

APPEAL NO. 92602

On August 20, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). The hearing officer determined that the respondent, hereafter the claimant, suffered an injury to his ribs and right elbow that arose out of and in the course and scope of his employment on (date of injury); that the claimant gave timely notice of his injury to his employer; and that the claimant did not establish that he has disability as a result of his injury. The hearing officer decided that the claimant is entitled to medical benefits and that, if the claimant has disability in the future prior to reaching maximum medical improvement, the appellant, hereafter the carrier, is to pay temporary income benefits.

The carrier contends that the hearing officer's findings and conclusions concerning injury in the course and scope of employment and timely notice are against the great weight and preponderance of the evidence and requests that we reverse the decision with respect to those findings and conclusions. The claimant did not file an appeal contesting the determination that he did not show that he had disability, nor has the claimant filed a response to the carrier's appeal.

DECISION

We modify the hearing officer's decision to reflect that the claimant injured his left elbow, and not his right elbow as found by the hearing officer, and affirm the decision as modified.

The employer makes fiberglass parts. The claimant testified that on (date of injury), he slipped on a piece of fiberglass at work, fell against a table injuring his left elbow and his ribs, and reported his injury to his supervisor, (J), on the day of his accident. Claimant's coworker, (RH), stated in an affidavit that he worked with the claimant on (date of injury), that he saw the claimant slip and fall on a table on that day, that the claimant told him he had hurt his left arm, and that he, (RH), told another supervisor, (Mr A), that the claimant should see a doctor for his injury.

The claimant and nine or ten other workers were laid off work on February 13, 1992. On February 14, 1992, the claimant contacted the Texas Workers' Compensation Commission about his (date of injury) injury and filed a claim for compensation form. The claimant said he attempted to see a doctor on February 14th but was refused treatment. On March 6, 1992, the claimant was treated by (Dr. M), M.D., whose diagnosis was "injury to left elbow and injury to left side of the ribs." (Dr. M) prescribed pain medication and referred the claimant to (Dr. H), an orthopedist. The claimant said that he has been treated for his injuries at a medical clinic on three or four occasions after being treated by (Dr. M). Medical records from the clinic and (Dr. H's) office were not in evidence.

The carrier contended that the claimant was not injured at work on (date of injury) because he was not at work on that day. A time card for the claimant for the date (date of injury), has the notation "sick" written on it and does not show any hours worked that day. (JM) stated in a written statement that he was the claimant's supervisor and that the attendance records showed that the claimant was not at work on (date of injury). He further stated that if the claimant did receive any injuries, such were not reported to him or to his lead man. (AB) stated in a written statement that he was never told about the claimant's fall or the need for the claimant to see a doctor. (JM) stated in a written statement that he was a coworker of the claimant's and that the claimant had told him on some unspecified date that he had hurt his left elbow in a fight outside of work.

The carrier disagrees with the following findings of fact and conclusions of law:

Findings of Fact

No. 4. Claimant slipped and fell on a piece of fiberglass while gluing fiberglass parts together on (date of injury).

No. 5. As a result of slipping and falling, claimant suffered an injury to his ribs and right elbow on (date of injury).

No. 6. Shortly after the incident on (date of injury), claimant notified his supervisor (J) that he suffered an injury by slipping and falling against a table.

Conclusions of Law

No. 4. Claimant suffered an injury to his ribs and right elbow that arose out of and in the course and scope of his employment on (date of injury).

No. 5. Claimant gave timely notice of his (date of injury) injury to his employer as required by Article 8308-5.01 of the Texas Workers' Compensation Act.

The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e). The parties presented conflicting evidence in this case. The Supreme Court of Texas has stated that when presented with conflicting evidence, the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986). The claimant's testimony that he worked on (date of injury) and that he was involved in an accident at work on that day was corroborated by his coworker, (RH). (Dr. M) medical report corroborated the claimant's testimony that he suffered an injury to his left elbow and an injury to his ribs. Although there was evidence contrary to that presented by the claimant in regard to whether

he worked on (date of injury) and whether he reported an injury to his supervisor on that day, having reviewed all the evidence we conclude that, except as to which elbow was injured, the hearing officer's findings are sufficiently supported by the evidence and are not against the great weight and preponderance of the evidence, and that the findings support the hearing officer's conclusions of law, except as to which elbow was injured. The claimant testified that he injured his left elbow, (Mr. H) referred in his affidavit to the claimant's left arm being hurt, and (Dr. M) diagnosis concerned an injury to the left elbow. Considering the evidence and the fact that the hearing officer found that the claimant was injured at work on (date of injury), we believe that the hearing officer's finding and conclusion concerning an injury to the right elbow instead of the left elbow was simply an oversight on her part which we remedy on appeal by modifying Finding of Fact No. 5 and Conclusion of Law No. 4 to refer to the left elbow as the injured elbow instead of the right elbow. As modified, the decision and order of the hearing officer are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda Nesenholtz
Appeals Judge