APPEAL NO. 002058

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 9, 2000, a contested case hearing (CCH) was held. With regard to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable repetitive trauma injury on _________ (all dates are 1999 unless otherwise noted), and that the claimant had disability from January 25 through September 20.

Appellant (carrier) appealed, contending that the hearing officer failed to consider facts that the carrier believes are critical to the decision and that the claimant actually worked during portions of the time for which he asserts disability. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The appeals file does not contain a response from the claimant.

DECISION

Affirmed.

It is undisputed that the claimant had been employed by a temporary service agency and had been assigned to work for the (employer) for about a month prior to accepting full-time employment with the employer, on or about January 20, doing essentially the same work he had been doing prior to his employment. The claimant testified that his duties required him to repetitively shovel dirt, level out pens, push wheelbarrows, lift and carry heavy bags of shavings and spread the shavings in the livestock pens. The employer's general manager agreed that the description of the job was "pretty accurate," although some of the leveling may have been done while the claimant was still employed by the temporary agency. The claimant said that he worked 12 hours a day, seven days a week, at $5.50 an hour. The claimant testified that on January 24 (three or four days after he was employed by the employer) he began to have pain, tingling and numbness in his arms and reported an injury to the employer the same day. (There is some evidence that the pain began a day or two before the claimant reported it, but he thought it was "poor circulation or something.") The claimant said that the employer sent him to the first aid station, which sent him to a hospital emergency room (ER). The claimant said that a doctor at the ER told him he had bilateral carpal tunnel syndrome (CTS) and to follow up with his family doctor. The claimant said that his family doctor was Dr. GW.

In a prescription pad note dated January 25, Dr. GW wrote "[claimant] was seen & [treated] today for ® [CTS] which was apparently aggravated by his most recent work." The claimant said Dr. GW sent him to another doctor, apparently Dr. B who, in a report dated February 8, states: "I think [claimant] basically has an acute carpal tunnel and should respond to some aggressive means." The carrier complains that the various doctors were not given an accurate history; however, the history Dr. B recites is that the claimant "was doing heavy manual work involving a lot of shoveling. . . ." The claimant saw a number of other doctors (the carrier, in its appeal, complains that the hearing officer does not recite

the reports of all those doctors), including Dr. BW, who took the claimant off work in an off-work slip dated October 18. In evidence are a series of S.O.A.P. notes from Dr. BW showing treatment for bilateral CTS. In a report dated March 13, 2000, Dr. BW states: "We have treated [claimant] . . . since July 1999, for symptoms of pain, weakness, and numbness in both hands and wrists. Symptoms are consistent with clinical diagnoses of [CTS]." Dr. BW recommended "EMG/NCVT" testing.

Apparently after a benefit review conference, a Texas Workers' Compensation Commission (Commission) benefit review officer, in an order dated March 15, 2000, ordered the claimant to be examined by a Commission-selected required medical examination doctor and appointed Dr. D. In a report dated April 6, 2000, Dr. D recited a history that the claimant's "job required a lot of repetitive maneuvers such as shoveling dirt, pushing wheelbarrows and digging ditches." Dr. D recited the various doctors the claimant had seen, testing and the results of his examination, and concluded:

> In regards to the etiology of his bilateral [CTS] I think that this is basically due to the repetitive activity he performed as a laborer during the [employer's] Stock Show. The constant shoveling, digging and pushing required repetitive flexion and extension motions that caused compression of the carpal tunnel and ultimately compression on the median nerve. The two-month time period that [claimant] worked prior to the Stock Show contributed to his injury but I think that the main cause of his [CTS] was due to the work he performed during the Stock Show. It is true that [CTS] is a cumulative traumatic disorder that occurs over time but I think that the repetitive motions that were continuously performed over one week time period and culminated in the 1/26/99 injury was the major cause of [claimant's] bilateral [CTS].

The carrier sent the claimant's records to Dr. K, who conducted a review of the claimant's medical records. In a report dated June 6, 2000, Dr. K agreed that the claimant had "moderately severe bilateral CTS" and concluded, based on the medical literature, that there "is no documentation that [claimant's] work at [employer] entailed any unusual hand activity . . . which would have caused him to develop CTS." Dr. K opined that causation between the work and the claimant's "severe CTS has not been clearly established." The hearing officer, after quoting portions of Dr. D's and Dr. K's reports, commented:

> I am persuaded by the credible evidence that claimant's physically demanding, repetitive work activities have established the causal connection between his repetitive work and his bilateral [CTS].

The carrier appeals, complaining that the hearing officer did not consider the short period of time the claimant worked for the employer; that Dr. D "simply lumped" the claimant's previous job together with his work for the employer; and that Dr. K "suggests that the degenerative changes are part of the Claimant's natural life." We do not find the carrier's arguments persuasive. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as

the weight and credibility that is to be given the evidence. 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 (Tex. Civ. App.-Amarillo 1974, no writ). 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). We find the hearing officer's decision on the injury issue supported by the evidence, namely, Dr. D's report.

The facts regarding disability are more complex. The hearing officer notes that the claimant is a poor historian. The claimant testified that he was unable to work after January 24 because of his hands. However, the claimant also testified that he was hospitalized for a bipolar disorder (not related to work) for two weeks in February. The claimant said that he would have been unable to work during this time anyway because of his bilateral CTS. As previously noted, in evidence is an off-work slip from Dr. BW taking the claimant off work on October 18. Also in evidence is a note dated August 7, 2000, stating that the claimant "has not worked since his last job as a laborer for the [employer]." This, however, is not accurate because the claimant testified that on or about June 1 he worked temporarily in one position and then worked for some time (maybe months) for another concern. The claimant was vague about his pay from these jobs, but appeared to say it was more per hour than he had received from the employer, but that he only worked 10 hours a day, six days a week. The claimant went back to work in another position on September 21 and at the CCH claimed disability only from January 25 through September 20, although there was evidence of intermittent disability after that date, as evidenced by Dr. BW's off-work slip. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. The hearing officer comments:

> I am convinced by the credible evidence that for the time period from 01-25-99 through 09-20-00, claimant was unable to obtain and retain employment at his preinjury wages because of his 01-24-99 work-related injury.

Although there is conflicting testimony, with the dates and earnings of the claimant's work between June 1 and September 20 being in doubt, we are not prepared to say that the hearing officer's determinations on this issue are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier also argues that the claimant's work "at several other positions . . . could have caused this CTS. . . ." If this is so, then the carrier has the burden to prove that the other, subsequent jobs or events were the sole cause of the claimant's injury and resultant disability. The carrier has failed to do so.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are 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). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

CONCUR IN THE RESULT:

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Tommy W. Lueders
Appeals Judge