APPEAL NO. 950367

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 12, 1994, a contested case hearing (CCH) commenced in (city), Texas, with the record being closed on February 8, 1995, and with (hearing officer) presiding as hearing officer. The unresolved issues remaining for the hearing officer were:

1.Whether Claimant sustained a compensable injury in the form of an occupational disease on (date of injury); and

2.Whether Claimant has had disability due to a compensable injury on (date of injury).

The hearing officer determined that neither on (date of injury) (all dates are 1993 unless otherwise noted), nor at any other time "while Claimant was working for Employer did repetitive activities result in an occupational disease in the form of bilateral carpal tunnel syndrome [CTS] to Claimant." Consequently, the hearing officer determined that claimant has not had disability at any time since (date of injury).

Appellant, claimant, contends that the great weight and preponderance of the evidence demonstrates that claimant did sustain an occupational disease in the form of a repetitive trauma injury and that claimant did have disability due to her bilateral CTS. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent, carrier, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Claimant is a 51-year-old lady who had apparently worked as a data entry operator some years. Claimant testified that in May 1993, while working for a temporary employment agency, she began working for (employer), the employer. Claimant said that she officially became an employee of the employer on June 27th, as a keypunch operator. Claimant testified that in her employment she did 10,000 to 15,000 key strokes an hour, seven and a half hours a day. Claimant testified that at some time before (date of injury) she began having problems with her hands where they "would start to swell and with pain" and some numbness. Claimant testified she thought it was arthritis. Apparently, on the evening of (date of injury), while on her way to work (claimant appears to have worked an evening shift), claimant was involved in a motor vehicle accident (MVA) when she was "rear-ended" by another car. Claimant suffered a number of injuries in that accident, including injuries to her back, neck and arm. Claimant saw a number of doctors and testified that (Dr. H), a neurologist, diagnosed her as having CTS on August 12th. Dr. H subsequently sent claimant to (Dr. R) and claimant testified that on September 10th, Dr. R told her "[t]he carpal-tunnel was job related, but the ulnar nerve was automobile related." Claimant gave

notice to her employer (not an issue in this hearing) of her alleged work-related CTS in September.

Claimant subsequently filed an Employee's Notice of Injury (TWCC-41) dated "Dec 20, 1993," alleging a (date of injury) date of injury and alleging the "auto accident that agrivated [sic] Injury." Claimant filed a subsequent TWCC-41 dated "Apr 11, 1994" with a revised date of injury as "Sept 10, 1993--Dr. stated it was wk related" listing the cause as "Thru repeated use of fingers of right hand causing Extreme pain." The nature of the injury was listed as "Carpal Tunnel of right hand and also Left hand." Claimant testified that a benefit review officer had advised her to delete references to the MVA because it was "messing the whole works up."

Claimant also filed a claim for the injuries sustained in the MVA against the responsible third party. The third party insurer had claimant examined by (Dr. O) who, in a report dated January 28, 1994, stated that there was no evidence that claimant "had a [CTS] or ulnar tunnel syndrome related to this accident" and that there was no relationship between "the patient's [CTS] and the accident." Claimant eventually settled her claim against the third party and the third party insurer specifically stated that the settlement "did not include payment for any claim she may have resulting from [CTS]."

The medical evidence is conflicting. Dr. R, the treating doctor for the CTS, in a report apparently dated January 11, 1994, states that claimant ". . . denied any symptoms referable to the Carpal Tunnel prior to the accident." Dr. R goes on to state that "if the patient does not have any symptoms of carpal tunnel prior to the accident then I assume that these are not related. . . ." Dr. R indicates the CTS is "100% accident related." Then, in another report dated March 9, 1994, Dr. R states: "We know that [claimant] had an accident prior to her complaining of her [CTS] and that I can only assume that the accident was the participating factor. . . ." Dr. R lists causal factors which may relate to CTS such as being "post menopausal," aging, injuries and "muscoskeletal hypertrophy, repetitive effort, . . . arthritis. . . ." Dr. R concludes that in claimant's case, "her symptoms were subsequent to the traumatic event [apparently meaning the MVA]." Dr. H, in a report dated October 28, 1994, opines that it is his belief "that her carpal tunnel complaints are indeed related to her occupation." Claimant also saw (Dr. V), who, in a report dated October 24, 1994, essentially stated claimant's CTS is work related.

With the medical evidence in this posture, the hearing officer, at the December 12, 1994, hearing, decided to send claimant for an Independent Medical Examination (IME). (Dr. PH) was selected as the IME doctor and in a report dated January 13, 1995, noted a history of "intermittent tingling and numbness" in certain fingers of both hands before the (date of injury) MVA. Dr. PH concluded:

> It seems to me that this lady by history had a developing repetitive use [CTS] prior to [date of injury]. Subsequent to [date of injury] she developed ulnar nerve symptoms. It is reasonable to assume based upon that information that the

> [MVA] at least contributed in part to the developing of this. I think the diabetes also played a factor and probably also a factor was played by repetitive stress syndrome at work. In any event, I believe that her current tremor is not related to her surgery since she only had surgery on the right and she has tremor bilaterally and is most probably in my opinion related to some other process such as Parkinson's disease but would defer to a neurologist for his opinion in this matter as they typically treat such things.

The hearing officer, in the discussion portion of his decision, gave the rationale for his decision:

> Claimant failed to meet her burden or [sic] proof on either issue although a portion of the medical evidence is favorable to her position. Claimant's car wreck on (date of injury), was the precipitating factor which has [sic] the causal connection with her medical problems which began on (date of injury), including the occupational disease alleged herein.

Claimant, in her appeal, emphasized the favorable (to her) aspects of the various medical reports, citing Dr. H, Dr. V and Dr. PH, who claimant emphasizes was the Texas Workers' Compensation Commission's (Commission) IME doctor, and noting that only Dr. R's reports were contrary. When it comes to weighing the evidence, it is the hearing officer who is the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). As previously noted, the medical evidence was conflicting and when that is the case, it is for the hearing officer, as the trier of fact, to resolve those inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. 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). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer determined that, reading all the medical records as a whole, the MVA of (date of injury) was the cause, or the precipitating factor, for claimant's condition. Although another fact finder may well have decided this issue differently, that alone is insufficient grounds on which to base a reversal. An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would 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).

Claimant contends that because the hearing officer found a portion of the evidence favorable to her position, "the findings contradict the Hearing Officer's findings that [claimant] did not meet her burden of proof." We disagree. In most cases there is some evidence favorable to either party. As noted above, it is the hearing officer that is the sole judge of the weight to be given the evidence. In this case, although there was medical evidence to support the claimant's position, the hearing officer determined that that evidence did not constitute the preponderance necessary for a decision in claimant's favor.

Further, claimant seeks to impute the burden of proof on the carrier "to prove that the automobile wreck was the sole cause [of claimant's CTS]." We do not read that to be the carrier's position. Rather, we read carrier's position to be that any number of things could have caused claimant's CTS, including diabetes, age and, possibly, the MVA. Consequently, carrier does not have the burden of proving the sole cause was the MVA. In fact, carrier's position at the benefit review conference was that claimant "did not sustain a compensable occupational disease . . . [and] the medical does not indicate a causal relationship between the claimant's condition and the employment." That places the burden on the claimant to prove by a preponderance of the evidence that claimant's condition (the CTS) was work related. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ).

In that the hearing officer determined that the claimant had not sustained a compensable injury, claimant cannot, by definition, have disability as defined in Section 401.011(16).

Claimant further contends that claimant's date of injury was September 10, 1993. We would agree that, pursuant to Section 409.001(a)(2), for an occupational disease, the date of injury is the date the employee knew or should have known that the injury may be related to the employment, and that claimant's uncontroverted testimony was that she first learned that her CTS was work related on September 10th. However, the date of injury was not an issue and the hearing officer determined that claimant had not sustained a compensable injury on (date of injury), "or at any other time. . . ." The hearing officer was not required to make a determination as to the date of injury and we find his determinations on this point to be sufficient.

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 manifestly 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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge