

APPEAL NO. 010755

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 21, 2001. The hearing officer determined that the respondent (claimant) sustained a compensable occupational disease (repetitive trauma) injury on _____ (all dates are 2000 unless otherwise noted), and that the claimant had disability from October 4 to the date of the CCH.

The appellant (carrier) appeals, essentially asserting that the claimant has an ordinary disease of life and that the complained-of repetitive trauma was not causally linked to the claimant's employment. The carrier also appeals the disability determination on a basis separate from the noncompensability of the injury.

DECISION

Affirmed.

The claimant was employed as a "family service counselor" for a funeral home. The funeral home was apparently in a two-story building with the administrative offices being on the second floor. Although the claimant's work hours might vary, the hearing officer's comment that the claimant normally worked at least 10-hour workdays is supported by the claimant's testimony. The claimant testified that she walked up and down two flights of stairs (apparently two half flights), a total of 18 to 20 steps "about 50 round trips per workday" and that she spent "85% of her time going up and down those stairs." It was up to the hearing officer, as the sole judge of the weight and credibility of the evidence, to evaluate this testimony. The claimant testified that in September she began to have back pain which grew progressively worse and that she saw Dr. B on October 4.

Dr. B's office note of October 4 recites a history of "worsening back and knee pains resulting from continuous up and down climbing of stairs." The diagnosis was lumbosacral strain. Other progress notes have a diagnosis of "Degenerative Arthritis per X-rays 2E lumbar strain" or lumbar strain. A brief "To Whom It May Concern" note dated November 17 states that the claimant's job duties, including climbing stairs, "can be responsible for such recent degenerative changes." A similar note dated December 15 states that the claimant "was injured as a result of repetitive climbing stairs which caused immediate pain in her lower back." X-rays performed on October 6 showed early degenerative changes. An MRI of February 15, 2001, showed a bulging disc at L4-5. Another note dated February 23, 2001, refers the claimant to a specialist and comments that in Dr. B's professional opinion, the claimant "did sustain an injury while at work as a result of the repetitive climbing of stairs." The carrier offered no medical, or other, evidence to the contrary.

An occupational disease can be compensable under the 1989 Act and is defined in Section 401.011(34) to include a repetitive trauma injury. The term does not include an ordinary disease of life to which the public is exposed outside employment. The hearing

officer cites Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.), a case involving traumatic repetitive activities of a flight attendant. That case is clearly distinguishable on the facts from the instant case. We also note that the claimant conceded in closing argument that simple walking/standing cases are generally not compensable, but argues that this case involves climbing stairs. In Texas Workers' Compensation Commission Appeal No. 962371, decided January 6, 1997, a case where a carrier appealed a decision holding a knee injury resulting from climbing stairs compensable, the Appeals Panel held:

we do not regard the Appeals Panel's "walking and standing" cases as necessarily ruling out, across the board, that injury from climbing is compensable, and as holding that injury therefrom is an ordinary disease of life as a matter of law. The Appeals Panel has affirmed cases where it was proven that injury resulted from very frequent climbing in the course of employment activities. Texas Workers' Compensation Commission Appeal No. 91026, decided October 18, 1991; *also* Texas Workers' Compensation Commission Appeal No. 952127, decided January 31, 1996. It may be inferred, based upon common experience, that while the general population walks a good deal of the day, members do not necessarily climb stairs for much of the day.

We would also paraphrase the appellate court in Davis, *supra*, that although the trial court (in that case the trial court entered a judgment n.o.v. against the injured worker) may disagree with the fact finder's conclusions and may have reached an opposite conclusion had it been the trier of fact, the trial court could not legally disregard the jury's findings "because the record contained at least *some* evidence to support them." Similarly, the claimant's testimony and Dr. B's notes and records provide some minimal support for the hearing officer's decision, particularly in the absence of any evidence to the contrary.

As for the disability issue, while the carrier notes that the claimant had applied for and apparently had accepted employment at another funeral home sometime in February 2001, subject only to obtaining a license and insurance, the circumstances are unclear. That testimony and evidence was presented to the hearing officer and we find that her decision is not so against the great weight and preponderance of the evidence requiring reversal.

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Michael B. McShane
Appeals Judge