APPEAL NO. 93895

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 September 14, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues to be decided at the CCH were: "Whether Claimant sustained a repetitive trauma hernia injury within the course and scope of his employment with [employer] on (date of injury), even though Claimant was not employed by [employer] on that date, whether Claimant timely reported his alleged injury or, alternatively, had good cause for failing to do so, and whether Claimant has sustained any disability as a result of such alleged injury." The hearing officer determined that the appellant, claimant herein, did not sustain a repetitive trauma hernia injury within the course and scope of his employment with employer.

Claimant disputes certain of the hearing officer's findings and decision and 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.

Claimant testified that he had worked as a cashier/carry out/customer service person for the employer from April 1989 to February 7, 1992. Before that claimant had worked for a state mental health agency (where he had been assaulted by a male patient) and in 1978 had a left inguinal hernia repaired. Claimant testified that his duties for the employer consisted of lifting, bending and stooping; claimant is supported on this point by his former supervisor, (Mr. R), who testified he routinely carried items weighing 20 to 25 pounds and on occasion up to 50 or 60 pounds. Mr. R testified claimant was loyal, dependable and did not question claimant's honesty, credibility or integrity. According to Mr. R, in early February 1992, claimant was transferred to another store in order to be trained as a scanning coordinator, which Mr. R viewed as a promotion. According to Mr. R, apparently claimant did not like the other store or work, and after a few days did not go back and instead returned to the store where he had previously worked and asked Mr. R to be re-instated to his old job. Mr. R testified that on asking employer's home office for instructions on re-instating claimant to his carry out duties, he was instructed to remove claimant from the work schedule. Neither Mr. R nor claimant are certain whether claimant was terminated or had quit by not showing up at the other store.

Claimant's last day at work for the employer was February 7, 1992. Claimant was not employed between February 7th and (date of injury), when he went to the emergency room (ER) regarding complaints of blood in his urine and bleeding from his scrotum. Upon examination, the ER doctor, (Dr. A), diagnosed claimant as having a right inguinal hernia among other things related to claimant's complaints. In a report dated August 3, 1993, Dr. A expressed the opinion that claimant's right inguinal ". . . hernia had been there for some

time and very likely was caused by lifting and straining over time (weeks, months, years). It is not possible for me to put a definite date of onset, but is (sic) is very likely related to his work." Claimant was referred to (Dr. W) "for recheck of his hernia and repair."

Although a July 15, 1993, report from Dr. W was excluded from the record for failure to exchange the report, another report of Dr. W, apparently dated "05-04-92," indicates claimant has a "right inguinal hernia that can be repaired electively."

Claimant was sent to the (UTMB) by the Texas Rehabilitation Commission (TRC) to assess whether claimant had a hernia and if surgery would be recommended. According to a TRC report dated July 26, 1993, the UTMB general surgery department on "6/15/92" gave a diagnosis that a hernia was not present. On September 10, 1992, the UTMB outpatient follow-up examination report stated "φ inguinal hernia. Prob. chronic prostatitis." On September 25, 1992, the UTMB urology department gave a diagnosis of "chronic prostatitis." Claimant argued that these reports were by medical students and should not have the weight as practicing medical specialists.

Claimant was also seen by (Dr. H), a urologist, who in a report dated January 7, 1993, stated: ". . . has a bulge in his right inguinal area. On physical examination the patient does have a definite bulge in his right inguinal area. A classical indirect hernia is not palpated however I feel he may have a direct hernia in this area."

Because of the circumstances surrounding his departure from the employer's employment, claimant filed an unemployment claim with the Texas Employment Commission (TEC). Claimant, in one of several hearings on the unemployment issue, saw the employer's personnel representative in early April 1992, but did not mention an injury at that time. Claimant filed his Employee's Notice of Injury (TWCC-41) on April 20, 1992, with the Texas Workers' Compensation Commission (Commission). Subsequently, claimant worked as a cashier for a drug store chain for a few weeks over the 1992 Christmas season. Claimant testified he left the drug store chain because he needed a more remunerative job and because of his hernia. Thereafter claimant worked for a local office supply store. Claimant stated this job was only on a trial basis and that he left it in March 1993 for the mutual benefit of himself and the store.

Claimant testified that his left hernia, 14 years previous, was caused by lifting, he was immediately aware when it happened as he had pain and a bulge. In contrast, claimant testified regarding his present alleged right hernia, he was unaware of when it occurred, it was not painful and he had not noticed a bulge or was even aware he had a hernia until he was told he had one when he went to the ER on (date of injury), for other unrelated problems.

Claimant alleges he sustained the hernia by repeated and repetitious lifting while employed by the employer although he was unable to specify a time frame during which it may have occurred. The hearing officer, in her discussion of the case, noted that in a repetitive trauma injury, the date of injury is the date the claimant first knew or should have known that his injury may be related to his employment. The hearing officer states:

Since it is clear from the evidence that Claimant was first aware of the possibility of an employment-related hernia on (date of injury), that date would be considered Claimant's date of injury, even though Claimant was not employed by Carrier's insured on that date.

In the case of a repetitive trauma injury, the employer of last injurious exposure is considered the employer for workers' compensation purposes. Since Claimant did not work between the time his employment with [employer] terminated and the time he became aware that he might have sustained a compensable injury, [employer] would be the employer of last injurious exposure, and its workers' compensation carrier would be responsible for workers' compensation benefits associated with the Claimant's injury, if Claimant sustained a compensable repetitive trauma hernia injury within the course and scope of his employment with [employer].

Noting that the date of injury in such a case is used to determine the time period for providing notice, we find no error in the hearing officer's statement of the applicable law in this case and as it is not an appealed issue will not be discussed further.

The hearing officer in discussing the factual aspects of the case notes that the record contains medical evidence to support claimant's contention of a repetitive trauma hernia. The hearing officer then goes on to state:

However, the record also contains medical evidence that Claimant does not have a right inguinal hernia. Considering the conflicting medical evidence regarding this matter, together with Claimant's own testimony regarding the drastically different symptoms he suffered with his left inguinal hernia than he suffered with his alleged right inguinal hernia, it can not be decided that a preponderance of the credible evidence supports Claimant's allegation that he sustained a repetitive trauma hernia within the course and scope of his employment with [employer].

The hearing officer determined that claimant's employment with the employer did not cause claimant to sustain a repetitive trauma hernia injury. Claimant appealed and reiterated much of the evidence presented at the CCH, including the fact that Drs. A, W and H all have stated he does, in fact, have a right inguinal hernia and that the hernia prevents him from obtaining or retaining employment.

The key issue is whether claimant sustained a repetitive trauma hernia injury while employed by the employer. This is strictly a factual determination within the province of the hearing officer to determine. The hearing officer could well have found that claimant sustained a hernia while employed by the employer, that claimant gave notice as soon as he was aware he had a hernia and that it was work related, and that he had disability arising therefrom. However, the hearing officer, based on the evidence before her, found that

claimant did not sustain a repetitive trauma hernia, as discussed in her decision. The hearing officer is the sole judge of the relevancy and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a); Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The hearing officer recited that while there is some medical evidence to support claimant's contention he has a hernia (Drs. A, W and H), the hearing office notes there is also some evidence to the contrary. It is within the province of the hearing officer to resolve any conflicts or inconsistencies in the testimony. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Here the hearing officer chose to accept the reports from UTMB as opposed to the reports of Drs. A, W and H. An appeals level body is not a fact finder, and does not normally pass on the credibility of the evidence or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such a decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). In that the hearing officer found that claimant had not sustained a repetitive trauma hernia in the course and scope of employment; that is dispositive of the case and makes a discussion of notice and disability moot.

While the hearing officer could have reached a different conclusion than that which she did, we will not substitute our judgment for that of the fact finder where, as here, the determinations are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986).

Our review of the record convinces us that the hearing officer's determinations were supported by sufficient evidence. The decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge