APPEAL NO. 990972

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 April 7, 1999. The issues concerned whether the appellant, who is the claimant, sustained an occupational disease. Also at issue were the date of injury and whether she had the inability to obtain and retain employment equivalent to her preinjury average weekly wage as the result of a compensable injury (*i.e.*, disability).

The hearing officer held that the claimant did not engage in repetitively traumatic activities at work. He noted that she did not have an injury traceable to a specific date, time, and place, and that her job duties did not exceed job duties of an ordinary worker doing the ordinary tasks of a workman. If there was a date of injury, he noted, the claimant contended she was injured on _____.

The claimant has appealed, and argues that she proved a repetitive trauma injury. She asserts some facts not developed at the CCH. She argues that the medical examination order had inaccuracies on it.

DECISION

Affirmed.

The claimant said that she worked for three months for (employer), a "fast food" restaurant. She testified as to a variety of activities involved in food preparation. Among these activities were pouring about 14 to 15 pitchers of water into pans that were used in the steam table area and cooking area, lifting a 33-pound tub of rice and a 20-pound tub of Cajun rice per day, and putting about 50 "inserts" of food portions, weighing three to five pounds each, into a microwave oven above her head. Claimant was five feet tall. She said the rice tubs went into a steamer cabinet up over her shoulder in height and she did this once, sometimes twice, a day. She said that moving frozen items from the freezer to the preparation area was part of her job and that she did this three to four times a day. The other significant activity she did that involved lifting was hauling out trash.

Transcribed statements and testimony from coworkers disputed how frequently claimant would have to lift heavy tubs or do lifting in general. Another worker, Ms. M, said that while there was some lifting required, there was nothing really strenuous about picking up the little containers of food for the front line, that they would often go to "the guys" to assist with heavier pans, and that claimant would often do this and had stated she wouldn't lift anything heavy basically from the start of her employment. Ms. M recalled seeing claimant refuse to lift anything heavy. Ms. W said that the night shift did most of the product transfers to the food preparation area. Ms. W said that each shift should not have to move more than two cases of frozen items per day. She did not agree that the job was heavy lifting. Ms. W said that she presently was doing all stocking and did not move as

much as claimant contended she did. Claimant said that Ms. W's statement was not truthful in this respect. Ms. H, her supervisor, said that claimant asked to work in the back area. Ms. H had to cut the hours of employees at the store because business had evened out and they did not need as many workers, and that claimant had complained that this impacted her financially. Ms. H did agree that employees had complained on occasion that pans were too heavy. The witnesses did not recall claimant ever complaining of pain or the activities prior to leaving employment at the store.

Claimant said that the work in total was "too much for her" and, because she had never had neck or back problems before the work, she concluded that it was the cause. The claimant said her last day of work was December 24, 1998. She went to an emergency room (ER) on December 28th with back pain. Claimant saw Dr. R, D.C., on December 31st. She has been diagnosed with discs out of line and was advised not to go back to work. Claimant indicated that she first realized she was hurt on _____ when her back began to hurt. However, she also said that from the first she generally felt sore in the shoulders and neck.

Dr. R wrote on February 14, 1999, that claimant's diagnosis was myofascial pain syndrome with abnormal involuntary spasms and sacral segmental dysfunction. As the hearing officer's decision indicates, the doctor's understanding was that the claimant lifted food trays up 48 to 67 inches 80 to 100 times a day, and that these trays weighed eight to 48 pounds. Based on this history, he concluded that her problems were related to her employment. Claimant agreed that this was not accurate and she had since sat down and figured that she lifted items 50 times a day.

Dr. R treated her six days a week at first, and then a month before the CCH he had reduced treatment to three times a week. She said that the treatment was helping "somewhat." Dr. R told her she was not physically able to return to work and had not released her to return to work, and wanted her to see a specialist, whose name she could not recall. She did not have the money to see a specialist. An MRI of the lumbar spine showed moderate disc narrowing at one level and otherwise well-maintained disc spaces.

There was testimony that the store where she was injured first opened on November 9, 1998. (Other store records showed that the claimant was first employed on November 2, 1998.) The claimant said she went into training before she started working at the store and cleaning the store in preparation for the opening. She said that she did the food preparation activities for about a week before the store opened, for practice. She said that they would cook food for some of the other fast food stores owned by the store owner.

The ER records appeared to state that claimant had a history of neck pain for either "8" years or "X" year, on and off; the claimant did not know why this note would be in the record. She did not even think that the doctor had asked her a question about neck pain.

On cross-examination, claimant estimated that the heaviest item she put into the microwave was three to five pounds. She did not identify a particular activity that was injurious, but said that it was the combined weight and activity that caused her problems.

Claimant was scheduled for a required medical examination on March 31st, but did not go. Her answer as to why was convoluted. Essentially, she said she felt it would be a waste of time because the results would not be ready by the time of the CCH. Then, she contended that she called the Texas Workers' Compensation Commission and was told by "(Name)" that she did not have to go.

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 of this type, 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. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). Furthermore, ordinary diseases of life to which the general public is exposed are not considered compensable occupational diseases even if sustained at work. Although the hearing officer phrased part of his findings in terms of the expectations and activities of "an ordinary worker," this would not prevent compensability of a repetitious activity that an ordinary worker might do. Rather, it appears to us that the hearing officer is, in effect, observing that a variety of activities undertaken at work, and which cause some muscle soreness, are not unlike those which the general public will encounter in a day of activity as well as persons at the workplace. The evidence supports his finding that the claimant failed to prove that she underwent regular repetitious and physically traumatic activities. The hearing officer could choose to give less weight to the opinion of Dr. R as to the causal relationship when it became clear that the assumed facts underlying the opinion were not accurate.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza, *supra*. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.- Beaumont 1993, no writ).

When there is no finding of a compensable injury, an essential part of the finding of disability is not present. The hearing officer's finding that the alleged injury did not cause a loss of ability to obtain and retain employment is supported by the evidence. We cannot agree that the decision is against the great weight and preponderance of the evidence, and affirm the decision and order.

For these reasons, we affirm the hearing officer's decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge