APPEAL NO. 93555

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989) Act). On June 3, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues to be determined at the CCH were: 1) Did CLAIMANT report an injury to EMPLOYER, within thirty days of the alleged date of injury as required by the Texas Workers' Compensation Act; 2) Was CLAIMANT injured in the course and scope of his employment on (date of injury); and, 3) Is CLAIMANT currently suffering disability as a result of the alleged injury on (date of injury). The hearing officer determined that although claimant timely reported his alleged injury to the employer, claimant had not suffered an injury to his right shoulder in the course and scope of his employment and that claimant had not suffered disability and would "not be entitled to income benefits if the injury had occurred."

Appellant, claimant herein, in a lengthy hand written appeal, alleges that as he had AIDS he is unable to find doctors that will treat him in the local area, there was confusion in ascertaining the correct insurance carrier, there were errors in file numbers and that he did in fact sustain an injury. 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.

At the outset, we note that the record and exhibits contain very little relevant evidence about the circumstances surrounding the alleged injury. Claimant's testimony, despite the hearing officer's efforts to keep it on track, is a lengthy diatribe on a variety of matters having little or no relevance to the issues before the hearing officer. When one of the employers testified by telephone, the dialogue principally consisted of "Yes, I did," "No, you didn't," "Yes, I did." In any event, the hearing officer's statement of evidence is a fair and accurate recitation of pertinent facts gleaned from various portions of the evidence and we adopt it for purposes of this decision.

Claimant apparently worked for (employer) employer herein, for four nights during a trial period in latter January 1993, possibly ending January 27th or 28th. The evidence is that he was a fry cook during the night shift and his duties involved lowering racks of doughnut dough into hot grease, removing them when done, and placing the racks of cooked donuts into a holding rack. Claimant also alleges he performed other duties such as carrying cans of lard and taking out the trash, but this is vehemently disputed by the employer. Although not clear, the claimant is apparently claiming a repetitive trauma injury to his right shoulder in carrying the racks of donuts and other items during the four nights claimant worked for employer. Claimant testified he informed the employer of the injury on a Friday when he picked up his paycheck. The hearing officer determined from later testimony that the Friday in question was February 5, 1993. There is no evidence to the

contrary. Claimant has only been seen in a hospital emergency room (ER) for his shoulder pain because claimant contends no specialist would see him without an insurance carrier authorization and claimant states he did not want to use Medicaid because it would confuse his worker's compensation claim.

(Ms. CT), one of employer's owners testified telephonically that claimant never informed her or her husband of an injury and that the first notice she had of the injury was a letter from the Texas Workers' Compensation Commission (Commission) in March 1993. Employer filed an Employer's First Report of Injury (TWCC-21) dated March 9, 1993. Ms. CT, in her testimony and exchanges with claimant, vehemently denied claimant was injured on the job, ever reported the injury and accused claimant of making trouble for employer. At least one allegation Ms. CT made in a written statement, admitted into evidence, was found by the hearing officer to be untrue. The hearing officer comments "[t]his case is complicated by lack of truth on both sides." We would only add that there is very little relevant evidence on which to review this case and that in some of claimant's testimony he was apparently demonstrating his handling of the donut racks. Not being able to view the claimant, we are unable to determine exactly what he was doing.

The only medical evidence is an ER report which lists a history of "R shoulder pain" on February 1, 1993, and a subsequent minor emergency clinic (clinic) report showing complaints of shoulder pain and strain with a diagnosis of "Acute Subsequent Tendinitis" on March 13, 1993. Another clinic report of "4/2/93" dealt with a stab wound.

The hearing officer determined in pertinent part:

FINDINGS OF FACT

3.CLAIMANT was employed by EMPLOYER on the alleged date of injury of (date), as a donut fry cook.

4.CLAIMANT reported his injury to EMPLOYER no later than February 5, 1993.

5.CLAIMANT has not been unable to work due to the alleged injury of (date of injury), and is currently capable of working at wages comparable to his preinjury wage.

6.CLAIMANT cannot identify a definite time, place and event when he suffered an injury.

7.CLAIMANT has not suffered an occupational disease in the form of a repetitive trauma.

CONCLUSIONS OF LAW

2.CLAIMANT timely reported his alleged injury to EMPLOYER when he reported it to [Ms. CT] on February 5, 1993.

3.CLAIMANT did not suffer an injury to his right shoulder in the course and scope of his employment with EMPLOYER.

4.CLAIMANT has not suffered disability as a result of the alleged injury and would not currently be entitled to income benefits if the injury had occurred.

Claimant's appeal is indicative of his testimony at the CCH. Among other things, claimant alleges that because he has AIDS he is unable to get medical care from specialists. What claimant alleges may or may not be true but that was not a relevant issue in the case below. Further, we note that claimant on a matter of principle has chosen not to see a specialist under Medicaid. Although advised by the hearing officer that it is not relevant, claimant, both at the CCH and on appeal, contends that confusion in determining the correct insurance carrier somehow prejudiced him by saying "[p]lease see documents that show different carriers - at least 3-4!! Which one was the real one?"

Claimant states "[a]lso I was ruled by the initial B.R.C. (that) I did sustain an on-the-job injury." We would note that the benefit review officer (BRO) only makes recommendations (Article 8308-6.15) which included that claimant "did not report an injury to his employer within the thirty day time limit. . . ."; that claimant did sustain an injury and that "[b]ased on the lack of any medical reports that . . .indicate (claimant) is not able to work. . . carrier should not be responsible for any benefits. . . ." The hearing officer had this information available as an exhibit and could choose to agree or disagree with the recommendations. The hearing officer obviously formed his own conclusions based on the evidence presented to him.

Claimant by stating his injury ". . .was an amalgamation, . . .and an accumulation of various work activities (that) produced REPETITIVE trauma to my R. shoulder. . ." appears to be claiming a repetitive trauma injury. Article 8308-1.03(39) defines a repetitive trauma injury to mean ". . .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." Case law holds that to recover for a repetitive trauma injury, one must not only prove repetitious, physically traumatic activities on the job, but must also prove that a causal link existed between these activities on the job and one's incapacity; that is the disease (a repetitive trauma injury is classified as an occupational disease under Article 8308-1.03(36)) must be inherent in that type of employment as compared to employment generally. *See* Davis. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93462, decided July 23, 1993. In Hernandez v.

Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ), the court observed that the fact that symptoms occur during a period of employment does not mandate the conclusion that the employment was the cause of the ailments.

The claimant is vague on possible causes of his injury mentioning other activities which caused discomfort in his shoulder. The hearing officer noted that claimant does not identify a specific incident which caused the pain but rather the pain came on gradually and built up over time. The hearing officer further noted that claimant only worked four nights and that "[i]t is highly unlikely he injured himself." The evidence is in dispute as to what claimant was required to lift, the claimant contending he had to lift cans of lard and take trash out and the employer disputing those contentions. These, however, are questions of fact and the hearing officer is the trier of fact in a contested case hearing and is the sole judge of the weight and credibility to be given to the evidence. Article 8308-6.34(e) and (g). Having reviewed the record, we conclude that there is sufficient evidence to support the hearing officer's determination that the claimant did not sustain a repetitive trauma injury in the course and scope of his employment, and further conclude that such determination is not against the great weight and preponderance of the evidence.

The hearing officer also determined that the claimant does not have disability because he does not have a compensable injury. "Disability" means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). Consequently, in order to have disability, an employee must have a compensable injury. Since the claimant does not have a compensable injury, the hearing officer was correct in determining that he does not have disability as defined by the 1989 Act. The hearing officer further found that the claimant gave timely notice of his claimed injury to his employer, which finding has not been appealed.

In sum, the relevant evidence is very sketchy, the hearing officer believed both sides were less than completely truthful, but in the end believed that claimant had not sustained a repetitious trauma injury to his shoulder. There is sufficient evidence to support the hearing officer's decision. Only if we were to determine that the decision of the hearing officer was so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust would we be warranted in setting aside his decision. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge