APPEAL NO. 000398

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 24, 2000. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease and did not have disability. In his appeal, the claimant contends that the hearing officer's injury and disability determinations are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The claimant testified that he was employed as a telemarketer selling home equity loans for the employer. He stated that he made 20 to 25 telephone calls per hour and that he had to input information either by mouse click or by keyboard. He acknowledged that the information he had to input varied based upon whether he made a sale or not and based upon the accuracy of the information that was already provided on the computer screen. He stated that on _____, he noticed a lump on his right wrist but he did not know what it was or what had caused it. On November 1, 1999, his employment was terminated. On November 8, 1999, the claimant sought medical treatment with Dr. G, a chiropractor. Dr. G diagnosed a ganglion cyst and bilateral carpal tunnel syndrome (CTS). Dr. G referred the claimant to Dr. T, for nerve conduction testing. Dr. T reported that the claimant's testing revealed "minimal bilateral demyelinating sensory median neuropathy at the wrist (*i.e.* [CTS])."

Mr. B, the director of operations for the employer, testified that the claimant was not required to perform repetitive data entry work for the employer. He explained that many of the questions in a field could be answered with a mouse click and that if keyboarding was required the claimant would type words or phrases, as opposed to sentences. In addition, Mr. B testified that the comment screen at the end of a loan application was limited to a maximum of 40 characters, including spaces. Mr. B stated that if a customer declined, the claimant would have to perform four mouse clicks and that the average sale, or loan application, was completed in three to five minutes. Mr. B testified that there were periods where the claimant could rest his hands in between entering the limited information which he was required to input.

The carrier had an ergonomic assessment of the telemarketing position performed. That report concluded that the claimant's "keyboard and mouse activities were limited to one event of three to five minutes duration per hour, or less, during his period of employment at [employer]." The carrier had Dr. H perform a records review to provide an opinion as to whether the claimant's ganglion cyst and bilateral CTS were work related. Dr.

H testified at the hearing that it was reasonable to determine that the claimant had a ganglion cyst; however, he further testified that he was not satisfied that the claimant had bilateral CTS. Dr. H further testified that the ganglion cyst was "definitively not caused" by the claimant's employment activities. Dr. H opined that ganglion cysts are "remnants of embryonic development." Dr. H stated that if he were to assume that the claimant had bilateral CTS, within reasonable medical probability it was not caused by the performance of repetitious physically traumatic activities at work. Dr. H testified that under Department of Labor guidelines there is a correlation between the performance of repetitively traumatic activities at work and the development of CTS where a person performs frequent or constant repetitious activity, which is defined as performing repetitious activity 66% of the time or more. Dr. H opined that there is no positive correlation between occasional repetitious activity, 33% of the time or less, and the development of CTS or other repetitive stress disorders. Dr. H noted that the claimant's repetitive activity fell in an infrequent/occasional category; thus, he concluded that it was not reasonably medically probable that the claimant's CTS, if he had CTS, was caused by his work activities.

Dr. G wrote a letter in response to Dr. H's report. In his January 13, 2000, letter, Dr. G opined that the claimant's ganglion cyst was caused by the repetitive activities the claimant performed at work. Specifically, Dr. H stated "[i]n my experience a ganglion cyst is caused by repetitive trauma which is usually accompanied with Carpal Tunnel. The diagnosis was confirmed by [Dr. T]." Dr. H concluded "[b]ased upon the subjective findings and the exam findings performed by all doctors it is my professional opinion that [claimant's] injuries were caused by his employment."

The claimant has the burden to prove by a preponderance of the evidence that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App. -Texarkana 1961, no writ). That question presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. The testimony of the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant did not sustain a compensable repetitive trauma, occupational disease injury. A review of the hearing officer's decision demonstrates that he simply was not persuaded that the claimant presented sufficient evidence to demonstrate the causal connection between his ganglion

cyst and bilateral CTS and his work activities as a telemarketer. The hearing officer specifically noted that the claimant's "allegation of repetitive motion needed to be supported by evidence of the extent and nature of the work he performed, with some description of the repetitive activity that affected him in a way not common to the general population. [Citations omitted.] The Claimant fell well short of that evidentiary requirement." The hearing officer emphasized that the claimant did his typing in short bursts of about five minutes when he made a sale and that the typing he had to do when he did not make a sale "was so minimal that it could hardly be called repetitive." The hearing officer was acting within his province as the fact finder in discounting the claimant's testimony and the causation opinion of Dr. G. He was free to give more weight to the testimony from Mr. B and the ergonomic assessment which indicated that the claimant did not perform repetitively traumatic activities at work, and the opinion of Dr. H that the claimant did not perform sufficient repetitively traumatic activities to have caused CTS. In addition, the hearing officer could credit Dr. H's opinion that the ganglion cyst was "definitively not caused" by the claimant's employment. Our review of the record does not reveal that the hearing officer's determination that the claimant did not sustain a repetitive trauma, occupational disease injury in the course and scope of his employment is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, no sound basis exists for us to reverse that determination on appeal.

Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the hearing officer's determination that the claimant did not have disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge