APPEAL NO. 010738

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 March 15, 2001. With respect to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable injury in the form of an occupational disease; that the date of injury was _____; that the appellant (carrier) is not relieved from liability because of the claimant's failure to timely notify her employer of the injury; that the carrier did not specifically contest compensability on the issue of timely reporting under Section 409.001; that the carrier did not waive its right to contest compensability of the claimed injury; and that the claimant had disability beginning on September 1, 2000, and continuing through the date of the CCH. On appeal, the carrier urges that those determinations which are favorable to the claimant are against the great weight of the evidence. The claimant urges affirmance.

DECISION

Affirmed.

Section 401.011(34) defines occupational disease as including repetitive trauma injuries. The date of injury for an occupational disease is the date the employee knew or should have known that the disease may be related to the employment. Section 408.007. Whether the claimant sustained a compensable injury in the form of an occupational disease, what is the date of injury, and whether the claimant had disability are generally questions of fact for the hearing officer to resolve. It was the hearing officer's prerogative to believe all, part, or none of the testimony of any witness, including that of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer's determinations with respect to the disputed issues are supported by the evidence. The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them to be so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951).

We note that the dissenting opinion cites a number of cases, none of which involve the reversal of a fact finder's determination that an occupational disease injury existed. The dissent would effectively set a new evidentiary standard in cases involving occupational diseases and invade the province of the fact finder.

For the reasons stated above, we affirm the hearing officer's decision and order.

Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

I concur and would point out that, in my opinion, the claimant's work activities are not what is common experience in people's lives. The fact that her knee "caught" while she was stepping down from a ladder she used to stock boxes on shelves supports the hearing officer's determination that she sustained a work-related injury. I would decline to hold that, to have a compensable injury, a claimant must either have a specific one-time incident; or prove that one or two motions were repeated over and over during a period of time of a certain length. The hearing officer could find that over time the repetitive use of a knee joint while walking up inclines with a cart, lifting, climbing, and squatting over time can cause an injury. The fact that the claimant did not do the same squatting motion continuously for several hours per day does not mean there was no repetitive trauma. The legislature meant for employers to be covered for work-related injuries and we should not limit coverage to fit specifications not required by the statute and rules.

Judy L. S. Barnes
Appeals Judge

DISSENTING OPINION:

I have carefully reviewed the evidence and have come to the conclusion that the claimant has failed to present probative evidence in support of her contention that her three torn areas in her knee resulted from repetitive trauma arising out of her employment. I dissent and would reverse and render.

At the outset, although there was repeated testimony that the claimant's left knee problems began from a specific incident on _____, the issue reported from the benefit review conference and litigated at the contested case hearing was whether the claimant sustained a compensable injury in the form of an occupational disease. The broader issue of whether the claimant sustained a compensable injury, including a specific incident, was not before the hearing officer and has not therefore been determined. There was no explanation as to why an alternative claim for a specific injury was not part of the issue. If it had been, the evidence would clearly support such a finding. However, this was not the injury claimed or theory of recovery or the issue raised, and we should not

compensate for the deficiency in presenting the case by relaxing the burden of proof on that which was presented. *See* Frazier v. Employers Mutual Casualty Company, 368 S.W.2d 955 (Tex. Civ. App.-Austin 1963, writ ref'd n.r.e.).

The claimant began working as a delivery person for a cookie company on May 21, 2000. The claimant said that she made deliveries for a roster of 11 stores two times a week, beginning at 5:00 a.m. and usually ending by 11:00 a.m. She said she worked four days a week, but her activities on the days she was not making deliveries were not made clear. The claimant owned the delivery truck, which was driven by her husband.

Only a general description of her delivery duties was offered; the claimant said that she loaded her truck in the morning from the cookie warehouse at the principal place of business. When she arrived at a store, she would first take the cookie order at the store, then load the cookies, up to 15 or 20 boxes, onto a dolly and take them into the store. The claimant said that such a dolly could weigh 200 to 300 pounds. She said that most stores had a "steep" incline, used to enter the store with or without the cookies, although a few had stairs which meant she had to pull the dolly up step-by-step. According to the claimant, she was also responsible for stocking the shelves. She asserted, again generally, that at "some" stores it was necessary for her to squat to stock lower shelves or use a step stool to reach higher shelves.

Medical records indicate that the claimant was 55 years old and weighed slightly over 200 pounds. She said that she used a treadmill at home prior to the incident on _____, and also went swimming. The claimant denied that she had knee problems prior to July 2000, although an MRI taken on August 8, 2000, characterized one tear as "old." Pictures of several of the inclines at the stores she delivered to show gradual and long gradients which would not, for the most part, be described by the ordinary person as "steep." Medical evidence was offered by a doctor for the carrier attributing the claimant's problems to obesity and circulatory problems. There were no opinions by the claimant's doctors that her problems were related to repetitive trauma, although the claimant contended that she had discussed this with them.

Section 401.011(34) defines occupational disease to include repetitive trauma injuries, but specifically does not include "an ordinary disease of life to which the general public is exposed to outside of employment, unless that disease is an incident to a compensable injury or occupational disease." 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." Numerous Texas cases have stressed that to recover for an occupational disease (including repetitive trauma), 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.); Home Insurance Company v. Davis, 642 S.W.2d 268

(Tex. App.-Texarkana 1982, no writ); INA of Texas v. Adams, 793 S.W.2d 265 (Tex. App.-Beaumont 1990, no writ). Not all occupational diseases are compensable under the statute, and only those meeting the requirements of the statute are compensable. Hartford Accident & Indemnity Company v. McFarland, 433 S.W.2d 534 (Tex. Civ. App.-Tyler 1968, writ ref'd n.r.e.).

Now, while the hearing officer notes in her discussion that she may conclude injury based upon "common experience" and medical evidence is not required, I would counter that activities at any given workplace cannot be left to common experience. As noted in Davis v. Employers Insurance of Wausau, *supra*, each occupational disease case must be decided on its own facts. The Appeals Panel has indicated before that at a minimum, proof of a repetitive trauma injury should consist of some presentation of the duration, frequency, and nature of activities alleged to be traumatic. Texas Workers' Compensation Commission Appeal No. 960929, decided June 28, 1996; Texas Workers' Compensation Commission Appeal No. 002366, decided November 27, 2000. There was essentially NO evidence offered that the claimant's work duties involving walking up inclines, squatting, and stepping up on stools exceeded what people in their ordinary lives would do; in short, nothing to refute "common experience" that persons similar to the claimant are more likely to have degenerative knee problems. Every reported case I have read on repetitive trauma includes evidence and testimony that "fleshes out" what the workday consisted of; so, requiring such minimal proof is not an arduous or cutting-edge level of evidence. *See* Texas Employers' Insurance Association v. Ramirez, 770 S.W.2d 896 (Tex. App.-Corpus Christi 1989, writ denied); Standard Fire Insurance Company v. Ratcliff, 537 S.W.2d 355 (Tex. Civ. App.-Waco 1976, no writ). Adams, *supra*. As noted in City of Bridgeport v. Barnes, 591 S.W.2d 939, 941 (Tex. Civ. App.-Fort Worth 1979, writ ref'd n.r.e.), a case involving a claim for stroke from repetitious trauma, it would not have been enough for the claimant in that case to merely show activities which tired him, but he was required to show that the activities were "of sufficient magnitude to be injurious." It was evidence of magnitude that was lacking here.

While affirmable on all other appealed issues, the decision in this case as to existence of a compensable repetitive trauma injury was against the great weight and preponderance of the evidence, and I would have reversed.

Susan M. Kelley
Appeals Judge