APPEAL NO. 94348

On February 15 and 22, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the hearing were: (1) whether the appellant (claimant) was injured in the course and scope of his employment on (date of injury); (2) whether the claimant gave timely notice of his claimed injury to his employer; and, if not, whether the claimant had good cause for failing to timely notify his employer of his claimed injury; and (3) whether the claimant has disability. The hearing officer found against the claimant on all issues and decided that the claimant is not entitled to workers' compensation benefits. The claimant disagrees with the hearing officer's decision and requests that we reverse it and render a decision in his favor. The respondent (carrier) requests that we affirm the hearing officer's decision.

DECISION

Affirmed.

The employer makes concrete blocks. The blocks are taken into a curing room on a small railcar, which is called a "rack," on tracks. The rack is pushed forward by a piston. The claimant testified that on (date of injury), the piston was not working so he used a pipe to move a rack full of blocks. He said he injured his right shoulder and neck when he did this and immediately reported his injury to (EO), a machine operator, and to (SB), who was the plant superintendent. Claimant continued to work until October 19, 1993, and during this period worked six days a week with overtime on most days. The claimant further testified that he stopped working because of shoulder pain and that SB gave him permission to go to the company doctor, (Dr. M), on October 21, 1993. The claimant said his injury has prevented him from working anywhere since October 19, 1993.

On October 21, 1993, Dr. M saw the claimant and he reported that the claimant said he had been injured at work on (date of injury), when he was pulling a rack full of blocks. Dr. M diagnosed "acute non-specific cervical back pain and acute right shoulder injury - rule out a rotator cuff tear," placed the claimant on one week of physical therapy, and recommended light duty work. The employer does not have light duty work. The claimant next saw Dr. M on October 28, 1993, when Dr. M recommended an MRI scan to rule out a cervical disc herniation and a rotator cuff tear. According to Dr. M, the carrier refused to pay for the diagnostic tests so they have not been performed and he has not treated the claimant since October 28th because the claimant is unable to afford treatment. On December 9, 1993, the claimant saw (Dr. G) who reported that the claimant had an internal shoulder derangement and diagnosed a rotator cuff tear. Dr. G noted that the claimant told him that he had injured his shoulder at work in October 1993 pulling a cart. The claimant said he did not tell Dr. G that his injury happened in October.

The claimant's wife testified that the claimant told her on (date of injury), that he had injured his shoulder at work on that day and that he had reported the injury to SB. She said

that the claimant has complained of pain since his injury. She also said she overheard the claimant tell SB on October 21, 1993, that he had hurt his neck and shoulder.

EO testified he was a "leadman" at work, but also said he was not the claimant's supervisor. He said that SB was the plant supervisor. EO further testified that the claimant told him on (date of injury), that he had hurt his shoulder on that day pushing a rack, and that the claimant also told him that he, the claimant, had reported the injury to SB that day. EO said he did not see the claimant get hurt. EO also said that he reported to SB on (date of injury) that the claimant had been injured that day, and he indicated that the employer had had problems with the rack piston. EO quit work on October 8, 1993, because he was dissatisfied with the pay.

SB testified that on (date of injury), he was the supervisor of the claimant and EO, both of whom were machine operators. He further testified that the employer had no "leadmen" and that EO was not a supervisor. SB said that no one, including the claimant and EO, reported to him on (date of injury) that the claimant had been injured at work on that day. SB said that all plant machinery was operating on (date of injury) and that there had been no breakdowns on that day. According to SB, on October 19, 1993, the claimant told him that he was going to a doctor because of leg pain, but did not mention anything about a work-related injury. The claimant denied he reported leg pain to SB. SB testified that the claimant first reported a work-related neck and shoulder injury to him on October 21, 1993. SB said he reported the injury to the personnel department who made an appointment for the claimant to see Dr. M the same day. SB also testifed that he had not observed claimant having any problems doing his work in the month preceding October 21st.

The claimant testified that he cannot lift his right arm straight up without pain. Videotapes of the claimant made in January 1994, show the claimant moving and lifting his right arm, and lifting his children with both arms, without apparent difficulty.

The claimant had the burden of proof on all issues before the hearing officer. The hearing officer found that the claimant was not injured in the course and scope of his employment on (date of injury); that the claimant has not had disability; and that the claimant, without good cause, failed to give notice of his claimed injury to his employer within 30 days of the date of the alleged injury. The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer is responsible for determining what facts have been established from the conflicting and contradictory evidence. In this case, the hearing officer decided to give more credence and weight to the testimony of SB than he did to the testimony of the other witnesses, which, as the finder of fact, he was entitled to do. In addition, a doctor's recitation of the history of an injury as reported to the doctor by the claimant, does not compel a determination that the injury in fact occurred as alleged by the claimant. Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). Although reasonable inferences different from those deemed most reasonable by the hearing officer could be drawn from the evidence by a reviewing body, that is not a sufficient basis to disturb the hearing officer's

decision. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Having reviewed the record, we conclude that the hearing officer's findings are supported by sufficient evidence and that they are not against the great weight and preponderance of the evidence. *See* Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ); Griffin v. New York Underwriters Insurance Company, 594 S.W.2d 212 (Tex. Civ. App.-Waco 1980, no writ). Without a compensable injury, the claimant would not have disability as defined by Section 401.011(16). The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge