APPEAL NO. 950108
FILED MARCH 9, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on December 15, 1994, to decide the following issues: are claimant's carpal tunnel syndrome (CTS), cubital tunnel syndrome (CUTS), and ganglion cyst (cyst) on her left hand part of the injuries sustained on _____; did the carrier specifically contest compensability of claimant's CTS, CUTS, and cyst injuries; and does the claimant have disability due to a compensable injury. The hearing officer found all these issues in the carrier's favor, and the claimant takes this appeal, pointing to evidence in the record that supports her position and asking that this panel find that claimant's three conditions were compensable and that the claimant had disability. The carrier essentially contends in its reply that the hearing officer's decision should be affirmed.

DECISION

We affirm.

The claimant had been employed by (employer) since October 1993, doing airplane cabin service, which involved cleaning out a plane's cabin on arrival and preparing it for departure. She testified that on _____ (all dates hereafter are in 1994), she was working in tandem with (EB), who was tossing wrapped blankets to the claimant. The claimant said EB was throwing the blankets rapidly, and that when she attempted to catch one she bent back the fingers of her left hand. Claimant said she screamed out; EB testified that claimant said "Ow," that she asked claimant whether she was hurt, and that claimant replied that she was okay. The claimant denied this, saying that EB refused to let her put ice on her hand until she had finished cleaning the plane. EB said that later in the day the claimant came to her and said her finger was hurt, and that she looked at it but could see no injury; EB also said she asked claimant if she needed medical attention but claimant told her she was fine. A written statement from employer's station manager also said EB advised claimant to seek medical treatment at employer's clinic, if necessary, but claimant refused. Claimant's testimony was that very shortly after the injury her finger and hand began to swell and become discolored and that a lump appeared on her hand. She said she went to another employee, (JG), to complain about her finger and that he taped her fingers together. The transcription of JG's statement to the carrier reflects that he wrapped claimant's hand on the day she was injured, after she told him she jammed her finger. Two other coworkers gave written statements said they had seen claimant's finger on the day of injury and that it was swollen and bruised.

The carrier did not contend that the claimant did not sustain an injury to her finger nor that she did not timely report such injury. Its TWCC-21 (Notice of Refused or Disputed Claim) stated as follows: "Carrier disputes entitlement of benefits for the following reasons:

1) Carrier admits claimant sustained an on the job injury to left ring finger only. All other diagnosed complaints unrelated to such employment with [employer], sole cause non-occupational. 2) Claimant terminated for cause 3-4-94. No proof of disability prior to termination, as claimant first treated for such complaints 3-25-94."

After her injury claimant continued to work for several days but was terminated on March 4th. Claimant first saw (Dr. A) on March 25th; his initial medical report states that claimant complained of a painful left ring finger and hand and a lump on top of the left wrist from a _____ injury. Dr. A's examination disclosed moderate swelling of the ring finger and swelling in the palm of the hand, with tenderness along the flexor tendons in the forearm. Dr. A's impression was that the claimant sustained a hyper-extension injury to the left ring finger with rupture of the vincula and secondary flexor tenosynovitis, along with mild CTS and a post traumatic dorsal wrist ganglion on the left. On April 8th Dr. A found pain over the ulnar nerve and added a finding of CUTS; he referred claimant to (Dr. M) for EMGs and nerve conduction velocities. Dr. M wrote on April 25th that claimant's EMG was abnormal and that she had CTS and CUTS on the left.

The claimant said she was terminated after her injury made it difficult to perform her work. Claimant's supervisor, (VB), testified that claimant had been reprimanded verbally and in writing several times during her employment and that she was terminated for failure to satisfactorily perform the work after several opportunities to improve. Both she and EB, who is her sister, testified that claimant was an accomplished seamstress who they had paid to sew several garments for them. Both said, however, that they did not physically observe claimant do the sewing, although VB said she saw claimant straighten sleeves that were too tight. At the hearing the claimant denied that she was able to sew well, stating that her mother had actually made the clothes she sold to EB and VB. In her statement to the carrier she said, "I sew every day. I sew wedding dresses, and I had too many that I need to do it but I can't because my hand won't hold anything . . . I've been sewing for about five years . . . I might be sewing for six to eight hours a day." However, at the hearing she said this was in error, and that she had actually been sewing only for two or three years and did so no more than 30 minutes a day or five hours a week. In the statement she also said she stopped sewing on February 19th and she responded to the question as to why she stopped sewing, "Because my hand - I was working on [aircraft] and they won't give me a chance or time to do sewing." However, at the hearing she said she stopped sewing on February 19, 1991.

As to the issue of disability, the claimant contended that she had been fired because of her inability to work due to her hand and that she could no longer work because of her injury. The medical records show that on April 4th a referral doctor, (Dr. J), placed claimant on "complete rest of her left hand" and advised that she wear an elbow brace. In an October 31st letter Dr. A stated that at the time he last saw claimant (on April 27th) "she was unable to work in her usual occupation due to the injury she received at work on _____." He also stated in a deposition on written questions that her disability was related "at least in part, by her left wrist tendinitis, left [CTS] and left [CUTS] to the best of my knowledge." At the hearing claimant acknowledged that she did not tell Dr. A that she

has a master's degree in computer programming and that she speaks several languages. She also stated that she had inquired about one job, but that her husband did not want her to return to work. Dr. A also said in the deposition that sewing for six to eight hours per day "can be a contributing cause of [claimant's] left [CTS] and does not exclude other contributing causes."

The hearing officer determined that the claimant failed to present credible testimony or persuasive medical evidence that the single traumatic incident of _____, caused her CUTS, CTS, or cyst, or that it aggravated such conditions. As to the other issues, the hearing officer stated that but for claimant's termination for cause she could have performed her preinjury job duties with left hand restrictions and that she was qualified for many other positions within this restriction but chose to remain off because of her husband's wishes; and that the carrier's TWCC-21 contests the extent of claimant's injury beyond the hyper-extension of the left ring finger.

In her appeal the claimant correctly notes that certain facts were undisputed, such as the fact that EB was throwing blankets at claimant and that claimant injured her left ring finger as a result. It also was not disputed that claimant suffers from other conditions (the CTS, the CUTS, and the ganglion), and the claimant contends that the medical evidence shows (with no evidence offered to refute) that those conditions were caused by the February 26th incident. In a workers' compensation case, however, it is the claimant's burden to establish by a preponderance of the evidence that an injury occurred in the course and scope of employment; the carrier is not obligated to establish that an injury did not occur. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). In this case, while certain doctors' reports reference a February 26th injury, courts have held that a doctor's recitation of the history of an injury as reported by a claimant is not competent evidence that the injury in fact occurred on the date alleged. Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). The hearing officer also may not have been persuaded that the single incident of that date was the cause of the ensuing diagnoses, based upon the length of time which had elapsed before the claimant sought medical attention and the discrepancies in testimony as to the incident itself and regarding whether and to what extent claimant engaged in sewing, an activity which Dr. A said could be a causative factor.

The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). Where, as here, there is directly contradictory testimony, the hearing officer is entitled to believe all, part, or none of any witness's testimony and to resolve and reconcile conflicts or inconsistencies in the evidence. Bullard v. Universal Underwriter's Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ); Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its 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 will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We decline to make that finding in this case.

Likewise, we are not convinced that the evidence does not support the hearing officer's determination as to disability. To the extent that the claimant's ability to work was hampered by conditions which the hearing officer has found not to be a part of her compensable injury, such inability to work falls outside the statutory definition of "disability." Section 401.011(16). In addition, while the claimant did have some medical restrictions, she acknowledged that she did not inform her doctors that her education and skills qualified her for employment other than manual labor. Finally, it was her testimony that she had not looked for work because her husband did not wish her to work. As fact finder, the hearing officer was entitled to determine based upon the evidence that claimant did not have disability.

Finally, claimant appeals the hearing officer's conclusion that the carrier properly contested the extent of injury; in support she contends that the carrier merely presented a document stating that the sewing might or could cause CTS or CUTS, which did not rise to the level of overcoming Dr. A's opinion. The claimant does not appear to address her arguments to the content of carrier's TWCC-21, which we determine was sufficient for us to affirm the hearing officer's determination on this issue.

Finding no error on the part of the hearing officer, her decision and order are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge