APPEAL NO. 960929

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 April 17, 1996. The issues at the CCH were whether the claimant sustained a neck injury on or about _____; whether a preexisting condition was the sole cause of his current condition; whether claimant gave timely notice of his injury to his employer; whether he had disability and, if so, for what periods; and the claimant's average weekly wage (AWW). During the CCH, the parties agreed to withdraw the issue concerning timely notice to the employer as an issue.

The hearing officer held that claimant had injured his neck while driving his truck on _____; that he had disability for the period from February 28 through November 9, 1995; that his AWW was $510.93; and that his preexisting neck injury was not the sole cause of his current condition. Although the timely notice issue had been withdrawn from consideration, the hearing officer determined that claimant gave timely notice of his injury to the employer.

The carrier has appealed, pointing out that there was no evidence of an injury on _____. The carrier further argues that, if the theory on which the decision was based was one of repetitive trauma, that expert medical evidence is required, and none was produced here. The carrier argues that the finding of injury is so against the great weight and preponderance of the evidence as to be manifestly wrong and or unjust. The carrier argues that whether it meets a sole cause burden of proof, the claimant retains the basic burden to prove that a work-related injury occurred. The carrier further appeals the determination of AWW on a fair, just, and reasonable basis, pointing out that proof of wage was the claimant's burden. There is no response from the claimant.

DECISION

Reversed and rendered.

Claimant was employed by (employer) on December 22, 1994. Claimant testified that he had left his previous employer after a month and a half of work due to a softball injury causing pain to his shoulder which affected his ability to lift. He also agreed that he had fusion surgery on his neck in 1972, but denied he had been treated since that time for his neck. Claimant drove a "drip" truck which picked up liquid residue from natural gas. He stated generally that the lift seat on the truck was broken, and that he "sometimes" drove on "bumpy" roads, and that he had "several" times hit his head on the top of the cab. Claimant said he "turned in" his broken seat and on February 6th, a nut was added which improved the seat greatly. Claimant said that he had a "crick" in his neck on February 6th that went away after two days. On _____, after sleeping on the couch, claimant said he woke up with a crick in his neck. He stated that he thought he had probably slept wrong. He said that this bothered him throughout the day and he could not sit comfortably, and when it did not resolve, he went to Dr. P, a chiropractor, on the 24th, and later went to

Dr. F. Claimant said there was no incident which occurred on the _____, and he stated that it was his opinion that he injured his neck because of all the bumping and bouncing around that he did driving his truck, because there was nothing else that happened to him that would account for the herniated cervical disc with which he was diagnosed.

One of Dr. F's notes, dated April 12, 1995, records that claimant was questioning if chiropractic manipulation could have damaged him, and that Dr. F pronounced it unlikely. Dr. F's initial notes recite a history of the injury, as related by claimant, of bouncing around 12-14 hours a day, and hitting his head a couple of times on the top of the truck. Dr. F's note, at the end, noted the old fusion and commented: "almost certainly incited by the long bouncing hours he sustained in the truck while at work".

Claimant agreed that he found out that he was not eligible for health insurance for the first 90 days of his employment, which he discovered after he inquired about coverage for his doctor bills.

Claimant said he was referred to Dr. P, a neurosurgeon, who diagnosed a herniated cervical disc. An April 10, 1995, dictation note from Dr. P states:

> The patient asked me how old I thought the herniation was on the MRI scan. I told him I would not hazard a guess. It is my gut feeling that the patient is essentially looking to make this a workman's compensation case or perhaps something against the chiropractor. I will not become a party to that. I have no idea when this could have occurred, especially in someone who has had a previous fusion and would be a set up for having changes at lower levels to compensate for the movement loss from the fusion.

On May 31, 1995, a large herniated disc at C6-7 with spinal cord compression was determined by myelogram. Claimant had surgery on June 20, 1995, and had not worked since February 28, 1995. There was evidence that he was released to work in early November 1995.

Mr. C, the field supervisor for the employer, said that claimant never directly reported to him that he was injured bouncing around in the truck, and said he was aware that a work-related injury was claimed when a doctor's office called to verify coverage. Mr. C said that employees were hired for a 90-day probationary period, and would be given full benefits at the end of that time if work was satisfactory and they were retained as employees. He stated that claimant was evaluated before the end of this period in accordance with procedure and terminated effective March 31, 1995, for unsatisfactory work. He went over claimant's evaluation with him and said that claimant signed the evaluation, which stated that his injury was not job related. He said that claimant agreed verbally that his injury was not job related, and there was no disagreement about that.

(When claimant was asked if he had reviewed this part of the evaluation, he responded that he and Mr. C had primarily gone over the portions of the form relating to his performance.) Mr. C said that this affirmation was not a usual part of the evaluation and that it had been included because claimant had been inquiring about benefits and Dr. F had called about workers' compensation. Mr. C said it was his understanding that claimant had inquired about whether he had benefits sometime around the end of February.

The form itself indicates that claimant was terminated for failure to complete the probationary period because he was off work due to a non-job related injury, and that the employer would be willing to rehire him in the future if there was a need for a driver and claimant was physically able to perform his job duties.

Mr. C said he did not recall claimant reporting a bad seat. He said that bouncing around in a truck was an everyday occurrence.

Mr. M, the dispatcher, confirmed that he set up a doctor's appointment for claimant at his request on February 23rd or 24th, although claimant did not disclose the reason for the appointment.

A preemployment physical form signed by claimant listed hobbies as sports and dirt bike riding. He was classified as able to perform essential functions of the job.

No employer wage statement was produced. Printouts entitled "driver payroll" are in the record which show amounts paid to claimant, which are not identified as gross or net pay. The payroll statements show that the dates when claimant was paid do not include seven days a week. Claimant did not testify about his hours of work. The hours of work listed on the payroll list appear to range between 10-12 hours a day for the days claimant worked. On claimant's claim for compensation, he asserted that he was paid $8.62 per hour.

We do not believe that the hearing officer erred in using a fair, just, and reasonable method to compute AWW. The obligation was firmly on the employer to produce wage information, including identification of a same or similar employee. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 128.2(b) (Rule 128.2(b)). In the absence of such a statement, the hearing officer was free to use a reasonable method to compute wage. The finding of fact which includes the dates of work contains on obvious typographical error, in that "March 27, 1995" should be "February 27, 1995." While we might speculate that a better method would have been to take the total amount earned during the 35-day period, which is five weeks, and divide it by five, the approach used by the hearing officer is not an abuse of his discretion and we will not substitute our method for his.

In considering all the evidence in the record, we agree that the findings of the hearing officer that claimant sustained an injury on _____, are so against the

great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (Tex. 1951). Although the claimant's theory of recovery had elements of both repetitive trauma and accidental injury, the hearing officer apparently based his decision on accidental injury, as he determined that claimant was injured while driving the employer's truck on _____, and made no finding that this was the date claimant knew or should have known he was injured. An accidental injury should be traceable to a definite time, place, and cause. United States Fire insurance Company v. Alvarez, 657 S.w.2d 463 (Tex. Civ. App.-San Antonio 1983, no writ). There is essentially no evidence of a work-related injury on _____; indeed, claimant had virtually nothing to say about that particular work day except that he engaged in his usual occupation of driving the drip truck. However, claimant testified unequivocally that he woke up the morning of _____ with a crick in his neck, which he felt then was from the way he slept. There were no incidents such as bumping his head that he testified about that occurred on that day. While the payroll records indicate that claimant was paid for 15 hours that day on five different tickets, there is no basis in the record, even from generalized testimony about his driving job, from which to infer how much of that time claimant spent in the truck and encountered "bumpy" roads. Experience of pain on the day in question does not itself prove that there was a work-related injury.

There was general testimony that claimant drove over bumpy roads, as well as paved roads, on a broken seat, throughout the course of his employment. He agreed, however, that the seat had been fixed and improved on February 6th. While we do not believe that the hearing officer has found that a repetitive trauma injury occurred, such a finding would not be supportable in this record. 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." To recover for an occupational disease of this type, 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. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). At a minimum, such proof should consist of some presentation of the duration, frequency, and nature of the activities alleged to be traumatic. *Compare* Texas Workers' Compensation Commission appeal No. 92171, decided June 17, 1992.

In addition to the lack of evidence supporting any specific or repetitive trauma injury occurring on the job, the great weight and preponderance of other evidence weighs including the strong statement of Dr. P disclaiming any work-related connection and the termination statement signed by claimant which says he was off work for a nonwork-related injury, claimant's insurance status at the time of his injury, the fact that claimant woke up with the pain before he started to work, and doctor's notes that he was inquiring as to the age of the herniation or whether chiropractic care could have caused it, are against the

hearing officer's finding of injury in this case.

Claimant's opinion as to the cause, which opinion was the foundation of Dr. F's note that the neck was "incited" by truck driving, amounts, to no more than speculation and guess, and is no more than a mere scintilla of evidence in favor of the hearing officer's decision. The fact that the carrier may have been unable to prove that claimant's herniated disc traced to an earlier condition does not supply needed evidence from which to infer that claimant was necessarily injured on the job.

The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Service Lloyds Insurance Co. v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas 1993, no writ); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). The history of injury set out in a medical record are not proof that a work-related injury in fact occurred. Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Our analysis of the evidence in this case compels us to conclude that the finding in favor of an injury on _____, is supported by no more than a mere scintilla of evidence. We therefore reverse, and render a decision that claimant failed to prove that he sustained an injury on _____, in the course and scope of his employment.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge