APPEAL NO. 991452

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 June 14, 1999. The issues at the CCH involved whether the appellant, who is the claimant, sustained a compensable repetitive trauma injury, with the date of injury as _____, and whether she had disability as a result of this injury.

The hearing officer found that the claimant did not sustain injury from either breaking her chair or sitting in a broken chair. He further found that any inability to obtain or retain employment at wages equivalent to her preinjury average weekly wage was due to something other than an injury occurring at work and she did not have disability.

The claimant has appealed. The claimant argues that this is not a claim for mere sitting. She argues that the evidence showed that a specific injury was sustained on (prior date of injury), with continuing trauma thereafter. She argues that the injury caused the inability to work. The respondent (carrier) responds that the decision is supported by the record.

DECISION

Affirmed.

The claimant said she was employed by (employer), in the department that sought to obtain insurance reimbursement for patients using its products. The claimant said that on (prior date of injury), one of the new chairs that the employer supplied broke in the back when she adjusted it. The claimant said that because of this, she had to keep the back upright by pressing her own back into it. The chair in question was never described for the record.

The claimant said she reported this right away to the employer, but that this incident set up a continuing course of pain which worsened and resulted in her seeking medical treatment on _____. As it happened, this was the same day she filed a written response to a written reprimand she had received (but would not sign). The claimant asserted that the reprimand process (preceded by two verbal counseling sessions) had "nothing to do with her back."

Claimant was first treated by a company doctor on March 1st, when she requested to be sent to a doctor. The diagnosis was lumbosacral strain. The recorded history notes that claimant has noticed her pain for three months; no mention is made of an incident in which she was struck in the back. She then was treated by Dr. M, and had an MRI on March 27th. The MRI was reported by a radiologist as showing only degenerative bulging and was characterized by Dr. M as mild. The claimant said that the MRI was not paid through workers' compensation, but through her private insurance. The claimant said she was unable to work due to inability to sit for long periods of time without her leg going

numb. The claimant thereafter was referred to Dr. H by her attorney. Dr. H testified by telephone at the CCH.

Much of claimant's argument, as well as the testimony and opinions of Dr. H, were based upon a history of problems that she had with "the chair." In fact, as e-mail notes written by the claimant on February 1st and 2nd to her supervisor and the human resources manager indicate, the claimant had by that date been supplied with at least three chairs. Again, whether these were similar to or different from each other was a fact left undeveloped in the record.

When he testified, Dr. H set forth a different understanding of the sequence of the history of injury. He agreed that her back injury resulted from a combination of sitting in a broken chair over time, and then having a specific incident of being hit in the back which caused her to seek medical treatment. His report of March 25, 1999, somewhat contradicted this testimony in that he stated she was using a broken chair in December 1998, and acknoweldged that her chair was changed at least three times, the last time being February 1999. Dr. H said that he read the MRI to indicate a herniated lumbar disc. He was not, however, a radiologist or orthopedic specialist.

On April 1, 1999, claimant underwent a functional capacity evaluation at Dr. H's request. She was found to have qualified at the sedentary work level. She agreed that her job at the time of injury was sedentary level, but that the need to sit for long periods of time precluded her from performing this. She said she has not returned to work because she has not been "released."

Ms. S, the human resources director for the employer, said that claimant had been supplied with various chairs. She agreed that the claimant had reported a broken chair in December, although she had not stated that the chair struck her back. Ms. S said that the particular chair had caused problems in that a number of them broke.

As reflected in the appeal, the claimant's theory of injury appears to be a blend between a specific injury asserted to have occurred on (prior date of injury), and repetitive trauma thereafter. However, the hearing officer was asked to adjudicate this as the matter was reported from the benefit review conference, that is, whether the claimant sustained injury "on" _____, which date makes sense only in the context that this was asserted as a repetitive trauma injury.

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. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). This is especially true where, as here, the activity

undertaken is one common to nonworkers and workers alike. A compensable occupational disease does not include an ordinary disease of life to which the general public is exposed.

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). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). 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).

In this case, the assertions that there was a repetitive trauma injury which followed on a specific injury was frankly not supported by the facts brought out in the documentary and testimonial evidence. Dr. H's understanding of the mechanism of injury at the CCH, or the nature of the injury, was contradicted by other evidence in this case. There was no description of any of the chairs which may have assisted in understanding the claimant's contention that sitting in them was injurious. Finally, the objective evidence of injury would support the hearing officer's inference that claimant suffered from degenerative disc disease, an ordinary disease of life. The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We do not agree that this was the case here, and affirm the hearing officer's decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Elaine M. Chaney
Appeals Judge