APPEAL NO. 001917

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 28, 2000, in (city 1), Texas, with the record closing on July 26, 2000. The appellant (claimant) appealed the hearing officer's determinations on compensability and disability, asserting that the determinations that the claimant had not sustained a compensable occupational disease injury and did not have disability resulting from the alleged injury were against the great weight and preponderance of the evidence; that the determination that the respondent (carrier) had not waived the right to contest the compensability of the injury was against the great weight and preponderance of the evidence and was incorrect as a matter of law; and that the hearing officer had erred by admitting and considering a videotape that was offered by the carrier. The carrier responded that the hearing officer neither admitted nor considered the videotape because it was withdrawn as an exhibit and that the determinations of the hearing officer on compensability and disability were supported by sufficient evidence; and requested that the decision of the hearing officer be affirmed.

DECISION

Affirmed.

The claimant had worked at the (city 1) reservations center for (employer). In late 1998, she began to experience symptoms of a bilateral carpal tunnel injury which is the subject of another claim. She was placed on modified duty for that injury until April 21, 1999, when she was cleared to return to full duty by her treating doctor. After releasing her to full duty, Dr. B scheduled a follow-up appointment for May 19, 1999. Although the claimant treated with Dr. B for approximately three months for her bilateral carpal tunnel injury, she did not complain of any cervical problems.

On May 13, 1999, the claimant first saw her treating doctor for this claim, Dr. Bu. Dr. Bu's initial notes do not reflect any cervical complaints but, some time after May 25, 1999, Dr. Bu suggested that the claimant file a workers' compensation claim for a cervical injury alleged to be the result of cumulative trauma due to holding her head at an awkward angle while performing her duties with employer.

The parties stipulated that the date of the alleged cervical injury was _____; that the claimant had disability from the bilateral carpal tunnel injury from May 14, 1999 through the date of the hearing in this matter; and that if the cervical injury were to be found compensable, that the claimant would have had disability resulting from the cervical injury from _____, through the date of the hearing. The primary dispute between the parties was whether the claimant's employment is the cause of her cervical complaints.

First, in her argument on the issue of whether the cervical complaints are a result of her employment, the claimant testified concerning the chronology of her complaints, her

duties for the employer, and the layout of workstations used in the prosecution of her duties. Claimant also offered the testimony of Dr. Bu who opined that the claimant's injury, the exact nature of which was still undetermined at the date of the hearing, was the result of prolonged, excessive flexion of the neck because the claimant sat at a workstation with her neck at an angle of between 20 and 30E off a neutral position. Dr. Bu testified that he had seen the workstations at the employer's reservations center once, but had not inspected them closely and had not taken any measurements of the relative heights of the desks, chairs, or monitors that were used at the workstations. Dr. Bu testified:

> I walked through. I took a short tour of the facility and did take a look [sic] the actual - - walked up the aisle or the ramp and the stairs there to take a look at the workstations.

When asked for the basis of his opinion regarding the manner in which the claimant's injury occurred, Dr. Bu testified:

> Well, more than anything it's a description from [the claimant] with regards to what her work posture is. As far as the workstations go, I know they're - - I believe they're allowed to adjust the keyboard itself. But with regards to the monitor, its relatively a fixed station.

In further testimony, Dr. Bu stated:

> [The claimant] described her work posture such that her neck is flexed at approximately 20 to 30 degrees from a neutral position.

When asked how the positioning of her neck could cause the claimant's injury, Dr. Bu testified:

> [I]f you look at the anatomy and physiology of the human, the cervical spine has a lordotic curve which curves basically forward . . . . The muscles in the neck help to maintain that curve. When you have your head flexed for a long period of time, you are in effect elongating those muscles . . . . As you do that, you then become susceptible to lose the lordotic curve.
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> In this nerve if you have your head flexed for, say, 20 to 30 degrees for long periods of time over a period of time, you then certainly could lose the lordotic curve. In [the claimant's] case I believe that she did, and that is how I'm making the correlation based on her work posture and normal anatomy and physiology versus what she has experienced over a long period of time.

The carrier countered the claimant's and Dr. Bu's testimony with medical records from a nerve conduction velocity study, an x-ray study, and an ergonomic analysis by Ph.D., C.P.E. (Mr. S) of (tester).

The May 25, 1999, nerve conduction velocity study failed to reveal any abnormalities in the sensory distal latencies and nerve conduction velocities of the median, ulnar, and radial nerves on either the right or the left. Additionally, C6, C7, and C8 dermatome responses were unremarkable. The physician interpreting the results of the study concluded that it was a normal upper extremity nerve conduction velocity study.

On June 29, 1999, a radiological study was done of the claimant's cervical spine at Dr. Bu's request. The x-rays revealed that there were no acute or significant degenerative bone or joint abnormalities present about the cervical spine and the alignment was normal. The claimant's neural foramina were widely patent.

Mr. S was hired by the carrier's attorneys to conduct an ergonomic assessment of the claimant's job duties and the physical work environment at the employer. Mr. S's report indicates that he visited the employer on June 23, 2000. He discussed job duties with employer's managers and workers, videotaped a large number of workers performing their jobs, and obtained appropriate measurements at the workplace. In discussing the videotapes of individuals performing the claimant's job functions, Mr. S reported that, with the exception of short periods while writing down notes, neck flexion of the observed employees ". . . was close to Œ for virtually all Agents reviewed." Mr. S measured keyboard tray heights, keyboard tray thicknesses, monitor heights, and horizontal leg clearances and determined that the resulting figures were acceptable when compared to ANSI/HFS 100-1988 and ISO 9241 guidelines. Mr. S concluded that the work duties and work environment for persons engaged in the claimant's occupation were acceptable based on all prevailing ergonomic design guidelines and that there was no evidence that the job provoked extreme neck postures that were alleged to be the cause of the claimant's neck problems.

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). While a claimant's testimony alone may be sufficient to prove an injury, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. 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).

The hearing officer was faced with conflicting testimony. As the trier of fact, she acted within her authority in weighing the evidence presented and resolving the discrepancies in the evidence. Given the relative reproducibility of the measurements used by Dr. Bu and Mr. S in arriving at their opinions, Dr. Bu's testimony that the claimant's injury could be a result of a loss of the lordotic curve, a hypothesis which was not supported by the x-ray study which found normal curvature of the cervical spine, and the remaining testimony available to her, the hearing officer determined that the claimant had failed to prove by a preponderance of the evidence that there was a causal connection between the claimant's employment and her alleged cervical injury. 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, 244 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.

The claimant next argues that the hearing officer ". . . erred by admitting and considering Carrier's Exhibit 1 (Videotape)." Our review of the record in this matter reveals that at the time the exhibit was offered, the claimant made no objection. Evidence which is admitted without objection cannot be complained of on appeal. Dicker v. Security Insurance Company, 474 S.W.2d 334 (Tex. Civ. App.-Waco 1971, writ ref'd n.r.e.). Additionally, during the hearing, the hearing officer determined that the videotape was not alleged to show the city 1's reservations center, but rather the reservations center in another city. The carrier offered to withdraw the exhibit, it was in fact withdrawn, and the exhibit was returned to the carrier and was no longer part of the evidence in this matter. Both legally and factually, the claimant's complaint regarding the videotape has neither substance nor merit.

In her third point of error, the claimant asserts that the hearing officer's determination that there was no disability is against the great weight and preponderance of the evidence. The parties stipulated that if the injury was compensable, an agreed period of disability would result. We have affirmed the hearing officer's determination that the claimant did not sustain a compensable injury on _____. Since the determination of disability rested solely on the compensability of the alleged injury, the hearing officer's decision that the claimant had no disability in this matter is not in error and will be affirmed.

In her final point of error, the claimant argues that the carrier waived the right to contest the compensability of the alleged occupational disease by failing to either initiate benefits within seven days or dispute the compensability, citing Downs v. Continental Casualty Co., No. 04-99-00111-CV (Tex. App.-San Antonio August 16, 2000). It is

uncontroverted that, factually, the claimant is correct. The parties stipulated that the carrier received written notice of the alleged injury on July 2, 1999, and filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) disputing the compensability of the injury on July 20, 1999. However, in Texas Workers' Compensation Commission Appeal No. 001717, decided September 7, 2000, the Appeals Panel reversed a decision by a hearing officer which applied Downs, *supra*, and wrote:

> On August 28, 2000, the Executive Director of the Texas Workers' Compensation Commission (Commission), issued Advisory 2000-07 acknowledging the Court of Appeals decision in Downs. However, the advisory states that the "August 16th decision in the *Downs* case should not be considered as precedent at least until it becomes final upon completion of the judicial process." In addition, the Director of the Hearings Division has informed the Hearings Division that the Commission's position is that a carrier has 60 days to contest compensability and that hearings staff are to follow the Commission's position statewide pending resolution of Downs.

The hearing officer did not err in failing to apply Downs to the facts of this case.

There being no reversible error and the hearing officer's decision being supported by sufficient evidence, the decision of the hearing officer is affirmed.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge