APPEAL NO. 950001
FILED FEBRUARY 15, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 10, 1994. The issues at the CCH were: 1. Is the appellant (carrier herein) relieved of liability because the day of last injurious exposure is a date after which the respondent (claimant herein) worked for a different employer and 2. Did the claimant have disability, and if so, for what period. The hearing officer found that the last date of injurious exposure was before the claimant went to work for another employer and thus found carrier liable. The hearing officer found that claimant has had disability beginning on July 27, 1994, and continuing through the date of the CCH. The carrier appeals challenging a number of findings by the hearing officer and points to contradictions in the testimony of the claimant as well as to contradictions between other evidence and the claimant's testimony.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The claimant testified that he began working for (employer 1), a truck wash, in February 1994. The claimant testified that the work involved repetitive use of his right arm. The claimant testified that he began to have right wrist pain after he worked a double shift sometime in April 1994. The claimant testified that he continued to have pain and as result missed two days of work in May. The claimant testified that on July 11, 1994, he quit his job with employer 1, in order to work for (employer 2), a meat processing plant, at a higher paying job.

The claimant testified that he began working for employer 2 on July 18, 1994, but that he spent the first four days in training and orientation, so that he did not perform any meat cutting work until Friday, July 22, 1994. Claimant testified that he suffered wrist pain that morning and was sent to the company nurse. The claimant's wrist was wrapped and he was put in a light duty position for the remainder of the day. Claimant returned to work on Monday, July 25, 1994, and testified that he worked that day in a light duty capacity. The claimant testified that his last day of work for employer 2 was July 26, 1994.

The claimant sought medical care on July 30, 1994. On August 5, 1994, the claimant was diagnosed with right carpal tunnel syndrome. The claimant testified that he has not been able to work at any job since he left employer 2 because of his right wrist problem. At the CCH claimant contended that he injured his wrist while working for employer 1; the carrier (which insures employer 1) contended that the claimant was injured working for employer 2.

On appeal the carrier challenges the following findings of fact and conclusions of law made by the hearing officer:

FINDINGS OF FACT

4. Claimant experienced pain in his right arm after working a double shift in April of 1994, but did not seek medical treatment at that time.

12. Claimant experienced pain but did not sustain an injury while working for [employer 2] in July of 1994.

13. Claimant's last exposure to repetitive trauma activity of significant duration to cause injury was while the Claimant was employed by [employer 1], prior to July 11, 1994.

16. Claimant is unable to obtain employment at a wage equivalent to his pre-injury wage because of his carpal tunnel syndrome injury to his right wrist.

CONCLUSIONS OF LAW

2. The date of last injurious exposure was prior to July 11, 1994, when the Claimant was employed by [employer 1], and the Carrier has liability for his workers' compensation claim.

3. Claimant does have disability which began on July 27, 1994, and continues as of the date of this hearing.

Section 406.031(b) provides as follows:

> 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.

We have previously held that whether or not a claimant was "last injuriously exposed to the hazards of the disease" while working for a particular employer is a question of fact for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 93828, decided October 27, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. 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, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association 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.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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 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 for factual sufficiency of the evidence we should reverse such 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); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In the present case there was evidence in the testimony of the claimant that his last injurious exposure to the hazards of repetitive trauma injury was while he was working for employer 1. While the carrier points out that there were contradictions in the claimant's testimony and that there was contrary evidence, this did not constitute the great weight of the evidence. Further as we pointed out in Appeal No. 93828, *supra*, the burden of proof as to this issue was on the carrier since it was contending that the last injurious exposure occurred with employer 2. The only direct (noncircumstantial) evidence the carrier presented on this point was the testimony of (Mr. M), an assistant manager at employer 1. Mr. M testified that seven years before he had worked at employer 2 and in his opinion the work at employer 2 was physically harder than the work at employer 1. The hearing officer was not required to accept this evidence as dispositive of the issue.

In both Appeal No. 93828, *supra*, and in Texas Workers' Compensation Commission Appeal No. 941358, decided November 23, 1994, we affirmed hearing officers who found that the last injurious exposure took place while a claimant worked for the original employer even though the claimant later worked for a second employer. Under the rationale expressed in those cases, we would affirm the determination of the hearing officer in the present case.

As to the issue of disability, the carrier argues that the claimant testified that after working for employer 2, his condition was no worse than when working for employer 1. The carrier argues that if the claimant was able to work for employer 1 in this condition, he should still be able to do so, and therefore does not have disability. Extended to its logical conclusion this argument would stand for the proposition that if the claimant worked yesterday with carpal tunnel syndrome, he should be able to work with it today. Such a standard, if adopted as a matter of law, could preclude disability from ever existing in many repetitive trauma cases. We have previously held that disability is question of fact to be determined by the hearing officer and may be based on the testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In the present case the claimant testified that he was unable to work due to his injury after July 26, 1994. The hearing officer chose to rely on this testimony and we do not find his finding was against the great weight of the evidence. Applying the standard of appellate review described above we will not overturn it.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge