APPEAL NO. 001621

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 5, 2000. The hearing officer determined that on _____, the appellant (claimant) did not sustain a compensable injury; that the claimant did not have disability; and that the respondent (carrier) did not waive the right to contest compensability.

The claimant appealed and argued that the decision was against the great weight and preponderance of the evidence. The claimant contended that pictures and a videotape that had not been timely exchanged were admitted erroneously by the hearing officer. The claimant also argued that the carrier waived the right to dispute compensability because it did not pay or dispute within seven days of receiving written notice of the injury. The carrier responded that the decision is sufficiently supported and has not responded to either the waiver or the evidentiary point raised.

DECISION

We affirm, although we find error in admission of certain evidence that was not timely exchanged by the carrier.

The claimant said she had worked for (employer) for about 21 years at the time of her alleged injury on _____. She was in her early 50s at this time.

The claimant said that she was transferred in October 1999 to assembling some racks. This involved a variety of actions, some of which she would perform while on a step ladder. Asked what happened on _____, the claimant did not point to any specific occurrence. She agreed that as near as she could recall, nothing specific happened to cause her onset of pain. She stated that she felt ill in general that day and noticed that her back hurt as well. She was off work for about two or three days for illness. She said that she did "not recall" exactly what she reported to her doctor on November 19 about what was wrong, although she felt that she discussed both her back and her congestion. The clinic notes state that she was treated for sciatica and sinusitis.

The claimant said that she called in sick to her employer but did not report that her back hurt. Asked why, she said that she did not think much of it. The claimant said that on Thanksgiving Day, while she was visiting her daughter, she felt very sharp back pain which radiated down her leg. The claimant again sought treatment from her family doctor, Dr. B, on November 29 and was given some expired medication samples, which made her decide to seek another doctor. The claimant returned to work and felt sharp pain as she was getting off a ladder at work on _____. The claimant also said that she felt that pushing and pulling the racks around resulted in her back pain.

The claimant sought treatment from Dr. V on December 1, 1999. Dr. V's copious case notes are in evidence. He initially noted a date of injury of _____, and a history

of the claimant having climbed up a ladder. Dr. V's notes indicate he was treating muscle spasms in the lumbar area. It is unclear what he believed the injury to be, although in a statement dated February 8, 2000, he attributed it to the claimant's climbing on the ladder to build a rack. A referral doctor, Dr. W, diagnosed lumbosacral radiculitis.

The carrier's attorney interviewed two supervisors of the claimant on April 6, 2000, on videotape. Apparently, pictures of the workplace and the claimant's home were taken the same day. (The pictures of the work site were duplicates of frames of what was made on the videotape.) The videotape was not exchanged with the claimant until late May and received on May 30, 2000. However, on April 10, 2000, the carrier had responded to interrogatories which included this question:

> Has any individual acting at the request of, or on behalf of, the carrier taken any photographs, videotapes, or motion pictures of the claimant since the date of the injury?

The response given was that "to date" no photographs or videotapes "have been taken." These answers were signed by the attorney for the carrier who four days earlier had taken the videotape. The claimant objected on the basis of failure to exchange and pointed to the interrogatory answer as untruthful. The carrier's response was at first to dispute that it was asked of same had been "taken" and then to assert that there had been technical problems that had to be resolved by an outside firm and that when it answered interrogatories, it was not clear that the carrier would be able to use the videotape at the CCH.

Although the asserted sending of this videotape to an outside technical firm for repair was asserted as the "good cause" for late production, the carrier indicated that the videotape had been given to the technical firm by the time the interrogatories were answered, which would, we note, indicate an intent to use the videotape at the CCH. As the claimant's attorney also pointed out, the videotape is stopped slightly before the midway point for a quality check; the carrier's attorney agreed but then stated that it was not clear that the videotape would be useable after this point.

There was no clear explanation as to why the pictures of the workplace could not have been exchanged promptly in April, except that this was apparently also tied to the asserted repair of the videotape. They were eventually sent to the claimant on May 22, 2000, and the videotape was sent later. The attorney for the carrier could not state the day that the technical firm returned the videotape, although it was asserted that exchange was made "immediately" after such receipt.

The hearing officer admitted the videotape and pictures on a finding of "good cause" without reciting what that good cause was. Initially, we agree that the hearing officer erred in admitting the videotape and pictures. First, they were not timely exchanged with the claimant (Section 410.161) and there was no evidence as to why copies (or repairs) could

not have been made promptly. Furthermore, their existence and a synopsis of what was included thereon could have been disclosed even if repairs were being done.

Secondly, the failure to exchange was exacerbated in this case by the sworn interrogatory answer, which was plainly not an accurate answer to the question asked concerning at least the videotape, and the claimant was thereby misled into believing that no such pictures or videotapes existed until shortly before the CCH. A trier of fact should not turn a blind eye to such an occurrence when it is pointed out and is part of the basis of objection to untimely exchanged evidence. The interrogatory in this matter was not qualified as to photographs or videotapes that the carrier intended to use at the CCH and the perceived need to send the videotape out to a technical firm does not constitute good cause in this case for either the late exchange or the failure to make disclosure of the existence of the videotape and pictures. We have, therefore, not considered these exhibits in our decision.

We do not reverse the decision on existence of a compensable injury, however, because the pictures and tapes were not critical to the hearing officer's decision in this case, which is otherwise supported by the record. The claimant bears the primary burden of proof in a claim of injury; the carrier does not have to prove that an injury did not occur.

As noted in Texas Workers' Compensation Commission Appeal No. 960929, decided June 28, 1996, an accidental injury should be traceable to a definite time, place, and cause. United States Fire Insurance Company v. Alvarez, 244 S.W.2d 660 (Tex. 1951). There was essentially a lack of testimony about any specific incidents occurring in _____, on either _____ or _____, that would have resulted in the claimant's back pain and only a generalized description of activities that might have caused back pain.

If the claim is one for repetitive trauma injury, we observe that 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. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). While the claimant generally described functions that were performed for assembly, the record fails to convey a sense of what, or how, these activities transpired to cause injury to the claimant's back. We would further note that the definition of "occupational disease" set out in Section 401.011(34) includes repetitive trauma injury but excludes ordinary disease of life. The fact that one may experience pain at work does not mean that the pain arose from activities originating in the work.

The hearing officer stated that she did not find the testimony credible on causation. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.- Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ).

Finally, the dispute to compensability (December 10, 1999) was made within 60 days of the date written notice of injury was received (_____). This was timely according to the longstanding interpretation of the Texas Workers' Compensation Commission (Commission). The Commission has not adopted the decision of the 4th Court of Appeals in Downs v. Continental Casualty Co., No. 04-99-00111-CV (Tex. App.-San Antonio August 16, 2000, no pet. h.) pending further appeal of that decision.

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 cannot agree that this was the case here and affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Philip F. O'Neill
Appeals Judge