APPEAL NO. 991076

On April 26, 1999, a contested case hearing (CCH) was held. The CCH 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 CCH were whether respondent (claimant) sustained a compensable injury in the form of an occupational disease on _____, and whether claimant has had disability. The hearing officer decided that on _____, claimant sustained a compensable injury in the form of an occupational disease and that from September 18, 1998, to February 15, 1999, claimant had disability. Appellant (self-insured) requests that the hearing officer's decision on both issues be reversed and that a decision be rendered in its favor. No response was received from claimant.

DECISION

Affirmed.

Section 401.011(34) provides that an occupational disease includes a repetitive trauma injury, and Section 401.011(36) defines repetitive trauma injury as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Disability means "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Claimant has the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Claimant also had the burden to prove that he has had disability as defined by the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. In Texas Employers Indemnity Company v. Etie, 754 S.W.2d 806 (Tex. App.-Houston [1st Dist.] 1988, no writ), the court stated that an injury that aggravates a preexisting condition is compensable provided that an accident arising out of employment contributed to the incapacity. The aggravation of a previously existing condition from repetitious, physically traumatic activities at work can consititute a compensable injury. Texas Workers' Compensation Commission Appeal No. 951297, decided September 21, 1995.

Claimant has worked for the self-insured for 32 years. He said that in Alleged injury he bumped his right elbow on a machine at work and two days later went to Dr. S. Claimant said he missed no time from work due to bumping his elbow at work and that that incident caused him to have soreness in his elbow. Claimant went to Dr. T on July 2, 1998, complaining of a painful right wrist from lifting boxes and Dr. T diagnosed a right wrist sprain and prescribed a wrist splint and recommended that claimant do no lifting at work. Claimant went to Dr. T on July 24, 1998, complaining of pain in his right wrist and elbow and Dr. T diagnosed claimant as having tendinitis and lateral epicondylitis and recommended that he rest his elbow over the weekend. Dr. T referred claimant to Dr. H, an orthopedic surgeon, who saw claimant on September 8, 1998, and reported on that date that claimant was having problems with his right arm, that he had hit his crazy bone while

he was working on some machinery at work, that x-rays were negative for any bony deformities, and that examination revealed tenderness over the lateral epicondyle. Dr. H diagnosed claimant as having lateral epicondylitis and stated that he felt that it would respond to an injection of cortisone.

Claimant said that in September 1998 he lifted some tires at work and then for three days before _____ and on _____ he worked on the assembly line for eight and one-half to nine hours a day using three different sizes of air guns to put spare tire racks on vehicles. Claimant said that the air guns were used to tighten down the bolts on the racks, that he is right handed, that he used both hands to hold an air gun, that he squeezed the trigger with his right hand, that when a bolt got tightened the air gun would jerk him around, that the job of putting the racks on the vehicles was continuous because the vehicles would come down the line to his work station for that part of the vehicle assembly, and that on _____ he felt severe, sharp pain in his right wrist and elbow while using the air guns to put the racks on the vehicles.

Claimant said that when he awoke on September 18th his arm was swollen and he was unable to go to work and that he went to Dr. T. Dr. T saw claimant on September 18, 1998, and she reported that he had injured his right elbow and forearm at work sometime in the past but did not report it as a workers' compensation injury; that in July 1998 he had injured his right wrist, forearm, and aggravated his elbow injury away from work; that she had treated claimant for his wrist, arm and elbow injury but not as a workers' compensation injury; that during the course of that treatment he started a new position with employer which required that he operate three "guns"; and that while using that equipment he experienced severe pain in his elbow on _____. Dr. T noted that cortisone injections had previously been scheduled at Dr. H's recommendation. Dr. T's assessment was lateral epicondylitis and she referred claimant back to Dr. H. In another report for the date of visit of September 18, 1998, Dr. T gave a date of accident of _____, and an assessment of right lateral epicondylitis and a right wrist sprain. Dr. T issued several off work slips and noted that claimant was totally incapacitated from _____, to February 15, 1999, and that as of February 15, 1999, claimant had sufficiently recovered to return to work with "limited use of guns."

Claimant said that he did not injure his right elbow outside of work; that he did not get cortisone shots for his right elbow until after _____; and that he was off work from September 18, 1998, to February 15, 1999.

In a report dated November 17, 1998, Dr. H wrote that he had initially seen claimant on September 8, 1998; that claimant's right elbow had recently been aggravated when he returned to work and started using three types of pressure guns that caused him severe pain in his right elbow; that claimant had had problems with his elbow before that; that claimant was lifting some tires and then had to use three types of air guns and that caused his right elbow to be aggravated; and that claimant probably has some overuse symptoms associated with the lateral epicondyle of the right elbow. Dr. H suggested that claimant be allowed to return to limited-duty work on December 1, 1998, and that claimant not be

allowed to use the air guns. On December 9, 1998, Dr. H wrote that it is his medical opinion that claimant's current problems are directly related to his use of air guns at work.

The hearing officer found that on _____, while repetitively using air guns in his assembly job, claimant suffered a new injury due to aggravation and that from September 18, 1998, until February 15, 1999, claimant's inability to obtain and retain employment at his preinjury wage was because of a work-related injury. The hearing officer concluded that on _____, claimant sustained a compensable injury in the form of an occupational disease and that from September 18, 1998, until February 15, 1999, claimant had disability. Self-insured contends that the hearing officer erred in finding injury and disability because claimant suffers from a preexisting condition, claimant aggravated his elbow condition away from work, and there is no evidence of an additional injury.

The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. An appellate 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. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge