APPEAL NO. 000459

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 February 15, 2000. The issues at the CCH were whether the respondent (claimant) sustained a compensable injury in the form of an occupational disease on _____; and whether the claimant had disability. The hearing officer determined that the claimant sustained a compensable injury in the form of an occupational disease (left tennis elbow and left carpal tunnel syndrome (CTS)) on _____; and that the claimant had disability on October 21, 1999, and beginning again on October 25, 1999, and continuing through the date of the hearing. The appellant (carrier) appealed, contended that all occupational diseases must be established using expert medical evidence, urged that the evidence is not sufficient to support the determinations of the hearing officer, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant did not sustain a compensable injury and did not have disability. The claimant responded; urged that the evidence, including the medical reports, is sufficient to support the decision of the hearing officer; and requested that it be affirmed.

DECISION

We affirm.

The claimant testified that she began working for the employer as a bus operator in _____; that she sustained a compensable low back injury in _____; that as a result of that injury, she was off work until January 1999; and that some time after that, she missed about two weeks of work because of back pain. She said that she obtained a license as a cosmetologist in 1994 or 1996, but she never worked as a cosmetologist. The claimant stated that as a bus operator she worked a split shift, had about three and one-half hours off between shifts, drove a bus, used a handle that was to the left of her to open the door, moved her hand from about the three o'clock position to about the twelve o'clock position to open the door, did not bend her wrist when she opened and closed the door, and opened the door about 50 times a day. She testified that in about August 1999, her elbow swelled; that she went to a doctor; that she was given something to rub on it; and that it helped some. She said that her left arm did not hurt on October 18, 1999; that during the morning shift on _____, she started having pain; that during the afternoon, she had sharp, shooting pain every time she would open the door or turn the steering wheel; that on _____, she got an appointment with Dr. S, her primary care physician; that she saw Dr. S on October 21, 1999; that he diagnosed tennis elbow; that she went to Dr. A, an orthopedic surgeon; and that Dr. A agreed with Dr. S.

In a report dated October 21, 1999, Dr. S recorded what the claimant told him; diagnosed lateral epicondylitis; prescribed medication and a tennis elbow support; suggested that she report it as a work injury; opined that she likely had a work-related overuse type injury; and took her off work until October 25, 1999. In a report dated October 25, 1999, Dr. A said that the claimant gave a history of having sustained a work-related

injury on _____; that she reported that she felt pain in her left elbow when driving a bus; that his diagnosis was left tennis elbow and possible left CTS; that the claimant's past medical history was noneventful and noncontributory; and that he prescribed anti-inflammatory medication, analgesics, muscle relaxants, and physical therapy and took her off work until further notice.

In its appeal, the carrier stated that all occupational diseases must be established using expert medical evidence, but did not cite a case to support that statement. In Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992, the hearing officer determined that the claimant sustained a repetitive trauma injury to her back while working as a driver for a parcel delivery service. The Appeals Panel cited Texas court decisions; stated that the courts have held that to recover for a repetitive trauma injury the employee must not only prove that the repetitious physically traumatic activities occurred on the job, but must also show that a causal link existed between the traumatic activity and the injury, that is, that the disease must be inherent in the type of employment as compared with employment generally; noted that generally injury and disability may be established by lay testimony of the claimant alone; said that there is a narrow exception requiring expert testimony where a claimant asserts that his injury aggravated cancer or a disease, or when an injury to a specific part of the body is alleged to have caused damage to another unrelated body part; rejected the carrier's argument that the claimant's surgeon's statement that her work-related activities could have caused a ruptured disc was insufficient medical evidence and that only expert medical evidence was probative of such causation; and affirmed the decision of the hearing officer. When expert medical evidence is required, the form of the expert medical evidence is not as important as is the substance of it and the use of "reasonable medical probability" is not required. Texas Workers' Compensation Commission Appeal No. 951417, decided October 9, 1995. In Texas Workers' Compensation Commission Appeal No. 962516, decided January 22, 1997, the Appeals Panel reversed the decision of a hearing officer that the claimant did not sustain a repetitive trauma injury in the course and scope of her employment because the hearing officer stated that the medical evidence only showed that it was possible that the CTS resulted from the claimant's job duties and that the evidence did not meet the reasonable medical probability standard. Courts and the Appeals Panel have stated that the requirements are different in some other situations, such as chemical exposure.

The burden is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding

medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The claimant told the doctors she went to what she did at work. Dr. S stated that it was likely that the claimant sustained a work-related overuse type injury. Dr. A stated that the claimant's past history was noneventful and noncontributory. An appeals level body is not a fact finder, and it 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). The hearing officer's determination that the claimant sustained a repetitive trauma injury in the course and scope of her employment is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support that determination of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

The appeal by the carrier of the determinations concerning disability is based upon the contention that the claimant did not sustain a compensable injury. Since we have affirmed the determination that the claimant sustained a compensable injury, we also affirm the determinations concerning disability.

Tommy W. Lueders
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Elaine M. Chaney
Appeals Judge