APPEAL NO. 93793

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On August 9, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant (claimant) did not show that he injured his elbow in the course and scope of employment and that the notice provisions of the 1989 Act were not met. Claimant asks that his case be reviewed and disputes certain findings of fact and conclusions of law. Respondent (carrier) replies that the decision of the hearing officer is sufficiently supported by the evidence.

DECISION

We affirm.

At the hearing, the parties agreed that the issues were whether claimant was injured in the course and scope of employment and if so, was notice timely, or was there good cause for its untimeliness, or did the carrier or employer have actual knowledge of the injury.

Section 410.204(a) of the 1989 Act states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

On appeal the claimant takes issue with Findings of Fact Nos. 6, 9, 10, 11, and 12, along with Conclusions of Law Nos. 4, 5, 6, and 7.

The Appeals Panel determines:

All findings of fact and conclusions of law necessary to the decision in this case are sufficiently supported by the evidence.

Claimant worked for (employer) for about two years making deliveries. He testified that he injured his elbow unloading a respirator at a loading dock of the airport between (date of injury). Hearing Officer Exhibit No. 1, the benefit review conference report, indicates that the date of injury was (date of injury). Claimant saw (Dr. G) who noted on (date), pain in the right elbow and stated, "no recent trauma;" the nurse's note above Dr. G's entry states the pain had been present for two weeks. Claimant also saw (Dr. B) on January 13, 1993. She recorded his history as including, "having problems with his right elbow since (date). He does not remember injuring his elbow but he had this gradual onset of increasing pain in the right elbow area." Dr. B put a splint on his right arm and instructed him not to use the right arm at work. (Claimant testified that he also worked for Humana Hospital during this period as a respiratory aide.) He stated that he had told his supervisor of the pain in his elbow and was told to see a doctor; he also felt that the problem would get better with time.

On behalf of the carrier, a statement from the employer's branch manager, (JS) said

that he asked claimant in mid-(date) how he hurt his right elbow when claimant complained of it being sore, and quoted claimant as replying that he "didn't know." (KM) testified that she was claimant's supervisor and kept operational data about deliveries employer made. Her records showed that the last respirator was delivered to the airport in October 1992; none was delivered in either November or (date). She also indicated that records showed claimant was on sick leave (date of injury), and did not work that day. She did not know that claimant was saying his elbow was hurt on the job for this employer until (date), when claimant made that assertion in a meeting in which he was to be laid off. Because of the assertion of an on-the-job injury, claimant was given a medical leave of absence. (Employer knew of the restriction on claimant's use of his right elbow, and it had no light duty for a deliveryman.)

The findings of fact disputed by claimant are:

FINDINGS OF FACT

6.The claimant testified that he injured his elbow on (date of injury), while lifting a 7200 Puritan Bennett respirator at the [city] airport.

9.The claimant's injury was not trivial in that his injured elbow prevented him from working for several days for the employer and later prevented him from working full duty for the employer.

10.On (date), the claimant reported that he injured his elbow on the job to the employer.

11.The employer was aware that the claimant's elbow was injured but was not aware that the injury occurred at work until (date).

12.The cause of the claimant's injury to his elbow cannot be determined from the evidence presented.

Conclusions of Law Nos. 4, 5, 6, and 7 stated that the claimant failed to show that he was injured in the course and scope of employment (this failure to show injury was not restricted to (date of injury)) and that he failed to show that notice provisions of the 1989 Act were complied with in some manner, either through timely notice, good cause for untimely notice, or actual knowledge on the part of employer or carrier.

Findings of Fact Nos. 9 and 10 were sufficiently supported by the evidence; the facts reflected in these two findings were essentially not disputed at the hearing. Finding of Fact No. 11 was disputed, with claimant stating that he told his employer that he hurt himself on the job within 30 days and the employer's two supervisory personnel stating or testifying that

he did not--one indicating that the question of cause was asked of claimant who replied that it was not known. The hearing officer is the trier of fact and is responsible for judging the weight and credibility of the evidence. *See* Section 410.165 of the 1989 Act. She could choose to believe that claimant indicated his pain to his supervisors but did not indicate any belief that it occurred from his job for employer until after the 30 days passed. Similarly, she could consider that he went to a doctor without delay and within one month was told to restrict his work. Finding of Fact No. 12 is sufficiently supported by the evidence since claimant ascribed his injury to lifting a respirator in the (date of injury), time frame at the airport; employer's records showed no respirators delivered to the airport as claimant averred. In addition, two doctor's records do not merely fail to address cause but state that claimant either remembered no injury or related no facts of recent trauma. Finding of Fact No. 6 is misstated in that claimant testified that lifting the respirator during the period (date of injury)-17th caused the elbow pain; he did not limit the date of injury to (date of injury). This finding, however, is not necessary to the decision in view of finding of Fact No. 12, stating that the cause of injury cannot be determined. With testimony that no deliveries of respirators to the airport took place at any time in December and the doctor's records denying any report of specific cause in claimant's history, the misstatement in finding of Fact No. 6 as to when in December claimant said he hurt himself was not a necesary element for Finding of Fact No. 12.

In sum, medical records do not support claimant's testimony of how the injury occurred, employer's records do not support that such a delivery took place at any time within weeks of the alleged injury, claimant worked for another employer in a job that could call for movement of equipment, and the credibility of the two supervisors' assertions as to claimant's lack of notification was a question for the hearing officer to decide. The findings of fact and conclusions of law necessary to the decision are sufficiently supported by the evidence. The decision and order are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge