APPEAL NO. 001801

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 12, 2000. The hearing officer determined that the compensable injury sustained by the respondent (claimant) on _____, did include an injury to the cervical "spine(neck.)" The appellant (carrier) appealed the adverse determination on the grounds of sufficiency of the evidence and, in the alternative, contended that the hearing officer erred in not excluding testimony of the claimant because she did not adequately respond to interrogatories. The carrier asserted that it had no understanding as to the cause of the cervical injury due to the vagueness of the answers provided by the claimant. The appeals file does not contain a response from the claimant.

DECISION

Affirmed.

We first address the carrier's contention that the hearing officer erred in allowing the claimant to testify. The carrier contended at the CCH that the interrogatories it sent to the claimant regarding causation were too vague to apprise it of the nature of the injury. (The interrogatories and answers were admitted as part of the hearing officer's exhibits.) In response, the claimant replied that "repetitive motion working as reservationist and unnatural positioning of head while acting as reservationist" and "see exchange" were sufficient answers because records documenting the cause of the neck injury were supplied as part of the documentary exchange prior to the CCH.

Section 410.161 provides:

> A party who fails to disclose information known to the party or documents that are in the party's possession, custody, or control at the time disclosure is required by Sections 410.158-410.160 may not introduce the evidence at any subsequent proceeding before the commission [Texas Workers' Compensation Commission] or in court on the claim unless good cause is shown for not having disclosed the information or documents under those sections.

We note that neither the 1989 Act nor Commission rules provide a specific remedy against a party that fails to comply with discovery other than to exclude that evidence which had not otherwise been exchanged. The only remedy is that absent a good cause finding, any unexchanged information and documents may be excluded. Texas Workers' Compensation Commission Appeal No. 990697, decided May 17, 1999; Texas Workers' Compensation Commission Appeal No. 982829, decided January 15, 1999. We review the hearing officer's ruling on an abuse of discretion standard. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ); Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. It is clear

from the hearing officer's comments and actions that she believed the claimant did answer the interrogatories as to causation and also did exchange documentation supporting such theories. We find that the hearing officer did not err in allowing the claimant to testify.

The parties stipulated that the claimant sustained a compensable injury in the form of bilateral carpal tunnel syndrome (CTS). The claimant testified that she worked as a reservationist and customer care representative and her duties required her to take incoming telephone calls all day and enter information into a computer using a keyboard. She stated that she did not sit at the same workstation everyday and would take what was available when she arrived for work. The claimant explained there were two basic setups for the computers, one higher than the other which would cause her to look down to view the screen. The claimant testified that she used two different computers when performing her customer care duties. One of the computers was placed between her and another coworker and she would have to look to the side in order to see the screen from the second computer. The claimant testified that she worked as a customer care representative about 50 percent of her work hours and she generally worked between 20 and 25 hours each week but that the days varied as her services were needed.

The claimant stated that her neck pain began in 1997 but she did not seek medical treatment. She acknowledged that she had TMJ and braces, but asserted these conditions caused a different kind of pain. The claimant admitted that she initially sought treatment with the company doctor only for her CTS complaints and did not assert neck problems until she sought out Dr. B as her treating doctor to whom she had been referred by her union. Medical records from doctors who initially examined and treated the claimant in November 1999, do not contain complaints from the claimant that her neck was hurting. The claimant stated that since 1997 she had been working out at a gym and used weights as part of her exercise program, but had discontinued the weights in 1999.

The claimant's treating doctor, Dr. B diagnosed the claimant with a cervical strain and provided chiropractic therapy for the strain. He testified that the claimant described her job duties as a reservationist using a computer keyboard and computer monitor. Dr. B stated that the claimant's repetitive and cumulative up and down and side-to-side head movements caused her muscles to exceed their metabolic threshold which caused myofascitis and a strain. He testified that when the claimant was typing, her shoulders bent forward which would cause her neck to flex forward into an awkward position. Dr. B opined that the cause of the claimant's neck problems was her exposure to her work activities. The claimant offered medical records from Dr. B to support his testimony.

On cross-examination, Dr. B admitted that he did not hold any type of certification in ergonomics or take any classes on the subject, was not familiar with the American or International standards for computer workstations and had not seen how the claimant performed her job. Dr. B acknowledged that the claimant had problems with TMJ which could preface cervical complaints and that the claimant undertook personal daily activities which also caused her to flex her neck. He admitted that about twenty percent of his

patients worked for the employer. Dr. B testified that despite his care and the claimant not working for the past eight months, the claimant's neck condition had not improved.

Dr. S testified that he was a certified professional ergonomist and that he had seen the claimant's workstation. He testified that he was familiar with American and International workstation requirements and opined that the reservationists working for the employer were subjected to a nominal risk for purposes of developing upper-extremity problems. Dr. S found that there was zero-degree neck flexion associated with viewing the computer monitors. Dr. S admitted that the standards were derived from a range of the population and that individual variances did occur. The carrier offered a report from Dr. S which summarized his testimony.

Dr. L testified and his medical records reflect that he examined the claimant on May 10, 2000, for complaints of cervical pain radiating to her left arm and hand including the left thumb, forefinger and middle finger which corresponded to a C6 distribution. He found complaints of pain with cervical rotation, flexion and extension. He stated that any weakness was not related to the neck but to the CTS. Dr. L noted that the claimant exhibited muscle spasms and tenderness in the mid-cervical region, but that she had full range of motion. He opined that the claimant had some sort of structural disorder in her neck, most likely a herniation, but he needed an MRI to confirm or rule out the diagnosis. He related the cervical complaints to the activities performed by the claimant at work.

Ms. F testified that she was the center manager for the employer and that the claimant had not made complaints about the workstation accommodations prior to asserting a workers' compensation claim. She explained that a customer service representative's duties were quite varied but that the claimant did use a computer and keyboard in performing her duties.

The claimant had the burden of proving by a preponderance of the evidence that her compensable injury of _____, included an injury to her cervical "spine(neck)". Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). 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 capacity; 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.).

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. 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).

In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could 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).

Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We affirm the hearing officer's decision and order.

Kathleen C. Decker
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge