sitting jobs can gradually deteriorate general musculo-skeletal condition contributing to various health risks. The claimant was instructed in stretching exercises specific to the work she did. The claimant also introduced a copy of American National Standard for Human Factors Engineering of Visual Display Terminal Work stations published by The Human Factors Society, Inc. in 1988 and pictures of work stations provided by the employer.

The carrier introduced a report from Dr. P dated March 13, 1993, in which he reported that in addition to CTS the claimant was having some aching problems in her shoulder and neck. Dr. P also wrote:

She is continuing to employ [CTS] prevention techniques, and, in fact has had significant changes in the work site, with a new adjustable keyboard, and change in position of the work station. This should make significant improvement, but it will be a slow process and will not have immediate results; but rather more likely, long-term results. However, [employer] should be applauded, recognizing and making substantial progressive changes in these areas.

In a report dated April 15, 1994, Dr. H, the Commission-selected designated doctor for the CTS claim, reported that the claimant has CTS, that the claimant complained of pain in her lower back and neck during the visit, and that the claimant had been hospitalized for muscle spasms in her back and neck. A report from a physical therapist dated November 18, 1991, indicates that in addition to CTS the claimant has problems with her shoulder and neck that are perhaps due to asymmetrical positioning of the terminal and keyboard at work among other factors. Another report from a physical therapist dated July 24, 1992, also indicates pain in the shoulder region. A letter from the claimant to the employer dated December 23, 1994, contains the following:

By receipt of this certified letter, I hereby inform you that I, the undersigned cannot return to work at this time due to my occupational related illness diagnosed by [Dr. C] of the lab.

He expressed that it is not in my best interest healthwise and would be very detrimental to my existing condition to further jeopardize my well being by returning to the work place at this time.

The claimant complained that Findings of Fact Nos. 5 and 6 are not proper findings

of fact. Those findings of fact are as follows:

### **FINDINGS OF FACT**

5. The Commission's Appeals Panel has determined that sitting in a chair is an activity in which the general public at large engages and does not subject an employee to a greater risk of harm or of an injury than that confronted by the general public.
6. Decisions of the Appeals Panel in cases involving facts and alleged injuries similar to the evidence presented in this case have held that a worker performing duties similar to those performed by the Claimant in circumstances similar to those under which the Claimant worked were not subjected to a greater risk of harm than that confronted by the general public.

We first address the question of whether it was reversible error for the hearing officer to include the substance of Findings of Fact Nos. 5 and 6 in her findings of fact. We conclude that it was not. Section 410.168(a) provides that the hearing officer shall issue a written decision that includes findings of fact and conclusions of law, a determination of whether benefits are due, and an award of benefits due. Generally, an award of benefits should be based on conclusions of law, conclusions of law should be based on findings of fact, and findings of fact should be based on evidence. We have not held it to be reversible error to mislabel either a finding of fact or a conclusion of law. Even though not required by the 1989 Act, hearing officers often include a statement of the evidence and a discussion in which the evidence and the law may be discussed. The hearing officer included in her decision and order a statement of evidence but did not include a discussion section. While it would have been preferable for the hearing officer to have discussed Appeals Panel decisions in a discussion section, she did not commit reversible error in including discussion of Appeals Panel decisions in Findings of Fact Nos. 5 and 6.

The hearing officer also made the following findings of fact:

### **FINDINGS OF FACT**

7. The evidence presented does not establish the Claimant sustained an injury to her lumbar spine as the result of performance of her assigned duties for the Employer.
8. The evidence presented does not establish that the Claimant sustained an injury to her shoulders as the result of the performance of her assigned duties for the employer.

9. The evidence presented does not establish that the Claimant sustained an injury to her neck as the result of the performance of her assigned duties for the Employer.
10. The cause of any problems the Claimant is experiencing with her lumbar spine cannot be determined from the evidence presented.
11. The cause of any problems the Claimant is experiencing with her shoulders cannot be determined from the evidence presented.
12. The cause of any problems the Claimant is experiencing with her neck cannot be determined from the evidence presented.

The hearing officer then concluded that the claimant did not sustain a compensable injury to her lumbar spine, neck, or shoulders in the course and scope of her employment on December 7, 1993.

The burden of proof is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993, the author of the majority opinion wrote "we are unaware of a requirement that back injuries be proven by expert medical evidence." That claim involved a back injury that resulted from lifting a 40-pound bag of dog food. In Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992, the Appeals Panel affirmed the decision of a hearing officer who determined that the claimant sustained a repetitive trauma injury to her back while working as a driver. The Appeals Panel wrote that Texas courts have stated the element of causation in repetitive trauma cases as follows:

"To recover for an injury or disease of this type, one must not only prove that repetitious traumatic activities occurred on the job, but must also show that a causal link existed between the traumatic activity and the incapacity; that is, the disease must be inherent in the type of employment as compared with employment generally. [Citation omitted.]" Texas Employers' Insurance

Association v. Ramirez, 770 S.W.2d 896, 899 (Tex. App.-Corpus Christi 1989, writ denied); Davis v. Employers' Insurance of Wausau, 694 S.W.2d 105, 107 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.).

The court in Ramirez also noted that the general rule in Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 494 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.) in workers' compensation cases is that the issues of injury and disability can be established by the lay testimony of the claimant alone, even if contradicted by the unanimous opinion of medical experts. A "narrow exception" requiring expert testimony exists where a claimant asserts that his injury caused or aggravated cancer or a disease, or when an injury to a specific part of the body is alleged to have caused damage to another unrelated part of the body. Ramirez, *supra*, at 900-901. However, in Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92340, decided September 3, 1992, we held that medical evidence would be required to prove that sitting in a certain type of chair would cause back injury because such a connection was beyond the knowledge of laymen based upon common experience. Texas Workers' Compensation Commission Appeal No. 93461, decided July 19, 1993, involved a case in which the hearing officer determined that the claimant who testified that she remained seated for long hours working on a computer did not sustain a repetitive trauma injury to her back. In that case the claimant said that the chairs provided by the company were too high, that her feet would not rest on the floor, and that her requests for a footrest were not honored. The Appeals Panel affirmed the decision of the hearing officer.

An appeals level body is not a fact finder, and it 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). This is so even though another fact finder may have drawn different inference and reached different conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). Concerning the need for medical evidence to establish causation, the Appeals Panel has distinguished cases involving claims for back injuries resulting from a specific event such as lifting, see Appeal No. 93426, *supra*, and back injuries resulting from repetitive trauma such as sitting in a certain type of chair, see Appeal No. 93461, *supra*. While the evidence concerning repetitive trauma is that the claimant did more than sit in a chair and there is some medical evidence relating her back, neck and shoulder problems to her work, the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Having found the evidence to be sufficient to support the determinations of the hearing officer and no reversible error, we affirm.

Tommy W. Lueders  
Appeals Judge

CONCUR:

Elaine M. Chaney  
Appeals Judge

CONCURRING OPINION:

I concur with the majority, but write separately to emphasize my view that with the proper proof, which is accepted by the hearing officer, an injury based on sitting may be compensable. At first glance, the hearing officer in this case could be read as stating that the Appeals Panel has barred claims based on sitting. A careful reading of her findings shows that she did not believe the evidence in this case established that sitting caused the claimant's injury. On this latter basis the hearing officer is exercising her function as the fact finder and I have no problem affirming her factual determination. In my view, establishing such an injury would require showing a type or duration of sitting that would go beyond normal daily activity and expert testimony relating that sitting to the claimant's injury. A hearing officer still could accept or reject such expert testimony.

Gary L. Kilgore  
Appeals Judge