APPEAL NO. 990591

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 19, 1999, a contested case hearing (CCH) was held. The issues disputed at the CCH were whether the respondent, who is the claimant, sustained an injury in the course and scope of his employment on or about _____, and whether he had disability as a result of such injury.

The hearing officer held that the claimant, "while he slept in the sleeper compartment of the sleeper truck he was riding in," sustained a compensable injury "on or about _____," and that he had disability from this injury from October 7, 1998, through the date of the CCH.

The appellant (carrier) has appealed. The carrier argues that the decision is against the great weight and preponderance of the evidence. The carrier points out that a decision must be based on probative, credible evidence, and there was either "no" evidence or the evidence adduced in this CCH falls short of that. The carrier points out that the opinion of the doctor who testified and asserted that claimant had a repetitive trauma was based upon facts and assumptions that were not true or accurate. The carrier states that there was no evidence whatsoever of a specific injurious event, and that the statement of the coworker who was driving the truck, while claimant slept, is devoid of any such statements. The carrier argues that the mere inception of symptoms of a disease during work hours does not establish the causal link. The claimant responds by asserting that the sleeper cab was not designed to be used while the truck was in motion, that the road upon which claimant rode while asleep was "heavily rutted" and that claimant was "thrown about the sleeper berth." The claimant argues that the decision is supported by the record.

DECISION

Reversed and rendered, the decision not being supported by the evidence developed at the CCH.

We must begin by the observation that evidence upon which a decision must be based is that information which is developed through testimony, or through documents, that are admitted into the record. The assertions and arguments of counsel, however sincere and forceful are not "evidence" that is sufficient to support a decision. Questions that are posed which assume facts not in evidence are not sufficient, standing alone, to supply those facts.

The case involved a claim filed by the claimant, who was employed as a truck driver by (employer). He asserted injury based upon the fact that when he awoke from his off-

driving time on _____, in the sleeper berth of a truck, he had a stiff neck and tingling to his fingertips. He was ultimately diagnosed with a herniated cervical disc.

The first witness called in the claimant's case in chief was a representative of the Teamsters Union, (Mr. K). Mr. K had not himself driven a truck in two and one-half years. He stated that he was a high school graduate and had no special training in mechanical design. However, Mr. K stated that he was generally familiar with the model of truck that the claimant was riding in at the time of his injury. When he was asked what the "purpose" of the sleeper berth design in the cab of the truck in question was, an objection was made by the carrier to his expertise to so testify and it was sustained. Mr. K testified, however, as to his personal opinion that the berth was not designed to be slept in while the truck was being driven.

Mr. K testified that drivers "constantly" got "beat up" in sleepers. He testified that an "astronomical amount" of drivers had been hurt in sleepers. He also testified that for another truck company who was not the employer in this case, a substantial portion (about one-fourth) of its workers' compensation claims were for "the same reason." There was no description of the nature of the injuries compromising the basis of the claims. Mr. K said that the berths had a harness across them to prevent drivers from falling out.

Mr. K did not know what the maintenance schedule for the employer's trucks was. He described the suspension system of the cab as being an air cushion system. He asserted that a bump would still cause a driver to pitch around in the berth, regardless. Mr. K had not inspected the truck in which claimant was riding at the time of his contended injury.

On cross-examination, Mr. K stated that he was not asserting that the employer in this case was in violation of a union agreement which detailed the size of sleeper berths. The size of these berths was set forth in a page from a Teamsters Union Contract Guide dated September 1, 1986, which set out the dimensions for sleeper berths. The contract guide refers to the sleeper berths as "over-the-road" berths.

Claimant's next witness was his treating doctor, (Dr. BK), D.C. Dr. BK had first examined the claimant on November 18, 1998. It was Dr. BK's opinion that the claimant's cervical injury was a repetitious trauma. He said that after "years" of being exposed to road bumping, that claimant being "thrown about" on _____, was akin to the "straw that broke the camel's back." Dr. BK made clear that he understood that claimant had been a truck driver for about 15 years preceding his cervical problem. Dr. BK agreed that his only source for facts underlying the work-relatedness of the injury was the history given by the claimant; he had done no independent investigation. Dr. BK agreed that the claimant's objective testing (MRI) showed the presence of arthritis in his spinal column. Dr. BK stated two opinions regarding manifestation of a herniated disc: he stated on direct examination that he did not believe that claimant had a herniation prior to _____, primarily

because he did not have symptoms before that date, and, on cross-examination, that it was possible to have a herniated disc with no symptoms.

Dr. BK did not review the records of the first doctor (a company doctor) who had examined he claimant. However, he said he was aware that the claimant had had prior neck symptoms before _____. Dr. BK took the claimant off work indefinitely beginning November 11, 1998, and retained him in an off-work status in January 1999.

The claimant testified last. He stated that he and his partner, (Mr. D), were driving from the (city 1) area to (city), Arizona, and were alternating the driving time. Claimant drove to (city 2), Texas, and then went to sleep in the sleeper berth in the cabin. When he awoke outside of (city 3), his neck was stiff and sore. Claimant did not testify as to awareness that he had specifically been jarred on this trip, or that there was any specific incident. When asked if he recalled being jostled about on this trip, he stated only that one is "always" jostled about in a sleeper and there is thus always that recollection of being jostled. He said that the mattress on the bunk was six inches thick. Asked if it was "rougher" than sleeping in a "swinging" bunk, he said that he would "assume so," although he had never slept in a swinging bunk. (Mr. K had described a swinging bunk as one suspended on springs, based on a design of an apparatus used to carry nitroglycerin.)

Claimant was asked about the condition of his truck. Claimant testified that he had no knowledge of what the maintenance schedule of the parts of his truck was supposed to be. Claimant said that his truck had an air bag suspension system and he did not have mechanical knowledge enough to say how it worked, or how often it should be replaced. Claimant said he would "know" whether the air bags were working or whether they were not. He agreed the air bag suspension on his truck was working, but that the bags were not "aired correctly." He said that other workers had complained about the air bag suspensions on these trucks but he said he would not identify these persons. He further stated unfamiliarity with the spring or valve systems in the cushioning mechanism of the truck. When objection was made to this line of questioning and claimant's attorney was asked the purpose of this, the attorney responded: "I'm just establishing that the suspension on the truck is substandard," to which the hearing officer stated, "Well, I think you've established that."

Claimant agreed he had not turned in a report on the truck suggesting that there were problems or requesting repairs, although he was familiar with the forms and procedures for doing this. His explanation was that there was a "standing rule" that a lot of drivers wouldn't write up problems because they "won't get fixed anyway."

Contrary to the statement of Dr. BK, claimant said that he had begun working "on call" for the employer in December 1997, and full time in August 1998. He was eligible for union mandated benefits six weeks after being employed full time. Before working for the employer, the claimant had been a process server for a law firm for nine years. He had

gone to this job from an earlier work history of commercial truck driving because it presented more opportunity. Claimant agreed that two or three weeks before _____ he had been troubled with a stiff neck. He said there was no radiation of pain or numbness into his arms at that time, and that he did not seek medical treatment. He was off work for three days. Claimant described his neck pain after _____ as "different" from his previous pain.

Claimant called in to his headquarters when he awoke on _____ with his stiff neck, and was sent to the company doctor in (city 3). This doctor, (Dr. N), told him he had a sprain. Dr. N's report noted that claimant had developed "some increasing discomfort and stiffness to the neck" which claimant related to sleeping in the sleeper section of his truck, and that this had gone on for several days. Claimant could not continue driving due to his pain and was flown home by the employer. Claimant did not testify, one way or the other, as to his ability to perform work at any time after his injury.

Claimant asserted that the road to (city 3) had "rough and rutted" pavement. He said there were warning signs to be on the lookout for this. He said his own experience supported his observation that the road was rough, and that "that particular stretch of road" was worse than others. A signed statement from Mr. D, the co-driver, stated only that claimant had awoken on _____ with a stiff neck. There is nothing in the statement describing the road as rough, nor anything indicating that there was bumping and jostling. However, another statement was offered that was signed by four other drivers from the employer. This statement said that the stretch of Interstate 10 after (city 4), Texas, was one of the roughest highways in Texas. Claimant said that "all the drivers" he'd ever talked to had problems in general being bounced around in sleepers.

An MRI examination done November 5, 1998, reported a small herniation at C6-7, degenerative disc disease throughout the cervical spine, and narrowing at C4-5 and C5-6. A written report from Dr. BK dated November 23, 1998, stated that claimant was injured when he was "jarred and thrown about while sleeping in the sleeper compartment" on _____. A peer review conducted by (Dr. S) on January 22, 1999, concluded that claimant, who was 53 years old, had arthritis and an ordinary disease of life.

The hearing officer's decision and recitation of the facts at the CCH do not lend an insight into how he believed the injury occurred. He found:

**FINDING OF FACT**

2. The Claimant sustained a compensable injury on or about _____, while he slept in the sleeper compartment of the sleeper truck he was riding in.

He further found the claimant had disability due to his injury beginning October 7, 1998, and continuing through the date of the CCH.

Although the claimant's claim had elements of both repetitive trauma (Dr. BK's theory) and specific incident (claimant's theory), the hearing officer appears to have found a specific injury. We reverse this finding as having no more than a mere scintilla of evidence to support it. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). As noted in Texas Workers' Compensation Commission Appeal No. 960929, decided June 28, 1996, an accidental injury should be traceable to a definite time, place, and cause. United States Fire Insurance Company v. Alvarez, 244 S.W. 2d 660 (Tex. 1951). There was a lack of testimony about specific incidents occurring on October 6th. Instead, there was a generalized statement that an unidentified stretch of road somewhere east of (city 3) was found to be bumpy or rough. Whether it was one-half mile, one mile, or 10 miles was left undeveloped and unexplained. The duration of bumping, if any, that might have been encountered by claimant was left to speculation.

If the hearing officer believed, as he stated during the hearing, that claimant "established" that the cab in which he rode was "substandard," we note that, far from being established, there was no more than a mere scintilla of evidence concerning this assertion. There was no probative evidence that the cab was actually defective. There was no direct evidence of a problem with the suspension or other mechanism of the cab of claimant's truck. What "evidence" there was took the form of claimant's testimony that the air bag system in his truck, while working, was not full enough, testimony that must be interpreted in the context of his admission of lack of knowledge about the systems or their need for maintenance from a mechanical standpoint. Claimant's opinion that the air bags were underinflated in some form or fashion therefore was sheer speculation, and could not support an inference that any defect or problem with the claimant's truck gave rise to his injury. The hearing officer sustained an objection to testimony about the purpose of the cab and its design. While Mr. K went ahead and testified generally that it was his opinion that the cab was not meant to be slept in while the truck was driving, his assertion is left unexplained and was certainly not supported with any reference to the design or dimensions of the cab. Mr. K contended that the dimensions did not violate the union agreement.

While it is the responsibility of the hearing officer to weigh evidence and find facts, there must be evidence to support such facts to be found. Texas Workers' Compensation Commission Appeal No. 982649, decided December 23, 1998. Inferences of causal connection must be based upon some evidence and not only upon argument. While the appeal itself argues much about the limited purposes of the sleeper cab, and its dimensions, essentially none of this was in evidence, and the national union contract guide page in evidence tends to refute the appellate arguments. As we stated in Texas Workers' Compensation Commission Appeal No. 952088, decided January 22, 1996, another case in which a truck driver awoke from sleeping in his sleeper cab with a "crick" in his neck, the

fact that symptoms occur during the period of employment does not mandate the conclusion that the employment was the cause of the injury. There is no evidence that would support either an inference that claimant was bumped the entire time that he was asleep, or that he was bumped only five minutes. However, the difference in effect of these disparate durations would appear to be significant in attributing causation. The fact that causation may be difficult to prove does not relieve the claimant of this burden. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980).

A finding of repetitive trauma would not be sufficiently supported in this record either. Section 401.011(36) defines 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 an occupational disease, one must not only prove that repetitious, physically traumatic activities occurred on the job, but also must prove that a causal link existed between these 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. Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). An assertion that one must on occasion ride over bumpy roads falls short of proving a repetitious course of activities. Likewise, although Mr. K's assertion that a significant proportion of injury claims for another employer was offered to prove that sleeper problems are somewhat indigenous to the occupation, we cannot agree that the number of asserted claims for another employer, under circumstances left undeveloped in the record, rises to a probative level of an occupational hazard.

Dr. BK's opinion that claimant has an injury in which years of repetitive trauma weakened his cervical spine was clearly premised on his understanding of roughly 15 years of truck driving by the claimant. When an expert's opinion is based upon facts that differ materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict. Burroughs Wellcome Company v. Crye, 907 S.W.2d 497 (Tex. 1995). It was undisputed that the claimant worked as a process server for nine years, began working on an as-needed basis for the employer less than a year before his contended injury and full time beginning in August 1998. Therefore, Dr. BK's underlying assumption that the injury represented repetitive trauma over years of riding in a truck was not based upon the undisputed facts, and cannot be credited on the matter of causation.

For these reasons, we find that any evidence in support of the decision amounts to no more than a mere scintilla, and we accordingly reverse the hearing officer's decision and render a decision that claimant was not injured in the course and scope of employment on or about _____. Likewise, we reverse the contingent finding that claimant had disability, as there must be a compensable injury in order for there to be disability. We caution against overreading this case as a holding that an injury while driving or riding in a truck could not be proven to be compensable. Rather, we are holding that the evidentiary burden was not met in this case to support compensability.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge