APPEAL NO. 980205
FILED MARCH 20, 1998

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 January 5, 1998. With regard to the issues at the CCH, he (hearing officer) determined that the appellant (claimant) did not sustain a compensable occupational disease in the form of a repetitive trauma injury on _____, and did not have disability because she did not sustain a compensable injury. The claimant appeals, seeks a reversal of the decision and argues that the hearing officer imposed an improper burden of proof upon her. The respondent (carrier) responds and seeks an affirmance of the decision.

DECISION

We affirm.

On _____, the claimant had been a dental assistant for the, (employer) for five years. Prior to _____, she had been off work intermittently due to some kidney problems. On March 3, 1997, her nephrologist, (Dr. MO), noted "recurrent persistent right flank discomfort, radiating down to her right lower extremity." The claimant testified at the CCH that the employer's dentists spent 15 to 60 minutes with each patient, that she assisted with 15 to 25 patients per day and that she sat a total of about three hours per day. One of the employer's dentists, (Dr. C), testified that the claimant complained of back pain caused by her kidney problems. The claimant said the chairs she had to sit in did not have the proper armrest for support. Dr. C said the dental assistants leaned forward when they worked but had armrests for support. Dr. C generally concurred with the claimant regarding the number of patients seen and the time spent with each patient.

The claimant contends that repetitive leaning over and sitting, assisting the employer's dentists, caused a back injury. On March 18, 1997, the claimant went to the emergency room (ER) complaining of back pain. The ER doctor, (Dr. MA) diagnosed a back sprain, excused her from work for three days and instructed her to return to light-duty work after three days. Lumbar and cervical x-rays taken at the hospital were normal. On April 11, 1997, the claimant's treating doctor, (Dr. S), recorded a history of "no injury recalled," diagnosed "myofascial spasm [without] injury" and released her to light-duty work. The claimant complained to Dr. S of left arm, right leg and neck pain on May 20, 1997, and Dr. S excused her from work "due to illness." In a June 21, 1997, report, Dr. S wrote that the claimant "stated that her symptoms began during a time at work when they were 'overloaded and understaffed.'" In a September 16, 1997, letter to the claimant's attorney, Dr. S stated that the claimant's leaning over patients while working for the employer "could lead to the development of back strain." In another letter to the attorney, he said that "[i]n all reasonable medical probability, her injuries could stem from this type of work."

An occupational disease is "a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. . . . The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease." Section 401.011(34). A repetitive trauma injury is "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).

The claimant complains on appeal that the hearing officer imposed upon her the burden to prove her repetitive trauma injury by presenting expert evidence of an injury to a degree of reasonable medical probability. An employee must prove, by a preponderance of the evidence, the compensability of an occupational disease. Texas Workers' Compensation Commission Appeal No. 960582, decided May 2, 1996, citing Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980). Our review of the record and the decision and order does not indicate that the hearing officer held her to a different or higher burden. In the "Statement of the Evidence" portion of the decision, he states that Dr. S's opinion was given to a degree of reasonable medical probability. Then he explains that the causal link between the claimant's physical job duties and her alleged injury is still missing, despite Dr. S's opinion. "[O]ne must not only prove that recurring, physically traumatic activities occurred on the job, but must also prove that a causal link exists 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." Texas Workers' Compensation Commission Appeal No. 950868, decided July 13, 1995, citing Davis v. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.), *see also* Texas Workers' Compensation Commission Appeal No. 951630, decided November 15, 1995.

According to the decision, the hearing officer concluded the claimant did not show that she performed the leaning and sitting tasks in a frequent, repetitive manner. Although the hearing officer did not reject the claimant's sitting claims on the basis that repetitive sitting is not compensable, we have consistently held that the mere act of sitting does not give rise to a compensable injury. *See* Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992; Texas Workers' Compensation Commission Appeal No. 92340, decided September 3, 1992; Texas Workers' Compensation Commission Appeal No. 93305, decided May 26, 1993; Texas Workers' Compensation Commission Appeal No. 93461, decided July 19, 1993; and Texas Workers' Compensation Commission Appeal No. 951149, decided August 30, 1995.

The hearing officer determined that the claimant did not show that the actions involved in her employment are causally linked to her condition. 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. Section 410.165(a). We will reverse the hearing officer's determination if we find that it is so weak or against the great weight and preponderance of the evidence as to be clearly wrong or

manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. The hearing officer's determination that the claimant did not meet her burden of proof with regard to the compensability issue is not so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust and, therefore, we affirm the decision as to that issue.

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. Disability, by definition, depends upon there being a compensable injury. *Id*. Since we affirm the compensability determination, we affirm the disability determination also.

The decision is not against the great weight and preponderance of the evidence and, therefore, we affirm.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge