APPEAL NO. 93828

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*.). At a contested case hearing held in (city), Texas, on July 6, 1993, the hearing officer, (hearing officer), reached a number of factual findings and concluded that (LS), the appellant and cross-respondent (claimant), sustained a repetitive trauma injury to the right shoulder and left elbow in the course and scope of his employment with (employer), that his date of injury was (date of injury), that he notified employer of a work-related injury not later than the 30th day after (date of injury), that he has disability (Section 401.011(16)) which began on (date), and which has continued through the date of the hearing below, and that his average weekly wage (AWW) is $250.00. Claimant has appealed from the AWW determination contending that his AWW calculation should be based on his wages as a full-time employee since he was employed full time by employer for a part of his period of employment. (carrier), the respondent and cross-appellant who was the workers' compensation insurance carrier for employer, does not directly challenge the hearing officer's determinations that the claimant sustained a repetitive trauma injury to his right shoulder and left elbow, that his date of injury was (date of injury), that he reported such injury to employer not later than 30 days thereafter, and that he has had disability since (date). Rather, the carrier asserts in its appeal that since the claimant was terminated by employer on November 1, 1992, and worked for (roofing company) for one day on (date of injury), the date the hearing officer determined to be the date of claimant's injury, claimant's last injurious exposure occurred while employed by roofing company and thus carrier should not be liable for the injury, citing Section 406.031(b).

DECISION

Finding the challenged findings and conclusions sufficiently supported by the evidence, we affirm.

Before addressing the merits of the respective appeals, it is necessary to comment on the disputed issues before the hearing officer. The four issues at the benefit review conference (BRC) were as follows: Did the claimant sustain an injury/disease as a result of repetitive trauma; did the claimant timely report his injury to his employer; does disability exist as a result of a compensable injury; and what was the claimant's AWW. According to the BRC report, the claimant's position on the injury issue was that after lifting and throwing bundles of newspapers on the job, his right shoulder and left elbow began to hurt, that after ceasing such activities his condition did not improve, and that he then realized his condition was serious and thereafter sought medical care. Carrier's position was that claimant did not sustain a repetitive trauma injury or disease.

On the timely notice issue, claimant's position was that he told employer of his shoulder and arm problems in October, that he did not think it was serious until the problems persisted when he tried to work another job, and that he timely reported the injury. Carrier's

position was that claimant did not report an injury within 30 days. The BRC report went on to reflect that carrier took the position that claimant "did not report an injury within 30 days from October 1, which is the injury date on the claimant's Notice of Injury and Claim for Compensation [TWCC-41]." We note that on the TWCC-41 in evidence, which was signed by claimant on "12-01-92," Item 8 reflects the "date of Injury" as "No specific date;" Item 16 reflects the date that claimant first knew the "disease was work related" as "late Sept.- early Oct. 92;" and Item 17 reflects the date claimant was "last exposed to the cause of disease" as "10-31-92." We also note that claimant, curiously, also signed on "12-21-92" the Employer's First Report of Injury or Illness (TWCC-1) which he offered into evidence without objection. The Benefit Review Officer (BRO) commented on the timely notice issue that claimant's mention to employer in October of "ordinary aches and pains" was "probably not enough to be considered notice to his employer" but that such complaints were consistent with how claimant then viewed the seriousness of his condition, and that claimant had good cause for not reporting the injury within 30 days because he viewed it as trivial. The BRO then stated: "Alternatively, the claim is for an occupational disease. The date he tried lifting the shingles [on (date of injury), for the roofing company] was the correct date of the injury as that was the date he knew he had an injury which was work related. Either way, the claim is timely reported."

Pursuant to Texas Workers' Compensation Commission (Commission) Rule 142.5(e), Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.5(e), the carrier sent the Commission a written response to the BRC report. In this response, the carrier said that with regard to the first issue as to whether claimant sustained "an injury/disease as a result of repetitive trauma," an additional issue should be added at the hearing regarding the date of such injury because the carrier should not have to defend a case alleging an injury without an injury date. The carrier reiterated its position that claimant did not sustain an injury in the course and scope of his employment. As to the timely notice of injury issue, the carrier's response took exception to the BRO's recommendation that claimant either had good cause for not timely reporting his injury or, in the alternative, that the claim was for an occupational disease and the date of such injury date was the date claimant tried to lift shingles. The carrier then stated: "However, the date of injury that the TWCC has listed as the date of injury for this claim and the one that is scheduled for the CCH is October 1, 1992." Carrier concluded its response stating it was "imperative that the injury date be determined before the carrier can be expected to defend this case," and requested an issue as to the date of injury be added for the hearing. Claimant also prepared what may have been a response to the BRC report. Claimant's document, however, did not discuss the date of injury or timely notice issues. It did refer to his "complete lack of specific knowledge, in these matters, as I have no legal counsel."

In discussing the disputed issues at the hearing, the hearing officer first stated the injury in course and scope issue from the BRC report and claimant agreed it was an issue. The carrier, too, agreed it was an issue and went on to state: "The only thing I want to raise it leaves out two things. One, as we'll get to I imagine, is the date. . . . And, secondly, the

employer. I mean there's always a possibility he sustained repetitive trauma but not with this employer. I'm just saying its not definitive in that sense." After further discussion by the hearing officer and both counsel as to the framing of the first issue concerning injury in the course and scope of employment, and the additional issue requested by the carrier concerning the date of injury, the hearing officer agreed, with no objection and the apparent concurrence of both parties, to amend the first issue to injury in the course and scope of employment with the employer, and further agreed to add the date of injury issue requested by the carrier. Subsequently in its case in chief, the carrier argued, without objection, that claimant's last injurious exposure to the hazards of his occupational disease occurred on (date of injury), when claimant worked a single day for the roofing company, that (date of injury) thus became claimant's date of injury, and that employer's carrier was therefore not liable for the claim.

Claimant's evidence showed that he began his employment with employer on June 24, 1992 (all dates are in 1992 unless otherwise indicated), and that his duties involved the loading of bundles of a large metropolitan daily newspaper onto trucks, driving the trucks to various delivery locations, and unloading the bundles. He testified that he initially worked part-time for approximately the first month, averaging between 20 and 25 hours per week for which he was paid an average of $250.00 per week. He then worked for approximately three months on a full-time basis, averaging approximately 50 hours per week for which he was paid an average of $550.00 per week. He also said he worked six days per week. On October 19th, at his request, claimant said he reverted to part-time employment to make time to attend a course which he expected to lead to another career. He was terminated on November 1st for reasons not relevant to this decision. Claimant's testimony respecting the dates of his employment, his periods of part-time and full-time employment, and his average wages for those periods was essentially corroborated by (Mr. B), employer's owner. Mr. B also testified that employer's other part-time employees were paid on the average of $250.00 per week.

Respecting the appealed issue of claimant's AWW, the hearing officer found that claimant worked full-time for employer from July 24th until October 19th, and earned $550.00 per week; that from October 19th until November 1st, claimant worked part-time and earned $250.00 per week; that he was terminated on November 1st; that claimant did not work for employer for at least 13 weeks immediately preceding the injury; that the usual wages paid by employer to other part-time employees for similar services to those performed by claimant was $250.00 per week; and that claimant's AWW was $250.00 per week based on the usual wage the employer paid similar employees for similar services. In his appeal claimant asserts that the hearing officer's AWW determination failed to take into account that before reverting to a part-time status on October 19th he had been working full-time earning $550.00. He also said he had been informed "by a TWCC official in (city)" that the hearing officer's AWW determination conflicted with Commission Rules 128.3 and 128.4 although such conflict was not explained.

Section 408.041(a) provides that the AWW of an employee "who has worked for the employer for at least the 13 consecutive weeks immediately preceding an injury is computed by dividing the sum of the wages paid in the 13 consecutive weeks immediately preceding the date of the injury by 13." Section 408.041(b)(1) provides that the AWW for an employee who has worked for less than the 13 weeks immediately preceding the injury equals "the usual wage that the employer pays a similar employee for similar services." Section 408.042(a) provides that the AWW "of a part-time employee who limits the employee's work to less than full-time hours or a full-time workweek as a regular course of that employee's conduct is computed as provided by Section 408.041." Section 408.042(c) defines a part-time employee as "an employee who, at the time of the injury, was working less than the full-time hours or full-time workweek of similar employees in the same employment, whether for the same or a different employer." These provisions were the obvious basis for the hearing officer's determinations that claimant was a part-time employee who did not work for employer for at least 13 weeks immediately preceding his date of injury ((date of injury)) and thus that his AWW was that of employer's other part-time employees whom Mr. B testified were paid approximately $250.00 per week. Claimant does not dispute the hearing officer's findings that his date of injury was (date of injury), nor that he was terminated on November 1st, nor that he was a part-time employee from October 19th until terminated, nor that the wages employer paid a similar part-time employee for similar services was $250.00 per week. Since claimant did not work for employer for 13 consecutive weeks before (date of injury), the AWW calculation provisions of Section 408.041(a) do not apply and the hearing officer correctly calculated claimant's AWW pursuant to Section 408.041(b)(1). Despite claimant's assertion, we do not find the hearing officer's determination in conflict with Rules 128.3 and 128.4 which pertain to the AWW calculations for full-time and part-time employees.

Claimant testified that he loaded and unloaded bundles which weighed between 20 and 30 pounds. Mr. B testified that the work was strenuous, that it involved a lot of bending and lifting, that on a daily basis drivers may load from 2000 to 4000 pounds, and that the maximum loads (Sunday editions) were up to 19,000 pounds. Mr. B agreed that the drivers did "thousands of movements" lifting and swinging the bundles. Sometimes the bundles were pre-loaded by other personnel with claimant doing the driving and off-loading, and at other times claimant did the loading as well. When loading, claimant was required to pull the bundles off the conveyor belt and stack them in the truck and he said had to work fast to keep up with the speed of the conveyor belt. When delivering the bundles to the delivery points, claimant had to pick them up and either throw or lift them off the truck. Claimant said the number of bundles varied and more bundles were delivered for the Sunday paper since the inserts were delivered separately on Saturdays. Claimant said that when loading trucks he handled from as few as 65 to as many as 300 bundles and when unloading he handled from 125 to approximately 600 bundles.

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. Claimant said that in late September he developed pain in his right shoulder and left elbow but "thought it would pass." He said he knew in late September or early October that the pain was worse when he was working and also said he had discomfort when not working. While claimant stated on his TWCC-41 that he knew his condition was work-related in late September or early October, and answered a question on cross-examination the same way, he also indicated he was just experiencing the aches and pains of such previous work, thought he had just pulled a muscle, and said he did not realize he had an injury, as such, until (date of injury) when he commenced a different job and the same pain returned. Claimant's testimony seemed to indicate he did not realize he was actually injured until (date of injury). He also said he was expecting to quit and was hoping the pain would subside thereafter.

After claimant was terminated on November 1st, he did not work until (date of injury) when he went to work as a laborer for the roofing company. On that day, he said he intermittently carried bundles of shingles up a ladder on his left shoulder, dumped them on the roof, picked up old shingles and debris off the ground, and placed it in trash bags. He stated that he knew by the end of that day that he could no longer do manual labor because his same pain had returned so he gave the roofing company an excuse for leaving the employment after only one day. He denied that he injured himself on (date of injury). Rather, he said, the same pain he had experienced when working for employer returned while he worked on (date of injury). He regarded (date of injury) as the day he both knew he had an injury, and that it was was serious, since he then realized he could no longer perform manual labor. He said he has not worked since that date. A few days later, claimant said he went to employer's premises to return a weight belt and told Mr. B he was going to have to file a workers' compensation claim. Mr. B agreed they had spoken about such a claim but said claimant did not state against whom the claim would be filed.

Thereafter, claimant said he contacted the Commission on November 30th for information, was provided a form and information on obtaining medical care, and he arranged for an appointment with a doctor on December 14th. He signed his TWCC-41 on December 1st. (Dr. G) issued a report on January 26, 1993, which stated that on December 14th he diagnosed a right shoulder rotator cuff syndrome and lateral epicondylitis of claimant's left elbow, and that a January 2, 1993, MRI showed a tendon tear with a large subacromial spur. Dr. G also stated: "This [MRI findings] correlates with the symptoms of the patient and the repetitious nature of his work. Both these injuries can be directly related to [claimant's] work responsibilities, i.e. handling heavy bundles and throwing papers." Dr. G felt that claimant's elbow had improved but that conservative treatment of the shoulder had failed and he recommended surgical decompression. In a March 1, 1993, report, (Dr. F), who practiced at the same clinic as Dr. G, stated that claimant had been kept off work since his initial visit because he was unable to work secondary to his pain. At that time, however, it was felt claimant could return to work with a lifting restriction of 20 pounds and avoidance of overhead repetitious activities. In an April 13, 1992, report, Dr. F stated: "[Claimant's] injury of his rotator cuff impingement of the right shoulder and lateral

epicondylitis of his left elbow are a result of repetitive type trauma from overuse type injuries. These are not related to a single episode or one day's work."

Respecting the carrier's appealed issue, which appears to be couched in terms of the last injurious exposure although it does refer to the (date of injury) injury date determination, the hearing officer found, as already noted, that claimant had worked for employer both part-time and full-time from July 24th until November 1st when he was terminated, that he attended school and was unemployed until (date of injury) when he was employed by the roofing company as a general laborer, and that he had experienced pain in his right shoulder and left elbow while working for employer but had not considered it serious until (date of injury) when he worked one day for the roofing company and experienced the same type of pain in his shoulder and elbow. The hearing officer concluded that claimant sustained a repetitive trauma injury to his right shoulder and left elbow in the course and scope of his employment with employer and that his injury date was (date of injury). The hearing officer also concluded that claimant notified employer of a work-related injury no later than 30 days after (date of injury), and that he had disability as of (date).

In his Statement of the Evidence the hearing officer observed that the carrier agreed the date of injury was (date of injury), the date claimant testified he first realized his injury was serious, but that carrier contended that since claimant's injury was an occupational disease, the employer where claimant was last injuriously exposed is considered to be the responsible employer under the 1989 Act. Indeed, the carrier made the following representation to the hearing officer in its closing argument:

So, therefore, the carrier's position is that the date of injury is (date of injury); and that

> the last injurious exposure did not occur at [employer]. That's why I don't think I'm arguing timely reporting not against [employer]. He reported to [employer] within 30 days of (date of injury), but it wasn't their injury on (date of injury). It was [roofing company] at that point.

While it is not apparent that carrier is directly challenging the hearing officer's conclusion that the date of injury was (date of injury), particularly in view of carrier's representation to the hearing officer and in view of its stipulation to being claimant's employer at all pertinent times, we nonetheless have reviewed the evidence on the issue and find it sufficient to support the hearing officer's conclusion. We infer from the evidence, having noted the hearing officer's reference to the definition of the date of injury for an occupational disease, a finding that (date of injury) was the date claimant knew or should have known of his occupational disease. Section 406.031(b) provides that if an injury is an occupational disease, "the employer in whose employ the employee was last injuriously exposed to the hazards of the disease is considered to be the employer of the employee under this subtitle." In his Discussion, the hearing officer explained his rationale for determining that employer was the responsible employer. He stated he found that claimant was last injuriously

exposed to the repetitive arm movements which caused his injuries while employed by employer and said he rejected carrier's argument that claimant was last so injuriously exposed while working for the roofing company. The hearing officer also stated that on (date of injury), claimant realized, after three weeks of rest, that his injury was a serious matter which needed medical treatment, and that claimant did not injure nor aggravate his injury on (date of injury). The hearing officer concluded that to be "injuriously exposed" requires more than merely being employed.

Under the 1989 Act, the hearing officer is the trier of fact at the 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. Section 410.165(a). The trier of fact can believe all or part or none of any witness's testimony, including that of the claimant, and judges the credibility of the witnesses and the weight to assign their testimony, and resolves the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993; Texas Workers' Compensation Commission Appeal No. 93155, decided April 14, 1993. As the fact finder, the hearing officer must resolve conflicts and inconsistencies in the evidence, weigh the credibility of the witnesses, and make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993; Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Where sufficient evidence supports the findings and they are not so 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); 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).

Whether or not claimant was "last injuriously exposed to the hazards of the disease" on (date of injury) while working for the roofing company was a fact question for the hearing officer as the fact finder to determine. Since it was the carrier who asserted that claimant's last injurious exposure occurred on (date of injury), it was the carrier's burden to so prove that fact. Incidentally, the parties stipulated at the outset of the hearing that "claimant was an employee of [employer] at all times pertinent to this case." This stipulation on its face could be dispositive of carrier's appealed issue regarding the date of the last injurious exposure and the date of injury. However, the hearing officer made findings of fact based on the other two stipulations, but not on this one, and apparently treated the appealed issue as if it had not been proven by the stipulation. Neither party has raised an appealed issue respecting the hearing officer's treatment of the stipulation. Accordingly, we have reviewed the appealed issue for the sufficiency of the evidence, aside from the stipulation, to support the hearing officer's determination. After carefully reviewing the evidence in this case, we are not prepared to say that the hearing officer's findings are so against the great weight and preponderance of the evidence as to be manifestly unjust. The carrier urges that since claimant used repetitive motions in lifting bundles of shingles to his shoulder to carry up the ladder on (date of injury) and also used his arms to pick up debris, that such activities

constituted his last injurious exposure. However, the hearing officer could consider and credit claimant's testimony regarding the manner in which he carried approximately 25 bundles of shingles weighing between 40 and 50 pounds up the ladder intermittently with his picking up of debris, as well as the duration of such activity, in contrast with his description of the manner in which he loaded and unloaded the newspaper bundles. The hearing officer could also consider the expert opinion of Dr. F that claimant's injury was not the result of a single episode or one day's work. The hearing officer in his discussion stated that while claimant's work activities on (date of injury) required arm movements, he did not find such movements to be "repetitive in nature, nor . . . to require an overhead movement." We are satisfied the hearing officer's findings are sufficiently supported by the evidence.

The decision of the hearing officer is affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Lynda H. Nesenholtz
Appeals Judge

DISSENTING OPINION:

I respectfully dissent from the majority opinion. In my opinion, the hearing officer's determination that the date of injury for this repetitive trauma injury was (date of injury), (which has been appealed by the carrier, even if argued primarily as last injurious exposure) is against the great weight and preponderance of the evidence, specifically, the claimant's testimony was that he knew he was hurt, and knew it was "definitely" work related, in early October of 1992, and the fact that he filed a claim with such early time frame of injury. The decision as a whole indicates to me that the hearing officer erroneously equated the notions of "last injurious exposure" and "date of injury" under the 1989 Act.

The case would then have to be remanded to determine the specific date of injury in that time frame, whether claimant gave timely notice and, if not whether he had good cause for failure to give timely notice. Claimant stated that he gave notice in October to his supervisor. (I note, parenthetically, that the hearing officer's decision discussed throughout his decision his impression that the facts were that claimant did not realize his injury was serious until (date of injury), indicating a "text book" case of good cause in the event actual

notice were not found). The average weekly wage would then be computed based upon 13 weeks prior to the early October 1992 date of injury, or the wage paid to a similar employee performing similar services on the date of injury.

I would affirm the hearing officer's determination regarding "last injurious exposure", in that his opinion that claimant did not occur further repetitive injury while at the roofing company has sufficient support in the evidence, and is not against the great weight and preponderance of the evidence on this point.

Susan M. Kelley
Appeals Judge