APPEAL NO. 991009

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 8, 1999. The issues concerned whether the appellant, who is the claimant, sustained an occupational disease 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).

As indicated in the discussion portion of the decision, the hearing officer held that the claimant did not prove that she engaged in repetitively traumatic activities at work that led to an occupational disease. The hearing officer held that she did not sustain an occupational disease in the course and scope of employment, although due to her injuries she was unable to obtain and retain employment beginning _____, and continuing through the date of the CCH. In the absence of a threshold finding that the claimant had a compensable injury, she was found not to have disability.

The claimant has appealed, arguing that the hearing officer failed to take into account the great weight of evidence in favor of repetitive trauma. Evidence that the claimant believes supports a finding in her favor is recited. The claimant argues that the Appeals Panel should reconsider sitting as a compensable injury. The respondent (carrier) responds that it is clear that the hearing officer evaluated the evidence and did not merely rely on a belief that sitting could not lead to a compensable injury. The carrier points out that the evidence supports the decision made by the hearing officer on the resolution of facts on pertinent issues in the case.

DECISION

Affirmed.

The claimant said she worked as an attendance clerk at a school operated by the self-insured (referred to herein as employer or carrier, depending upon the context of the reference) for over 22 years. She filed a claim relating to pain in her neck, shoulder, and radiating to her wrists and hands. The claimant had not worked since _____, the day she made an appointment with her doctor, Dr. W. The claimant said her call to Dr. W was precipitated the week earlier by a strong headache and neck and shoulder pain which had been increasing in intensity to the point where work was difficult. Claimant had an MRI of her neck on April 8, 1998, which was reported as showing a minimal disc protrusion at C3-4, which minimally contacted the spinal cord, with several smaller bulges in other levels. The reporting doctor described this as degenerative disc disease changed, most prominent at C3-4. She said that Dr. W also referred her to Dr. K.

The claimant testified about various injuries to her neck, to her shoulders, and to her arms and hands. She said that she first noticed pain in her neck and shoulders as much as three or four years prior to _____, although she later stated that such pain began in

earnest at the beginning of that school year, which would have been in August 1997. Claimant generally described her duties on direct examination as involving computer work eight hours a day. She then said that attendance and absence information would be gathered in the morning and input into the computer in the morning, and agreed that she was not physically typing on the computer the entire eight hours. Claimant made reference on cross-examination to the fact that she was required to "carry things around." When her current treating doctor, Dr. D, testified, he stated that he was told that she lifted and carried heavy reams of copier paper frequently throughout the day. Dr. D worked in the chiropractic office of Dr. B, whom claimant identified as the first doctor to actually diagnose her with carpal tunnel syndrome (CTS). The claimant also testified that at some point in the school year there were computer problems requiring re-entry of data and some overtime hours, although the time and extent of this was not specified.

The claimant was asked to specify what activities she thought caused her neck pain, which she said started about four years before _____. She said that she medicated herself with Ben Gay and this worked well. She could not point with certainty at what activities caused neck pain but said she concluded that there was a relationship to her job because she first noticed those pains at work. The claimant said she had been advised that it was looking "down" for so long at the computer screen that caused her neck pain. Dr. D testified that he concluded she injured her neck at work due to the fact that she was "looking up" at her computer screen for long hours. Claimant could not recall her diagnosis for her shoulder problem or what her doctors said would have caused this. Dr. D testified that the shoulder pain would be caused by overuse from carrying "heavy objects." Dr. D said part of his understanding of her work conditions came from reviewing pictures of her workstation. He said that whether claimant looked up or down would not change his opinion, as long as the neck was held at a "severe angle."

Pictures were put into evidence purporting to show the claimant's workstation; her computer was located on what could be described as a "television cart." The monitor of the computer was on the top shelf and the bottom of the screen appears to be at eye level. However, claimant said that this was not the appearance of her workstation for a few years prior to _____. From a discourse with the hearing officer, it appears that her monitor was located on a large desk straight across from her.

Dr. D agreed that in nearly every examination he found abnormal deep tendon reflexes, that could be cervical or shoulder in origin, and restricted range of motion. He could not comment on why Dr. W or Dr. K, a referral doctor, found normal tendon reflexes and range of motion. Dr. D said that the cervical diagnosis was cervical intervertebral disc syndrome, which was different from the degenerative disc disease noted on the claimant's April 1998 cervical MRI. Dr. D stated that it was his understanding that degenerative disc disease was an overuse problem. Dr. D testified that claimant's CTS alone would prevent her from working.

To briefly review documentary evidence in the case, Dr. W wrote on March 9, 1998, that his diagnosis was chronic cervical pain. Another note from Dr. W opined that there

could be an upper extremity problem relating to the shoulder. Physical therapy records in March 1998 record generalized complaints of pain. On June 10, 1998, Dr. W found normal strength testing of the extremities and full neck range of motion with pain complaints over the shoulders. Deep tendon reflexes were unremarkable. He found some limitations on her lateral range of motion, with normal flexion and extension. Dr. W noted that she was very round shouldered. Dr. K stated on June 24, 1998, that the claimant was much better than in March and should consider returning to at least part-time work. Dr. K found normal deep tendon reflexes. He found minimal palpation tenderness in one aspect of the right shoulder but not elsewhere in that region. A month later, he found increased range of motion in the neck. Dr. K found negative Tinel's signs and only vague forearm tenderness, with excellent wrist movements.

Dr. D began treating claimant on July 27, 1998, and saw her on nearly a daily basis. He recorded numerous pain complaints, abnormal deep tendon reflexes, and range of motion restrictions, along with radiating pain and numbness. He recorded muscle spasms throughout the neck and shoulder area. Dr. D testified that he believed that claimant should be evaluated for surgery. He also stated that the CTS alone would preclude claimant from working. He said that claimant's headache was likely due to muscle spasms or could relate to her cervical disc bulge.

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. Davis v. Employers 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 stated that injuries from sitting are not compensable, we should clarify that the Appeals Panel has never entirely ruled out that a claim could ever be made for an injury resulting from, for example, assuming a strained posture over an extended period of time. What Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992, stated was that "mere sitting," without more, would generally be an activity in which the general public was also engaged. We believe that this opinion and the concurring opinion refrained from issuing the strict prohibition that some, but not all, subsequent cases may have interpreted. There is no need to further discourse and distinguish that case and others like it because evidence was not brought forward in this case, beyond conclusory argument, to paint a picture of any repetitive trauma through extraordinary posture. Consequently, we cannot agree that the hearing officer's statement reflects a failure to consider the evidence or erroneous analysis, because the evidence here fell far short of making a case that more than mere sitting was involved. The workstation photographs were not current. Claimant's testimony generally focused on a range of activities, in a generalized way, that she performed, which included lifting and

carrying as well as sitting. The hearing officer could choose to believe that the data entry that would result in an average day from student absences in one school would not entail eight hours of computer time. And she could conclude that the claimant's primary basis for concluding a work relationship was that she was first aware of her pain at work, and could not pinpoint even a series of activities that she felt led to this pain. The hearing officer could conclude 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 her observations 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. D as to the causal relationship when it became clear that the assumed facts underlying his causal opinion were not accurate.

The hearing officer is the sole judge of the relevance, 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. 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:

_____
Robert W. Potts
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge