APPEAL NO. 001136

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 18, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease on _____; and that the claimant did not have disability. The claimant appealed and asked that the case be reversed on the determination that he had no injury, and remanded on the issue of a "finding" of a second injury in the service of another employer, so that the second employer and the carrier can be brought into the proceeding. The claimant also asserts that this particular hearing officer exhibits bias toward patients of the claimant's treating doctor, Dr. V, D.C. The respondent (carrier) responded that the decision is sufficiently supported on both the injury and disability holdings.

DECISION

We affirm.

Evidence Concerning the Injury

The claimant was employed by (employer), and assigned to various temporary assignments. He said that he did mostly warehouse-type work and he also worked temporary assignments for another temporary services company. The evidence showed that he asked for a 50-pound weight restriction from the employer.

In mid-October, the claimant was assigned to work at a laboratory where he inspected child-proof safety caps. He said he worked on an assembly line which sent 12 boxes with 12 bottles in each box to him at a time, and he had to uncap and check the seals on each bottle. The claimant contended he could do all of these bottles in five minutes. The assignment involved five 10-hour days beginning at 6:00 a.m.

Near the end of the first week, on _____, the claimant said, he felt a little sore, but that night woke up with pain and numbness in his right hand. The claimant said that he knew he could not report to work the next morning and he waited until the employer's office opened at eight o'clock to call in. He said Ms. E from the employer called him at about 7:55 a.m. and asked why he had not reported to work at the laboratory. The claimant said he reported his injury as the reason to Ms. E, but she asked him to finish out the assignment. He said that he was essentially threatened with no more assignments if he would not go to work at the laboratory.

The claimant said that Ms. E asked him how he liked the job and he said he did and in fact considered it to be easy. Ms. E's recollection about this telephone conversation was different. She said that the employer's office opened at 7:30 a.m., and at that time the laboratory called to report that the claimant had not shown up for work. She called the claimant's house and a woman answered the telephone and said that the claimant was

asleep. The claimant returned her call 10 minutes later and complained that the job was not to his liking and was too far to drive. He did not mention any injury to Ms. E and was told that if he would not finish out the assignment it would affect his ability to receive future assignments from the employer.

She said that after this conversation, the claimant was effectively "terminated" from the employer, which meant that they would no longer seek assignments for him. The claimant filled out an injury report for the employer on _____.

The Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) filed by the carrier on October 27, 1999, disputes that an injury occurred and contends that the claim is in retaliation for having been terminated. No preexisting or subsequent intervening injury is asserted. The claimant denied that he had any previous hand problems before _____. He contended at the CCH that his injury included his right thumb.

Medical Evidence

The claimant was treated by (medical clinic) on _____ for right wrist tendinitis. The notes record his history of repetitively removing bottle caps. He was given anti-inflammatory medication and advised to wear a splint. He was returned to work on this date with restrictions on lifting, pushing and pulling, and use of hand tools. A report on October 26th diagnoses a strain of the right wrist and finds decreased range of motion. His restrictions were continued. Improved range of motion was found on October 29th and November 3rd, but the claimant's restrictions were continued. On November 8th, the medical clinic notes show no restrictions on range of motion of the right wrist but some pain. The claimant's work restrictions were continued.

The claimant changed treating doctor to Dr. V on November 10th. Dr. V's report diagnoses various nerve lesions, tenosynovitis, and carpal tunnel syndrome (CTS) of the right wrist. Dr. V said that there was decreased range of motion, pain, misalignment on palpation, and muscle weakness. On November 29, 1999, Dr. B found the claimant to have very mild CTS.

The claimant began receiving very frequent therapy from Dr. V's office that may or may not have resulted in improvement in November and December 1999, as Dr. V continues to record under "objective" a <u>decreased</u> range of motion on each visit, although percentages of improvement in other symptoms are noted each time in this category. However, the objective symptoms recorded on each report of Dr. V are essentially identically worded with only the percentage of improvement changing throughout the months of treatment, rising from 10% to 50% improvement by December 29th. The assessment portions of each report contend a slight or slow improvement on each visit through the end of December 1999. Dr. V's reports do not comment on ability to work.

On January 21, 2000, Dr. V wrote that he had treated the claimant for strain and sprain caused by consistently screwing and unscrewing medicine bottles. No diagnosis or treatment for the right thumb is expressly mentioned. On February 21, 2000, the claimant was examined by Dr. S in a required medical examination. Dr. S said that the claimant had signs and symptoms consistent with right "trigger thumb." Dr. S found no CTS. He said that the claimant's thumb injury was consistent with having squeezed small bottle caps, a job which he acknowledged had lasted only a few days. Dr. S opined that the claimant had some preexisting tenosynovitis. Dr. S recommended surgery.

Evidence on Disability

The claimant maintained he could not work due to his right hand injury. However, he took a temporary assignment in January 2000 from the other temporary services company. This involved removing empty boxes from warehouse shelves and cutting them down for disposal. He used his right hand and a cutting knife. He also took a job sorting mail that he had continued to do through the time period of the CCH. This job paid $8.50 an hour, as opposed to the $8.00 an hour he made at the laboratory. The claimant also was paid $15.00 a trip for driving a friend to and from the doctor's office three times a week.

He said that he had trouble performing many activities of daily living. A videotape in evidence for periods of observation on November 10 and 15, 1999, largely shows the claimant walking to and from his car on various occasions. Sometimes he was shown wearing a support bandage on his right wrist. He also used his right hand to open doors or his car trunk. The claimant did not contend that he was completely unable to use his right hand. He said that the mail sorting job was within his restrictions.

Discussion on Injury and Disability

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.). Generally, lay testimony establishing a sequence of events which provides a strong, logically traceable connection between the event and the condition is sufficient proof of causation. Morgan v. Compugraphic Corp, 675 S.W.2d 729, 733 (Tex. 1984).

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 note at the outset that unsubstantiated allegations of bias against the claimant due to his choice of treating doctor cannot be credited, and observe that rulings on evidentiary objections made by both parties during the course of the hearing were made in favor of both parties, with no evidence of bias against the claimant by the hearing officer. If the hearing officer accorded less credibility to Dr. V's reports, this may have occurred due to the evident "boilerplate" language that was carried over from report to report and the comparatively severe clinical observations recorded only days after the medical clinic recorded nearly normal range of motion. It was the hearing officer's responsibility, as finder of fact, to resolve conflicts in the medical evidence, and the belief of the accuracy of one record over another does not equate to bias.

The issue before the hearing officer did not involve whether there was a subsequent compensable injury that occurred nor was evidence on this developed and no remand need be done to expand the matters and parties brought before the hearing officer at the CCH. We interpret the hearing officer's finding as to the cause of a right thumb injury not as an adjudication that there was a second compensable injury, but as part of her assessment of Dr. S's opinion on causation. The hearing officer believed that Dr. S was not informed of the January 2000 box cutting job which she deemed material to his opinion that a right thumb injury was caused in October 1999.

More troubling is that there is plainly evidence in existence prior to January 2000 of at least a right wrist strain. It is, however, the claimant's burden to persuade the hearing officer that this resulted from his activities at the laboratory. 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). While different inferences could have been drawn, at least as to the existence of a strain, the hearing officer could also evaluate Ms. E's testimony as credible and conclude that an on-the-job injury would have been reported to Ms. E on October 19th.

Without a threshold finding of compensable injury, the hearing officer's determination that there was no disability, as defined in Section 401.011(16) is supported.

We cannot agree that the decision as to injury is against the great weight and preponderance of the evidence, and affirm the hearing officer's decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Section Manager

Tommy W. Lueders
Appeals Judge