

APPEAL NO. 990415

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 February 2, 1999. He (hearing officer) determined that the respondent (claimant) sustained a compensable cervical spine injury on _____; that he had resulting disability from August 19, 1998, until February 2, 1999; and that he did not make an election of remedies that bars him from pursuing workers' compensation benefits. The appellant (carrier) appeals these determinations, contending that they are contrary to the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant testified that on the morning of _____, he was working inside a cylindrical "vessel" with two others installing mist extractors and vanes. He estimated the diameter of the vessel to be 42 to 48 inches and 20 to 30 feet long. He said he worked three hours, then took a 15-minute break, and worked another two hours, on his knees and bending over. After the first two hours, he said, he began to feel shoulder pain, but had not fallen or struck anything. When he came out of the vessel, he said, he told his supervisor, Mr. P, that his shoulders were hurting. Mr. P, according to the claimant, advised him to take an aspirin. The claimant continued to work that day with painters outside the vessel, believing he had only a muscle pull.

The claimant further testified that on August 19, 1998, he was sweeping the floor when he felt a sharp pain over his left eye and into his neck. His right arm and leg went numb, he said, and he slumped to the ground. Mr. H, the foreman, came up to him and, suspecting a stroke, according to the claimant, asked him how long he had been with the company. The claimant responded 90 days and Mr. H said that the claimant could use his health insurance. The claimant was then taken to a hospital where various tests were done to determine if the claimant had a stroke. The initial report by Dr. P, indicates no history of similar symptoms and no recent trauma. A CT brain scan and other tests ruled out a stroke. A cervical MRI on August 20, 1998, was read as showing multi-level cervical disc prolapse, most prominently at C5-6. The claimant was discharged the next day with a diagnosis of cephalgia and multi-level cervical disc herniation with stenosis. Dr. H, a referral doctor, diagnosed an acute onset of left retro-orbital pain of unclear etiology and right arm numbness and radicular pain with evidence of bulging at C5-6. A neurological consultation by Dr. B on August 31, 1998, contains a history of the _____, events and the follow-on incident. In a report of September 28, 1998, Dr. A records both and attributes the herniation to _____ "when [claimant] needed to do quite a bit of physical effort inside a tube putting some parts in place." Dr. A added that he believed the claimant's working the following week "aggravated the herniation." On November 23, 1998, Dr. A further explained that it was unlikely that the claimant would have sustained such a large

herniation at C5-6 any earlier and not have noticed it. In a note of October 7, 1998, Dr. P also gave an opinion that the disc herniation was most likely sustained as a result of working in the vessel on _____.

The carrier obtained a review of the cervical MRI on which the diagnosis of herniation was based. In a report of January 11, 1999, the reviewer found only a disc protrusion at C5-6 and an otherwise normal MRI. Dr. A reviewed this report, but his opinion remained the same.

Mr. P, the lead man on the vessel job, testified that the vessel had a six-foot, not 42 to 48 inch, diameter. He could only recall the claimant saying he had a headache on _____, and told him to go to the medicine cabinet for pain relief. Mr. H, the foreman, testified that he met the claimant in the office on August 19, 1998, and noticed his right shoulder and arm "hanging." When he asked Ms. S, the clerk in the office, to call a doctor, she called and was asked if this was workers' compensation or "regular insurance." She said she did not know, but the claimant volunteered that "it was nothing, so it was filed under regular insurance." Mr. P said it looked like a stroke, so he took it for granted that it was not work related. He did not recall asking the claimant if he had worked there for at least 90 days. He denied telling the claimant to file this claim under either workers' compensation or his health insurance.

Mr. T, the safety coordinator, testified that he visited the claimant in the hospital on August 20, 1998. He said that the claimant told him he did not know what happened and did not mention a neck injury at work. He again saw the claimant on August 24, 1998, at which time the claimant told him the MRI showed some neck problems, but the claimant still did not say they were work related. About a week later, according to Mr. T, the claimant said he needed workers' compensation to pay for surgery. Only then did he say he thought he hurt his neck working inside the vessel.

Ms. S, the office clerk, testified that she made the phone call on August 19, 1998, to obtain a medical appointment for the claimant. She said she asked the claimant if she should make the appointment on the basis of workers' compensation coverage or regular health insurance coverage. She said the claimant spoke up and told her it did not happen at work. For this reason, she made the appointment under the regular insurance policy.

The hearing officer found that "[w]hile working in a vessel on _____ Claimant had an injury to his neck." Finding of Fact No. 3. Though not expressly stated in terms of a repetitive trauma injury, the claimant proceeded under this theory and we assume that the hearing officer found in accordance with it. The carrier appeals this determination, arguing essentially that the claimant lacked credibility and his story of a neck injury crystallized only as he learned of his likely need for surgery. It further argues that the evidence fails to support a finding that the claimant engaged in repetitive traumatic activity in the vessel on _____. The question of the claimant's credibility was for the hearing officer to resolve and we will not revisit it on appeal. Section 401.011(36) defines a repetitive trauma injury 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." To recover for a repetitive trauma injury, one must not only prove that repetitious, physical traumatic activities occurred on the job, but also prove that a causal link existed between the 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, 107 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.).

In support of its contention both at the CCH and on appeal that the claimant did not prove repetitive trauma, the carrier cites numerous cases that deal with what can be described as ordinary office activities, e.g., Texas Workers' Compensation Commission Appeal No. 94010, decided February 4, 1994, or ordinary walking or sitting activities, e.g., Texas Workers' Compensation Commission Appeal No. 950711, decided June 16, 1995. Other cases involved lack of medical evidence, e.g., Texas Workers' Compensation Commission Appeal No. 951431, decided October 5, 1995. The activities described by the claimant as the cause of his herniation occurred, according to his testimony, over five hours in cramped quarters and involved constant bending or kneeling. We do not believe that such evidence compels the conclusion that the claimant was involved in only ordinary activities of life such as to preclude a successful claim of a repetitive trauma injury. In addition to his account of the work environment on _____, there was medical evidence from Dr. A and Dr. P that the claimant has cervical herniation, which they attributed to the claimant's work on _____. In its appeal, the carrier argues that its evidence seriously challenges whether the MRI can be read to support a conclusion of herniation and points to other negative tests. Whether the claimant sustained a compensable injury as claimed was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer evaluated the evidence and determined what facts had been established. Section 410.165(a). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the evidence for that of the hearing officer. Rather, we find the testimony of the claimant and the opinions of Dr. P and Dr. A, found credible by the hearing officer, sufficient to support the finding of a compensable cervical injury.

The carrier appeals the finding of disability on the basis that there was no compensable injury. Having affirmed the finding of a compensable injury, we also affirm the finding of disability.

Finally, the carrier argues that by using health insurance at least for the initial visit and hospitalization, the claimant is precluded under the election of remedies doctrine from pursuing workers' compensation remedies. See Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980). We have observed that election of remedies is not a favored doctrine and its scope will not be extended beyond the test of Bocanegra. The

carrier has the burden of proving an effective election of remedies and whether an election has been made is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 972051, decided November 13, 1997. Critical to a finding of an election of remedies is the determination that the election of non-workers' compensation remedies was an informed choice. Texas Workers' Compensation Commission Appeal No. 981226, decided July 20, 1998. In this case, the election, if any, was made in the brief time that a medical appointment was being made for the claimant on August 19, 1998, just after the claimant experienced unexplained severe head pain and a possible stroke. The hearing officer did not conclude that such exigent circumstances produced an informed election of remedies. We find the evidence sufficient to support this determination.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge