APPEAL NO. 931002

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On September 30, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as heari ng officer. The issues to be decided at the CCH were:

Did CLAIMANT suffer an injury in the course and scope of his employment in the form of repetitious trauma on (date of injury)?

Did CLAIMANT have disability resulting from a compensable injury sustained on (date of injury), entitling him to temporary income benefits and if so, for what periods?

Did CLAIMANT report his injury to his supervisor within 30 days of the injury or have good cause for failing to do so?

The hearing officer determined that the claimant sustained an occupational injury due to repetitive trauma to his shoulder on (date of injury), that claimant timely reported his injury to his employer on (date), and that claimant has experienced disability on June 5, 8, and from June 26 through November 30, 1992.

Appellant, Texas Department of Transportation, employer herein, contends that hearing officer erred on several points, and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, responds, in essence that he is satisfied with the hearing officer decision and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified that he has been employed for over 17 years by the employer and that he did "sign work." Claimant explained that job involved fabricating sign posts, operating a post hole digger, a "rock breaking bar," and a machine called a "pine jar driver that breaks rock, breaks concrete . . . ." Claimant states his job required "reaching up and essentially pounding the post in the ground." Testimony from claimant and his wife was that, apparently sometime in early 1992, claimant's arm and shoulder began to hurt. Claimant apparently received some kind of "steroid shot" from a Dr. D, but "the pain came back." Claimant's wife testified claimant was "in severe pain" in June 1992 and claimant made an appointment with (Dr. H). Dr. H in turn referred claimant to Dr. N for x-rays and subsequently to (Dr. R). According to claimant Dr. R found "some type of tore ligament . . . rotator cuff." Dr. R apparently also, according to claimant's testimony, found some type of shadow which "seems to be some type of tumor." Dr. R then sent claimant to a specialist, Dr. M "to see if it was a malignant tumor or not." Claimant testified that in July, Dr. R told him that the rotator cuff injury was due to "hard work." In the meantime Dr. M determined

that claimant had an unusual bone marrow configuration but not a malignancy and also identified "a torn rotator cuff and bicipital tendinitis." Claimant had surgery on his right shoulder "in early (month year)." (Medical records indicate the surgery was on (date). Claimant testified that it was not until sometime after the surgery "in late (month)" that Dr. R told him the rotator cuff injury was work related. Claimant testified that he tried to call the employer to report the injury in October. The employer's records indicated a report of injury was made to claimant's supervisor (Mr. L) on (date). Claimant apparently originally filed his claim as an injury on June 6, 1992, but later filed an amended notice claiming an occupational injury using "(date of injury)" as the date of injury. The hearing officer commented in the statement of evidence that "claimant was confused and often could not answer with specific dates as to when things happened or what the reports meant." Employer called claimant's supervisor (apparently also Mr. L's supervisor) (Mr. G) who testified he did not know claimant was alleging an on-the-job injury until November 2, 1992, when Mr. L called and told him. Mr. G acknowledges that the Employer's First Report of Injury or Illness (TWCC-1) shows the injury was reported to Mr. L on "10-26-92."

Hospital medical records show progress notes made by Dr. R beginning 7-13-92 with an impression of "[p]ossible tumor of the proximal humerus." The history records "progressive right shoulder pain" and right shoulder "impingement sign is positive." A 7-27-92 entry indicates evaluation "following shoulder impingement syndrome with a lesion in the proximal humerus . . . . It is imperative he goes and sees [Dr. M]." Dr. R records he impressed upon the family "pros and cons as well as other alternatives . . . ." An 8-13-92 note shows follow up evaluation with possible surgery. An 8-27-92 entry suggests "arthroscopic decompression with repair of the rotator cuff." Dr. R on (date) did arthroscopy for a right shoulder impingement syndrome with repair of rotator cuff. A 9-10-92 post surgery entry states claimant is "doing fine." Entries of (date of injury) indicate "pain is a lot better" of 10-19-92 claimant is "significantly better."

Dr. M's reports begin on July 24, 1992, which notes the rotator cuff tear and recommends further tests, note dated July 28th, advocates a "triphase bone scan" and notes claimant's pain "would be attributed to his rotator cuff or . . . tenosynovitis associated with long head biceps tendon." A July 31st note indicates a bone scan, CT scan and repeat x-rays. By note dated August 11, Dr. M concludes no malignancy but claimant "is going to have to undergo treatment for his rotator cuff and also bicipital tendonitis."

By letter dated June 29, 1993, a Texas Workers' Compensation Commission (Commission) ombudsman, on Commission letterhead, wrote Dr. R stating that claimant "in late (month)" stated that he had been told by Dr. R that "his problems were the result of a repetitious trauma due to his type of employment." The ombudsman stated that "the reports do not indicate specifically if his shoulders (sic) problems could be related to his employment . . ." and "[t]hus we are in need of additional information from you to proceed . . . ." The letter concludes "[w]e would appreciated (sic) a response . . . ." Dr. R responds by letter dated August 30, 1993, giving a brief history and concludes,

> [claimant's] problem of shoulder impingement syndrome with possible rotator cuff due to overuse was noted. The patient subsequently underwent a successful

> acromioplasty with complete resolution of symptoms to the point that he is able to return to work without much of a problem. His shoulder impingement syndrome is overuse syndrome with pain and discomfort in the shoulder with limitation of motion. The findings at the surgery are consistent with this problem; therefore, in my opinion, the patient has suffered a shoulder impingement syndrome because of his occupation.

Employer, both at the CCH and on appeal, strenuously objected to what it termed "the suggestive letter of the Ombudsman" and contended that it did not have "the opportunity to fully defend on this point" concluding the "tainted evidence" of Dr. R's letter should have been excluded by the hearing officer. Although employer registered a strong objection on the record to Dr. R's letter "to the extent that it would support any opinions solicited on behalf of [claimant] through the ombudsman," the letter was admitted into evidence by the hearing officer.

The hearing officer found claimant sustained a repetitive trauma injury to the right shoulder with a date of injury of (date of injury), that claimant timely reported his injury to employer on (date), and that claimant had disability on June 5, 8 and from June 26 through November 30, 1992. Employer basically appeals on four grounds: (1) that there was insufficient evidence of causation between claimant's work and the repetitive injury; (2) that Dr. R's August 30th letter is inconclusive and does not establish causation; (3) that Dr. R's August 30th letter was "tainted evidence" and should not have been admitted; and (4) claimant failed to give timely notice of his injury to employer.

I

Causation

Under the 1989 Act, the term "injury" includes an "occupational disease" (Section 401.011(26)), and the latter term includes "repetitive trauma injury" (Section 401.011(34)). Claimant testified in general what his duties were, including erecting signs requiring the use of a post hole digger, a rock breaking bar and a pine jar driver that breaks rock and concrete and "reaching up and essentially pounding the post in the ground." This testimony was unrefuted and the hearing officer could have inferentially found it was very heavy physically demanding labor. Employer argues that there is an absence of probative evidence to tie the injury to the specific work claimant did. Employer cites Parker v. Employers Mutual Liability Insurance Co. of Wisconsin, 440 S.W.2d 43 (Tex. 1969) for the proposition that the Texas Supreme Court has reviewed three methods of establishing causal relationship between injury and incapacity in workmen's compensation cases. We do not disagree. One of those methods allows the fact finder to determine causation "where the general experience or common sense dictate that reasonable men know, or can anticipate, that an event is generally followed by another event." 440 S.W.2d at 46. In this case, the hearing officer, as the trier of fact, might well have found, and apparently did find without specifically so stating, that the use of heavy post digging equipment and pounding posts into the ground might well cause a torn or frayed rotator cuff injury in the shoulder.

Employer cites Schaefer v. Texas Employers' Insurance Ass'n, 612 S.W.2d 199 (Tex. 1981) stating that the testimony does not establish that the rotator cuff injury is indigenous to claimant's work apparently comparing the Group III mycobacterium intracellaris in Schaefer with a common torn rotator cuff injury in the present case. We cannot agree that Schaefer and the need for expert medical testimony is applicable to the present case.

Nonetheless, Dr. R, in the objected to letter of August 30th, does provide some medical evidence of causation by stating that claimant's problem of shoulder impingement syndrome with possible rotator cuff injury was due to overuse and that in the doctor's opinion that problem was "because of his occupation." Dr. R's opinion of medical causation is uncontradicted by any other medical evidence.

Further we note that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility to be given the evidence. The hearing officer obviously believed, and there is no evidence to the contrary, that claimant engaged in heavy manual labor, that he noticed a pain in his shoulder that got progressively worse, that even the doctors were initially unsure of the source of the pain, that what was thought to be a tumor was discovered in claimant's shoulder and that eventually claimant's problem of a torn or frayed rotator cuff injury caused by heavy labor was resolved. We believe the hearing officer' determinations are supported by the evidence in the record and as discussed in the hearing officer's statement of evidence. We do not believe expert medical evidence of causation as required in Schaefer is necessary in this case. In fact, issues of injury and disability may be established by testimony of the claimant alone and the trier of fact may accept or reject such testimony in whole or in part, and may accept lay testimony over that of medical experts. Houston General Insurance Co. v. Pegues, 514 S.W.2d 492, 494 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). Texas Workers' Compensation Commission Appeal No. 92234, decided August 13, 1992.

II

Dr. R's August 30th letter is inconclusive and does not establish causation.

Employer argues that Dr. R's letter, Claimant's Exhibit 8, was admitted over objection of employer's counsel and that "the hearing officer did not permit any evidence to be received on the objection or otherwise entertain the objection." As previously noted, employer's objection referred to the ombudsman "overstepping her boundaries as described by statute, and . . . to any evidence introduced that was obtained in that regard." Transcript page 9. The hearing officer stated "the general issue of OMBUDSMAN participation in Commission proceedings was not an issue which could properly be heard at a benefit contested hearing and did not permit evidence to be offered on the proposed issue." No evidence or objection was specifically offered or ruled upon regarding Claimant's Exhibit 8, Dr. R's August 30th letter. However if it had been, Dr. R's letter could have been admitted as being relevant to the case. As cited earlier, the hearing officer is the sole judge of the

relevancy of the evidence. That Dr. R's letter is relevant and deals with the matter of causation is a question separate and apart from the question of the role of the ombudsman and solicitation of the letter.

Employer objects that Dr. R's letter is "inconclusive" and does not state how claimant's occupation, as opposed to work in general, caused such injuries. *Citing* Schaefer, *supra*. Employer points out that Dr. R's opinion does not "allude to any scientific studies" and his statement on causation is "merely conclusory." We have earlier commented that Schaefer and the test discussed therein, is not applicable to this case. Whether claimant's work could cause a torn/frayed rotator cuff is within the common knowledge and experience of the fact finder and is not within such scientific or technical nature to require skilled expert medical testimony. The fact that Dr. R's report contains no scientific studies and merely expresses the doctor's opinion in general terms affects only the weight to be given the report rather than its admissibility. And as we have earlier stated, the hearing officer is the sole judge of the weight and credibility to be given the evidence, including Dr. R's report.

III

Tainted Evidence

The employer argues that the Ombudsman "overstepped her authority" and that the solicitation of Dr. R's opinion was "an improper, overreaching communication." As indicated earlier, we view Dr. R's letter admissible and certainly the circumstances by which it was obtained may relate to the weight it is to be given. The hearing officer, as was within his authority, apparently gave the letter considerable weight. Employer argues that the admission of Dr. R's report somehow deprived the employer "of the minimal Due Process afforded parties under the Texas Administrative Code . . . by admitting such tainted evidence and not providing the Carrier [employer] the opportunity to fully defend on this point. Appeal No. 93232." First we point out that Texas Workers' Compensation Commission Appeal No. 93232, decided May 13, 1993, is a case dealing with attorney's fees and is totally inapplicable to this case. Secondly, employer cites the "Texas Administrative Code" without any reference even to some general section. Lastly, employer claims it was somehow deprived of Due Process and its ability to defend itself by the admission of Dr. R's letter. We can only presume, in the absence of an objection, that the letter had been exchanged and that the employer was aware of the contents of the letter. Employer could have gone to another doctor for an expert opinion or could have requested the hearing officer to allow a deposition on written questions. We fail to see how the employer was prejudiced in any way in its opportunity to defend itself. Certainly employer was not denied due process in that it had notice of the letter and had an opportunity to attack the opinions expressed therein. Employer's contention that it was denied minimal due process by admission of this report is without merit.

Having stated that Dr. R's report is admissible should not be interpreted as our approval of the ombudsman's solicitation of the information using Commission letterhead,

without disclaimer, which might lead one to reasonably conclude that it was the Commission, rather than one of the parties, that was requesting this information. The Ombudsman Program in Section 409.041 states:

Sec. 409.041. OMBUDSMAN PROGRAM; ADMINISTRATIVE VIOLATION.

(a)The commission shall maintain an ombudsman program to assist injured workers and persons claiming death benefits in obtaining benefits under this subtitle.

(b)An ombudsman shall:

(1)meet with or otherwise provide information to injured workers;
(2)investigate complaints;
(3)communicate with employers, insurance carriers, and health care providers on behalf of injured workers; and
(4)assist unrepresented claimants, employers, and other parties to enable those persons to protect their rights in the workers' compensation system.

Had the ombudsman in this case written Dr. R, identified herself as an ombudsman assisting the claimant under Section 409.041(b)(3) above and solicited the same information we would have had no objection. However the tenor of the ombudsman's letter on Commission letterhead made it appear that it was the Commission, rather than one of the parties in interest, that was requesting the information. While we believe that to be improper, that does not, at least in this case, so "taint" or color the response to require its exclusion. There is no reason to believe Dr. R would have provided a different opinion had he been advised it was claimant who was seeking his opinion.

IV

Claimant failed to give timely notice of his injury to employer.

Section 408.007 provides that the date of injury for an occupational disease (which includes repetitive trauma per Section 401.011(34)) is the date the employee knew or should have known that the disease may be related to the employment. Employer contends that claimant testified at various times to different dates when he knew his injury was work related and that "[t]he hearing officer resolved that (sic) inconsistencies in favor of the claimant . . . ." Although the employer recognizes that inconsistencies in the testimony are to be resolved by the hearing officer, citing Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ), in this case employer argues that the hearing officer' findings are so against the great weight and preponderance of the evidence to be manifestly unjust. We disagree. Some of claimant's testimony, particularly on cross-examination, could be interpreted to indicate that he knew or should have known that his injury was work related in July. Other testimony, quite as clearly, indicated he did not know

the injury was work related until after his surgery toward the end of (month) when Dr. R discussed his injury with him. We would note that it is employer's contention that claimant knew the injury was work related in July when he went to Dr. M. The testimony is not inconsistent that when claimant saw Dr. M at the end of July the primary concern at that time was the suspected tumor in claimant's shoulder which was the reason for Dr. M's involvement in the case. Dr. R in his August 30, 1993, report states "because of the tumor problem, the rest of the problems were ignored." Similarly the hearing officer comments that Dr. R's report "fits with CLAIMANT'S version of events (toward the end of July when claimant saw Dr. M)." The hearing officer, as the trier of fact, may believe all, part or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (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, not writ). The hearing officer chose to believe claimant's testimony that he did not know the rotator cuff injury was work related until he spoke with Dr. R towards the end of (month), which would have been (date of injury), in accordance with the medical records. Claimant's notice of injury to Mr. L on (date), would have been within 30 days of that date.

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 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust Cain v. Bain 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not so find and accordingly the decision of the hearing officer is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge