

APPEAL NO. 991825

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 July 22, 1999. She (hearing officer) determined that the respondent's (claimant) compensable injury of _____, included the neck and that she had disability from January 19, 1999, through the date of the CCH. The appellant (carrier) appeals these determinations, contending that they are against 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, who was 65 years old at the time of the CCH, worked as an assembler in the production of surgical masks. As part of a three person team, she would typically spend her work-day pulling the masks from the machine that made them and then rotate to two other jobs, each for 30 minutes, packing the masks and making them ready for shipping. She claimed a repetitive trauma injury to her right shoulder and neck. The carrier accepted a shoulder injury, but has disputed a cervical injury, generally diagnosed as a strain.

Section 401.011(26) defines injury as "damage or harm to the physical structure of the body" Included in the definition of injury is an occupational disease. An occupational disease is a "disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury." Section 401.011(34). Excluded from the definition of occupational disease is an "ordinary disease of life to which the general public is exposed outside of employment" Section 401.011(34). A repetitive trauma injury is an injury that occurs "as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Section 401.011(36). The position of the carrier is that the claimant's neck strain is an ordinary disease of life and that she failed to prove repetitive trauma as the cause of the injury.

In her written report of the claimed injury, the claimant said she worked the assembly machine "with my head bent." In her testimony, she said she had to repeatedly move her head down, then back to "regular level." She could work the machine standing or sitting on an adjustable chair. Medical reports of treatment at a clinic give a history of "lifting and packing boxes and looking down all day" or "bending forward all day." Others describe "repetitive lifting and packing boxes in a forward bent position all day." These activities were asserted to have caused a sudden onset of pain on _____. The claimant was examined by Dr. D, a required medical examination doctor, on April 28, 1998. He recorded her history as requiring her "to repetitively flex and extend her cervical spine as she looks down to pull the masks off the machine" and to place the masks in boxes and reach above

her to place them on a pallet. Dr. D concluded that this "mechanism" of injury "certainly could cause" her pain syndrome.

The carrier introduced a videotape of assembly operations showing other workers performing the claimant's job. One could deduce from reviewing this tape that, at least as regards the pictured employee, neck movement was minimal. Although the claimant said the pace of operations in the videotape was slower than what she did, Mr. M, her supervisor, testified that the videotape reflected the correct pace for the claimant and that the pace was largely dictated by the machine. He also said that this was the machine the claimant used.

The claimant had the burden of proving a compensable repetitive trauma injury to the neck or cervical spine. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). In Texas Workers' Compensation Commission Appeal No. 94941, decided August 25, 1994, we pointed out that to establish a repetitive trauma injury, the claimant must present some evidence that one is engaged in essentially the same trauma-producing conduct that is reasonably frequent, that is repetitive, in nature. For the repetitive trauma injury to be compensable, a claimant must further show that these activities affect the claimant in a way not common to the general public. The carrier, relying on Mr. M's testimony and the videotape, asserts that the claimant sustained no more than an ordinary disease of life and that the medical evidence, particularly that of Dr. D, which attempts to connect the injury to the workplace, was based on an erroneous understanding of the physical activities of the claimant on the job. It also cites our decision in Texas Workers' Compensation Commission Appeal No. 92525, decided November 19, 1992, for the proposition that the claimant's work activities were so common and ordinary that they were never intended to be covered by workers' compensation.

We agree that expert evidence given in reliance on erroneous or invalid factual presumptions is nonprobative. In Appeal No. 92525, the Appeals Panel reversed a determination that a telephone operator had sustained a compensable occupational disease injury to her voice, hoarseness, due to her extended periods of talking in a normal voice. The carrier's reliance on Appeal No. 92525 is misplaced because the distinguishing characteristic of that case was that the "evidence did not point to any unusual and special prevalence of disease-causing circumstances on the job. "Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1997. In the case we now consider, the claimant presented evidence, which the fact finder chose to credit, that regardless of how others may have performed the job, she did her work with her head and neck bent forward, a position that the hearing officer could conclude was of a different character than experienced by the general public. Accordingly, Appeal No. 92525 does not establish error as a matter of law on the part of the hearing officer. Whether the claimant's testimony described a more correct version of her job activities than the videotape and established a repetitive trauma injury were questions of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94266, decided April 19, 1994. Once the hearing officer accepted the claimant's version, she could further conclude that the medical

evidence which relied on the claimant's history of her work activities was also credible and persuasive. Under our standard of review of factual determinations of a hearing officer, we find the evidence sufficient to support the determination that the claimant sustained an occupational disease, not an ordinary disease of life. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986)

The carrier appeals the disability finding on the grounds that the compensable injury did not include the neck. Having affirmed the finding of a compensable neck injury, we also affirm the disability finding.

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

Alan C. Ernst
Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge

Dorian E. Ramirez
Appeals Judge