APPEAL NO. 000051

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 December 10, 1999. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury in the form of an occupational disease on _____, and whether he had disability. The hearing officer determined that the claimant did not sustain a compensable injury on _____, and thus did not have disability. The claimant appeals several findings of fact, arguing that the evidence showed his job involved repetitive physical activity that lead to his repetitive trauma injury and that he had disability. The respondent (carrier) urges that the claimant failed to meet his burden of proving that he sustained a work-related injury and that the decision of the hearing officer should be affirmed.

DECISION

Affirmed.

The Decision and Order of the hearing officer sets forth fairly and adequately the evidence in this case and it will only be summarized here. The claimant claims a repetitive trauma injury to his neck and shoulder from duties as a school custodian and part-time bus driver. He testified that he woke up with stiffness and pain in his neck and shoulder on Sunday, (day before date of injury), and that he subsequently saw Dr. H, D.O., the next day. He told Dr. H he did not know how he hurt his shoulder or what caused it, but when he told her his job activities, she thought, and subsequently opined in a letter, that it was related to his job. He states he was taken off work temporarily and undrwent therapy. A note from Dr. H indicated that the claimant stated on his first visit that he had some tenderness "some days before" and then had mowed grass and used a weed eater. A subsequent MRI gave impressions of a small fluid collection interposed between the anterior joint capsule and the coracoid process, possibly secondary to a superior labral tear or bursitis, degenerative changes in the acromioclavicular joint with mild impingement into the supraspinatus tendon and rotator cuff intact.

The claimant described his general custodial activities and school bus driving indicating that he emptied trash barrels, mowed the lawn, lifted furniture, and did general custodial activities. He also drove a school bus on field trips on his off-duty time. He states he was required to choose between full-time duties as a custodian and as a bus driver and that after he chose custodial duties, against his desires, he was placed on the second shift. The Saturday prior to his injury he had driven a school bus on a trip and had to occasionally open the door. He had not used a weed eater, which he stated was difficult, for some three weeks prior to (day before date of injury), although Dr. H mentions this activity made his tenderness much worse.

The supervisor testified that the claimant was not happy about having to choose between custodial duties and bus driving and did not want to work the second shift. He testified as to the variety of duties performed by custodians such as lawn mowing, emptying trash barrels, moving furniture, and taking down folding tables, and stated he would not consider the work very heavy. He stated the moving of furniture from one school to another had ended in August. He also stated there were other custodians that did the same type work as the claimant.

The school principal testified that there had been some complaints that the claimant was not carrying his share of the work, that they had 10 custodians (half were female), and that they did not have others complaining about the job functions or injuries.

The burden of proof to establish a work-related injury is on the claimant. Texas Workers' Compensation Commission Appeal No. 982314, decided November 2, 1998. While a claimant's testimony alone, if believed, can establish a compensable injury, the hearing officer is not required to accept the testimony of a claimant or other witness at face value. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). Rather, it is for the hearing officer to judge the weight and credibility to be given the testimony and other evidence. Section 410.165(a). Similarly, the hearing officer assesses and gives the weight he or she finds appropriate to medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Texas Workers' Compensation Commission Appeal No. 990875, decided June 7, 1999. In this regard, the hearing officer found that Dr. H's opinion that the injury was related to the job appeared, at least in an earlier note, to relate the repetitive activity to using a weed eater which had ceased some three weeks earlier. Where a medical opinion is based on erroneous or mistaken history, it may lack probative value. Texas Workers' Compensation Commission Appeal No. 991501, decided August 30, 1999. The hearing officer also was not convinced that the claimant had shown that his job activity was of such a repetitive, traumatic nature as to cause the asserted injury and found that his symptoms first occurred when there had been no job activity. As the fact finder, he was responsible for resolving conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d

701 (Tex. Civ. App.-Amarillo 1974, no writ). Only were we to conclude, which we do not from our review of the record, that the findings and conclusion of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust would there be a sound basis to disturb the decision. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge