APPEAL NO. 93911

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.) On September 7, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) did not sustain carpal tunnel syndrome as a result of his work and did not timely report his allegation to the employer. Claimant takes exception to certain findings of fact stressing the limited weight lifting he did during the period in question and emphasizing certain points in the medical evidence. Respondent (carrier) replies that the hearing officer should be affirmed.

DECISION

We affirm.

Claimant began work for (employer) in September (year). At first he worked in a warehouse filling orders for various supplies. He described a small trucklike vehicle he drove; he filled orders by leaving the vehicle to take a variety of goods from their places and place them on the bed of the vehicle; items could be small or "a fifty pound sack of pizza flour." He said that he had to work quickly to meet his quota. In December (year) he was moved to do sanitation work in the cooler area; the work involved a lot of sweeping, mopping, and moving items, such as pallets, out of the area. Claimant testified that he first felt tingling in his hands while working for employer. One doctor he saw, (Dr. S), states in his history that claimant developed his symptoms in October or November (year). Another doctor he saw, (Dr. M), on February 15, 1993, stated that claimant had had an abnormality in his right hand for over a month.

The first doctor claimant saw, Dr. M, also said on February 15th that the problem was possibly carpal tunnel syndrome and listed no other possibility. Dr. M, after nerve conduction studies, then said that claimant had carpal tunnel syndrome on March 24, 1993 but did not say it was caused by the work. No one disputed that claimant told the employer on April 12, 1993, that he considered the problem work related.

The surgeon who operated on claimant, (Dr. G), recorded on April 12, 1993, that claimant "works at [employer] where he does some heavy labor, but most of the heavy work he does in fact is at weight lifting, which he spends a lot of time at."

Dr. S, who directed the physical therapy of claimant, noted in August 1993 that inception had been in the October-November (year) time period; he stated the cause of the problem as "based on his history that there is a likelihood that the repetitive wrist activities undertaken while employed at [employer] may have been a causative or aggravating factor in the development or aggravation of his carpal tunnel syndrome." He also used the words "could well have been related to" in describing the work and the carpal tunnel syndrome.

(Dr. P) on June 9, 1993, in examining claimant on behalf of the carrier, said he noted various responses to testing; he added "most unlikely that the patient's work duties caused

his carpal tunnel syndrome." He also said that weight lifting is a "common cause for carpal tunnel syndrome." (Claimant disputed that weight lifting caused carpal tunnel syndrome saying that people with carpal tunnel syndrome are seen in rehabilitation doing weight lifting and that he keeps his wrist straight while weight lifting.)

Claimant testified that in the period of January 1, 1993, to February 15, 1993, when he saw Dr. M, he had worked out only four times (at the Racquet Club). He stated he had not worked out at Fitness World from September to December (year). The affidavit of the manager of the Racquet Club shows that claimant worked out there five times between January 1, 1993, and February 15, 1993.

Carrier called (DM) to testify; he is a private investigator who said that the manager of Fitness World told him that claimant had been a member since 1991 and remembered no lapses in attendance except for a few days. (Mr. B), who was human resources manager for employer in February 1993, testified that he is familiar with the work claimant did in the warehouse (September to some date in December (year)) and said it did not involve repetitive hand work, although there could be some repetition involving a person's back. He also would not characterize claimant's subsequent sanitation work as repetitive.

The hearing officer is the sole judge of the weight and credibility to be given the evidence. *See* Section 410.165. As fact finder he could have believed claimant when he said that he only worked out four times from January to February 15th. *See* Houston Gen. Ins. Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.) and Sifuentes v. T.E.I.A., 754 S.W.2d 784 (Tex. App.-Dallas 1988, no writ). On the other hand, he could also consider claimant's testimony as to his activities as that of an interested witness, which he is not required to accept. *See* Presley v. Royal Indem. Ins. Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ).

The burden of proof is on the claimant to show that his injury was caused by the work. *See* Martinez v. Travelers Ins. Co., 543 S.W.2d 911 (Tex. Civ. App.-Waco 1976, no writ). The hearing officer could consider that Dr. S's opinion only raised a possibility that the work caused or aggravated the carpal tunnel syndrome. The hearing officer may give more weight to one physician's opinion as opposed to another's. *See* Atkinson v. U.S. Fidelity & Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.). As a result, the opinion of Dr. P that said it was unlikely the work caused the condition could outweigh the opinion of Dr. S that said work "may have" or "could well have" been a factor or related to the condition. The evidence was sufficient to support the findings of fact that the carpal tunnel syndrome of claimant was not shown to be caused by the work. The evidence is also sufficient to support a finding that notice was not timely since Section 409.001 requires that notice be given the employer not later than 30 days after the date the employee "knew or should have known that the injury may be related to the employment." Since the finding that the injury was not shown to be caused by the work has been upheld, the finding as to notice is not controlling of the decision in this case.

Claimant suggests that a statement from the manager of Fitness World be obtained. The Appeals Panel only considers the record of hearing, the appeal and the response in reaching a decision. *See* Section 410.203. In addition, there is no indication that such a statement could not have been obtained and provided to the fact finder at the hearing. The suggestion is rejected.

The findings of fact and conclusions of law are sufficiently supported by the evidence and the decision and order are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge