APPEAL NO. 931128

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 November 9, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues to be resolved were:

(1)whether the claimant was injured in the course and scope of his employment on (date of injury);
(2)whether or not the claimant has disability as a result of an on-the-job injury on (date of injury); and
(3)whether the injury was reported timely.

The hearing officer determined that the appellant, claimant herein, sustained a compensable right elbow injury in the course and scope of his employment on (date of injury), that claimant had disability as the result of the injury from (date of injury) (all dates are 1993 unless otherwise noted), to August 24th but that claimant failed to timely report his injury to his employer.

Claimant contends that the evidence shows he did timely report his injury and that the employer had actual knowledge of the injury. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

It is undisputed that claimant was employed as a construction foreman or assistant superintendent by (employer)., employer herein, and that he had suffered an injury to his right arm/elbow on another job in spring 1992. Since the 1992 injury, claimant had continued to be bothered by the arm and had continued to complain about the arm "off and on." Claimant at various times stated his right arm "didn't really completely heal" but that in "February until the end of (month) (year) . . . never had any problems at all with it." Claimant testified that on (date), he reinjured his arm "prying templates up with a bar." Claimant states he informed (MB) the job superintendent "that I hurt my arm." Claimant states he continued to work but that his arm got progressively worse over the next day or so. Claimant states he finally went to the (ER) on March 31st, where he was seen by (Dr. G). The ER record states "Inj [R] elbow > yr ago - re-injured yesterday." Dr. G's report dated March 31st states: "[h]e injured his elbow about a year ago . .. and since that time he has had occasional numbness, tingling and pain in his arm. He has not had any new injury." Claimant was placed on light duty with lifting restrictions and told "to rest the elbow and gradually increase his activities." Claimant testified he continued to work until June 17th, when he had a disagreement with another foreman, went to employer's office, told MB he wasn't going to work with the other foreman and "make sure you mail me my check."

MB recalled the incident as claimant saying "I've had it."

On (date of injury), claimant saw his family physician, (Dr. F). Dr. F in a note dated September 24th, commented that claimant reinjured his arm on (date) and "[t]his in turn improved but because of the type of work that he does with continual use that he reinjured his arm again on June 11, 1993." Dr. F referred claimant to (Dr. Mc) who by memo dated August 24th noted complaints of severe medial elbow pain and attributed the problem "to repetitively stressful activities using the wrist and elbow on the job." Dr. Mc subsequently wrote a clarifying letter dated September 29th, indicating claimant "reinjured the elbow . . . March 28th while pulling templates and was seen at [ER] for this specific injury on March 31st." Dr. Mc concludes:

> It is true that epicondylitis can be a chronic or recurring problem, and it is also true that [claimant] had injured his elbow prior to these work injuries. Nonetheless it is clear that he reinjured the elbow at least twice on the job, and he may well never have had another recurrence were it not for these
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> work injuries. In fact, it is not clear that the initial injury was even related to the subsequent work injuries as I did not have an opportunity to evaluate him at the time of the initial injury.

MB, claimant's supervisor, testified that he was aware of claimant's elbow problems relating back to 1992, that claimant's elbow continued to bother him and that he complained about it "off and on." MB testified that he offered to "get it on workers' comp claim" but that claimant refused, stating his (claimant's) wife had insurance. MB stated he assumed all claimant's problems were related to the 1992 injury. MB said he thought that claimant's complaint "was the same problem." MB stated "[i]n June he was again complaining of the same arm, and I again assumed that it was the same injury." MB denied that claimant told him that he had reinjured his arm or somehow aggravated the injury until after claimant quit in June. MB's testimony is corroborated by the testimony and statement of (LW), another superintendent.

The hearing officer determined that claimant had injured his right elbow on (date), while employed by the employer, and that claimant had disability from (date of injury to August 24th when claimant was released to full duty and began drawing unemployment compensation. The hearing officer further found that while claimant informed MB, claimant's supervisor, about the fact that his right arm was bothering him, claimant did not report a new work-related injury until after (date). Claimant strenuously argues that MB and another superintendent were aware of the injury, had even told claimant "to fill out a report" and were aware that claimant went to the hospital ER. Claimant in his appeal summarizes "I was told by both superintendents on the job to file the injury under my wife's insurance because <u>they assumed it was</u> from a previous injury." (Emphasis added.) We note that when LW testified, claimant had no cross-examination and did not seek to elicit information from LW regarding claimant's reporting of his injury.

The hearing officer found as fact that MB was aware of claimant's 1992 injury to his right arm, claimant's "off and on" again complaints about his arm and that claimant did not report a new work related injury. MB testified that he was aware of claimant's complaints of right arm pain in March 93 and had suggested that claimant file a report on it, but all the while "assumed it was the same (1992) injury." The testimony and evidence supports the hearing officer's determinations that claimant at no time specifically distinguished ongoing general complaints about his arm from an aggravation or specific reinjury.

The claimant had the burden to prove that he was injured in the course and scope of his employment, (Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936

(Tex. Civ. App.-Texarkana 1961, no writ)) and that the employer knows the general nature of the injury and the fact it is job related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). Here the claimant through his own testimony stated he had had "off and on" again problems with his right arm. Exactly what claimant said or reported to MB, or his other supervisor, is a factual determination for the trier of fact who, in the instant case, was the hearing officer. *See e.g.* Western Casualty and Surety Company v. Gonzales 518 S.W.2d 524 (Tex. 1975); and Texas Workers' Compensation Commission Appeal No. 92540, decided November 19, 1992. The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). Although there is some conflicting evidence and testimony that one injury was a neurological problem and the other injury was a torn tendon and claimant states he injured his arm prying up templates, the supervisor's testimony was that he had no knowledge of a separate March injury until after claimant quit his position in June. Where there are conflicts and contradictions in the evidence, it is the duty of the finder of fact to consider these conflicts and contradictions and determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio, 1964, writ ref'd n.r.e.). The hearing officer clearly found that claimant had not reported a work-related injury within 30 days of March 29th, and that it was the supervisor's understanding that references to an arm injury or arm pain related to an earlier 1992 injury which had never completely healed. The hearing officer's determinations are supported by the evidence. Where sufficient evidence supports a fact finder's conclusions and his findings are not against the overwhelming weight of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); *citing* Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); In re King's

Estate, 150 Tex. 662, 664-665, 244 S.W.2d 660-661 (1951). Consequently, the hearing officer's decision, being supported by sufficient evidence, 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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Susan M. Kelley
Appeals Judge