APPEAL NO. 94193

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On January 21, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues were whether claimant sustained a compensable injury (a repetitive motion injury) on (date of injury); whether he had disability from his injury beginning in April 1993; and the average weekly wage for claimant. The hearing officer determined that claimant sustained an injury, with the date of injury being (date of injury); that he had disability therefrom beginning April 20, 1993; and that his average weekly wage should be based upon the thirteen weeks prior to (date of injury).

The carrier has appealed, arguing that the great weight and preponderance of the evidence is that claimant did not sustain carpal tunnel syndrome. This contention is based in part upon carrier's argument that claimant's surgeon performs carpal tunnel release surgery on persons who test negative for the syndrome. The carrier also argues that the hearing officer erred by admitting answers to a deposition on written questions into evidence, over carrier's objection that the same had not been exchanged as required by the 1989 Act and applicable rules. The carrier argues that an offer of a continuance is not a sufficient remedy, and that the admission of the evidence is reversible error. The claimant did not file a response.

DECISION

After reviewing the record, we affirm the hearing officer's decision. We correct a typographical error in Conclusion of Law No. 4, relating to claimant's disability, to read "April 19, 1993" instead of "1992."

The claimant had worked as a bus driver for 18 years for the (employer) (hereinafter referred to as carrier or employer, depending upon its role in the context). He said that about a year and a half to two years before his date of injury, the employer began using a kind of bus called the "Icarus" which was semi-power steering, as opposed to full power steering. As such, it had to be steered with greater force, which meant that the steering wheel had to be gripped more tightly. He said that the wheel on the Icarus was larger than the full power steering buses. Claimant said that every morning, he also punched transfers, as well as throughout the day, for a total of 200-300 "punching" actions a day. Claimant is right-handed. The claimant said he worked a ten hour, eighteen minute shift, and drove for approximately 9-1/2 hours of that time.

The claimant established his date of injury by thinking back to when he first began experiencing symptoms. He said that his hands began to hurt and get numb while he was driving, and would occasionally swell. He said the pain in his hands became enough to wake him up at night on occasion. Claimant said he complained to his family doctor,(Dr. H), who suggested that he might have carpal tunnel syndrome. Claimant said he loved his job, made more money at it than sitting home collecting checks, and that he put off seeking

medical care to work as long as possible. He had never heard of carpal tunnel syndrome prior to speaking to his coworker about symptoms.

Claimant said that a coworker noticed him shaking his hands one day, told him he had similar symptoms at one time, and referred him to a (Dr. R), whom he characterized as a specialist. Claimant saw Dr. R in January 1993; Dr. R eventually had an EMG test run on claimant. Claimant acknowledged that the test had for the most part normal results, but that Dr. R told him mild carpal tunnel was confirmed in his left hand, and that carpal tunnel syndrome did not always show up on EMG. Dr. R said his clinical examination confirmed that claimant had carpal tunnel syndrome. Claimant had a carpal tunnel release operation on his right hand October 4, 1993.

Claimant testified he was aware of other bus drivers who also had carpal tunnel syndrome. He said he left his job as he became unable to grip the steering wheel for his full day. Claimant said that Dr. R did not treat him with wrist braces, but offered him the options of physical therapy and surgery. A coworker, GT, also testified that she contracted carpal tunnel syndrome, drove the Icarus bus, and had surgery performed by Dr. R. She testified that she had overheard other bus drivers complain that they did not like the Icarus bus.

At the beginning of the hearing, claimant offered an exhibit consisting of his medical records and a deposition on written questions of Dr. R. The carrier objected to the deposition portion of the exhibit, stating that although it was aware of the questions, it had never received the answers in exchange. The record indicated that claimant's attorney had been involved on his case only slightly over two weeks at the time of the hearing. He said that claimant's previous representative (who was not an attorney) had told him everything had been exchanged. The answers to the written questions were dated December 1, 1993. The hearing officer admitted this deposition, citing as good cause the miscommunication of the claimant's representatives. The hearing officer told the carrier that she would allow it a continuance, which was rejected. The hearing officer stated that her interpretation of the statute mandating exchange of evidence under penalty of exclusion was "the intent of the exchange is not really directed toward excluding evidence. It's really directed toward everyone being on notice of what the evidence is. Now, I do not intend to have [claimant's attorney] be faced with a problem of being unable to go forward with a critical piece of evidence when I have a way to cure that."

Claimant was also examined by a doctor for the carrier, (Dr. K), who he said hurt him during his examination. He saw Dr. K twice, for a total examination time, he said, of no more than 15-20 minutes. Claimant said he had received long term private disability beginning August 1993.

Medical evidence (aside from the answers to the deposition) indicates that Dr. R felt that claimant had carpal tunnel syndrome, bilateral, notwithstanding the EMG test results indicating a normal right hand. Dr. R's specialty is listed on his correspondence as plastic

surgery. Claimant said he was given an EMG test by Dr. E) in May 1993; Dr. E's undated report states that the study was compatible with minimal left carpal tunnel syndrome without denervation. Dr. E notes no evidence of right carpal tunnel syndrome. Dr. K stated on a deposition to written questions that claimant's nerve test did not indicate carpal tunnel syndrome. (This may refer to an EMG test conducted June 9, 1993, at Dr. K's request). A letter by Dr. K dated May 11, 1993 comments on a questionable positive Phalen test on the right; the doctor performing the EMG stated that this was not diagnostically significant.

WHETHER THE HEARING OFFICER ERRED IN ADMITTING THE DEPOSITION ON WRITTEN QUESTIONS OVER OBJECTION THAT IT WAS NOT EXCHANGED

The hearing officer erred, we believe, by admitting the deposition on written questions, and finding good cause in the miscommunication between the claimant's representatives. First of all, the exchange requirement is incumbent upon parties. Section 410.160. Representatives merely stand in the party's shoes. The hearing officer's focus in analyzing whether an exchange was properly made is whether "the party" had seen to the required exchange. Whether a claimant's representatives had a misunderstanding would be no different than a carrier's adjuster and attorney having a failure to communicate. Neither is good cause, especially for a document in the possession and control of the party for at least six weeks before a hearing.

The hearing officer's statement about the intent of the law covers only half of the equation. The provision for exclusion of undisclosed evidence in Section 410.161 applies not only to proceedings before the Texas Workers' Compensation Commission (Commission), but to the courts as well. Were the intent of the statute only to provide for "everyone being on notice" of what the evidence was, the exclusion would not, in our opinion, be applied by the legislature to exclude evidence in the court proceeding (which may occur several months after the Commission hearing.) The carrier's point that a continuance is not a cure for the failure to exchange is well taken; if such were the case, the statute providing for exclusion would have no meaning because it could always be circumvented by a motion or offer for continuance. (Of course, parties are free to agree to a continuance, and a continuance is appropriate where there is true good cause for documents not available until right before a hearing). The exclusion provision is the drastic penalty put in the 1989 Act to ensure that each party will seriously, and diligently, recognize the duty to exchange pertinent information with the opposing party.

The deposition should have been excluded, and we have disregarded it in considering the weight of the evidence in this case. We do not feel reversible error was committed because the deposition is essentially cumulative of other medical evidence. The hearing officer's decision is sufficiently supported by other evidence in the record, including the claimant's testimony.

WHETHER THE HEARING OFFICER ERRED IN FINDING THAT CLAIMANT HAD COMPENSABLE CARPAL TUNNEL SYNDROME

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.- Houston [1st Dist.] 1987, no writ). In this case, claimant testified to progressive hand symptoms that caused increasing discomfort and inability to do the job. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701, 702 (Tex. Civ. App.- Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers' Insurance Ass'n v. Campos, 666 S.W.2d 286, 290 (Tex. App.- Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses 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 Co. of Pittsburgh, Pa. v. Soto, 819 S.W.2d 619, 620 (Tex. App.- El Paso 1991, writ denied).

It was clear from carrier's case that its argument is premised on its perception that Dr. R is performing costly surgery on persons with slim to no objective evidence of carpal tunnel syndrome. However, the forum for disputing the necessity of medical treatment is through the dispute resolution procedures provided by Sections 408.027 and 413.031 and applicable rules. Carrier presented evidence that there is some dissatisfaction among the employer's drivers with the new bus, perhaps as a manner to explain away claimant's testimony. However, the hearing officer could not be faulted by believing claimant's testimony over a theory that he would go so far as to have surgery to avoid driving an Icarus bus.

A typographical error has been made in the conclusion of law which supports claimant's disability period. It cites disability as beginning on April 19, 1992 rather than 1993. The date should be corrected in accordance with the evidence and the rest of the decision to the year 1993.

The decision and order of the hearing officer are affirmed, as corrected.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge