APPEAL NO. 93597

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). At a contested case hearing held in (city), Texas, on June 8, 1993, the hearing officer, (hearing officer), concluded that while the appellant (claimant) had injured his right hand in the course and scope of his employment with (employer), he did not sustain a compensable injury to his neck and shoulder. In his request for review, claimant disputes the sufficiency of the evidence to support the salient adverse factual findings and legal conclusions of the hearing officer's decision. The respondent (carrier) asserts the untimeliness of claimant's appeal and also seeks our affirmance.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

The decision of the hearing officer was distributed to the parties by the hearings division of the Texas Workers' Compensation Commission (Commission) on June 15, 1993, and claimant stated in his request for review that he received the decision on July 2, 1993. Accordingly, claimant was required to file his appeal at the Commission's Austin, Texas, central office not later than the 15th day after his receipt of the decision, that is, on July 17th. *See* Article 8308-6.41(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3) (Rule 143.3(a)(3)). Though addressed to the Commission's Austin central office, claimant's request for review was received in the Commission's office on July 9, 1993, and was sent by telephone document transfer to the central office on July 19th. Our review of the circumstances surrounding the filing of claimant's request for review persuades us that it was timely filed and, therefore, that the jurisdiction of the Appeals Panel to review the hearing officer's decision was properly invoked. *See* Texas Workers' Compensation Commission Appeal No. 93279, decided May 26, 1993, and Texas Workers' Compensation Commission Appeal No. 92045, decided February 25, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 92183, decided June 22, 1992.

This case presented, as indeed many do, a number of evidentiary conflicts and inconsistencies for the hearing officer's resolution and certainly turned in part on the credibility of the claimant. Claimant testified that on (date of injury), while performing his duties as a swamper, he reached in with his right hand between two concrete wall panels being lowered by a crane to straighten the piece of wood between them when his hand became stuck, and that his hand and arm were pulled downwards and stretched before the crane operator was signaled by the other swamper and pulled the panel back up to release claimant's hand. Claimant said that the accident "took the skin off" his hand and that it was bleeding and he had it wrapped in bandage material when he reported it to employer. He said he did not, however, immediately seek medical treatment because the injury was not painful. He said he continued to work and sometime later saw (Dr. T) and (Dr. M), the

doctors used by employer, who for about two weeks treated him daily for one hour including hot packs for his shoulder and neck. He testified he was later treated by (Dr. H),(Dr. O), and (Dr. D), that he told all of them he had problems with his neck and shoulder but that they did not treat him for those injuries because of the carrier's denial of coverage.

Claimant said he received certain income benefits from the carrier commencing eight days after his accident. According to the documentary evidence, the carrier did not dispute an injury to claimant's right hand, and its attorney averred that carrier paid temporary and impairment income benefits therefor. The carrier did, however, dispute claimant's contention that his shoulder was injured at the time his hand was injured on (date of injury) for the reasons that claimant did not seek medical treatment until (date), and then only for his hand, and that on December 5, 1991, when he next sought medical treatment, multiple contusions were noted on his face, scalp, and shoulder which were not present on (date). At the outset of the hearing, the disputed issue regarding claimant's injury was expanded, with the parties' consent, to include not only the right shoulder but claimant's neck.

Claimant's coworker, (Mr. F), testified that he did not witness claimant's accident, that he had been friends with claimant for 20 years, that he saw claimant daily when they both worked for employer, that he never observed cuts and bruises on claimant's face as described in Dr. T's record of December 5th, and that he had never known claimant to have been involved in a fight. Also, claimant had told him his shoulder hurt.

The employer's plant clerk, (Ms. M), testified that she conducted an investigation of claimant's accident shortly after it happened and talked to claimant, his foreman, the other swamper, and the crane operator. She said the trapping of claimant's hand during the lowering of the wall panels was noticed immediately and the panel was pulled back to free his hand. After the accident and apparently the same day, she observed claimant's hand to be bruised but saw no scratches or bleeding, nor was it wrapped. Claimant did not ask for first aid, said he did not want to go to a doctor, and made no complaint concerning his shoulder or neck. According to employer's time records, claimant missed no work in October or November 1991 except for one unauthorized absence each month. She said that claimant never returned to work after he signed his workers' compensation claim form on December 12, 1991, notwithstanding his several releases to work in December by Dr. T and his February 1, 1993, release by Dr. O. According to Ms. M, claimant complained to her of his hand and wrist, and possibly his arm, about a week before his (date) medical appointment which she made for him. About one month later claimant first complained to her about his wrist, arm, and upper arm hurting. Before December 5th claimant had not complained to her of his neck or shoulder. She told him to return to the doctor and believes he did so approximately one week later. She could recall no cuts or bruises on claimant's face in December 1991.

The Initial Medical Report (TWCC-61) of Dr. T and Dr. M reflected claimant's visit of (date), a diagnosis of right hand contusion, and treatment with a wrist splint. Claimant was released to full duty on (date) by Dr. M and dismissed from treatment on November 12th by Dr. T. A Specific and Subsequent Medical Report (TWCC-64) of Dr. T reflected a visit of December 5th with a diagnosis referring to claimant's right hand and right shoulder and also to contusions at multiple sites, face and scalp contusions, and a shoulder contusion for which claimant was treated with medication, hot packs and diathermy. This report also reflected visits on December 6th, 9th, 10th and 11th for diathermy and other treatment to claimant's right shoulder, that the pain in the right shoulder was decreasing on December 10th, and that on December 11th claimant was asymptomatic and dismissed from treatment. Dr. T released claimant on December 11th for return to full duty work.

Claimant saw either Dr. H or Dr. T on December 16th and gave a history of being injured at work when his right wrist and hand got caught between two cement walls. He complained of right wrist pain radiating up his right arm to his neck. He was diagnosed with cervical strain, shoulder strain, and a wrist contusion, treated with medications, and taken off work for two weeks.

Complaining of wrist pain radiating to his shoulder, claimant was seen on January 27, 1992, by Dr. D, an orthopedic surgeon, upon referral from Dr. H. Dr. D diagnosed Quervain's Disease and a rotator cuff tear. In his report of that date, Dr. D stated: "I believe at that time a concrete wall fell on his hand and twisted the hand so much that he injured all the way into the shoulder and also into the neck." Dr. D prescribed anti-inflammatory medication and ordered an MRI. In his February 24, 1992, report, Dr. D said the MRI revealed findings consistent with a rotator cuff, and possible avascular necrosis in the humeral head which was probably a pre-existing condition. He also stated that a bone scan of the right wrist was not positive and that it looked more like a tenosynovitis or Quervain's Disease. Dr. D later stated he reviewed the risks of rotator cuff surgery with claimant. In a June 8, 1992, letter to the carrier's adjuster, Dr. D said that the history of a concrete wall falling on claimant's hand and twisting it so badly he was injured all the way into his shoulder and neck was given to him by claimant and that he went by that history and by his examination. Dr. D further advised the carrier to get a second opinion on the shoulder surgery claimant desired and said he could do nothing if it were not approved.

At the carrier's request, claimant was examined by Dr. O on August 21, 1992. Dr O's impression included a right shoulder impingement syndrome, chronic mild right wrist sprain, and a mild right carpal tunnel syndrome (CTS). He recommended conservative treatment of these conditions. Claimant was treated by Dr. O throughout the remainder of 1992. Electrical studies on November 3, 1992, did not support a CTS diagnosis. On February 1, 1993, Dr. O determined that claimant has some mild chronic cubital tunnel syndrome but in view of various normal test results did not view him as a surgical candidate. He stated that claimant had reached MMI on February 1, 1993, that he had a five percent

impairment of the upper extremity or three percent whole body impairment, and that he was capable of returning to work without restriction.

Based upon the evidence set forth above, the hearing officer found that claimant did not injure his shoulder or neck when he injured his right hand, and that the cause of any injury claimant sustained to his shoulder and neck could not be determined from the evidence presented. Based on these findings, the hearing officer concluded that claimant failed to prove by a preponderance of the evidence that he sustained an injury to his neck and shoulder in the course and scope of his employment.

The record shows that the carrier felt that Dr. T's December 5th findings of facial, scalp, and shoulder contusions did not track with what it knew of claimant's hand and wrist injury of (date of injury). Claimant on the other hand denied having been in a fight and even having any such contusions, and believed the accident injured not only his hand and wrist but also his shoulder and neck from the downward pulling he experienced before his hand was freed.

The hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Articles 8308-6.34(e) and (g). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). He or she is privileged to believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer is not bound to accept the testimony of the claimant at face value. Garza, *supra*. As an interested party, the claimant's testimony only raises an issue of fact for determination by the trier of fact. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo, no writ). As the trier of fact, the hearing officer also judges the weight to be given expert medical testimony, and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Atkinson v. United States Fidelity Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.); Highlands Underwriters Ins. Co. v. Carabajal, 503 S.W.2d 336, 339 (Tex. Civ. App.-Corpus Christi 1973, no writ). The challenged findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge