APPEAL NO. 000247

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 29, 1999. The issues at the CCH were whether the appellant (claimant) sustained a repetitive trauma injury to his right shoulder, elbow, and forearm on _____; and whether the claimant had disability from August 12, 1999, to the date of the hearing. The hearing officer determined that the claimant did not sustain a compensable repetitive trauma injury to his right shoulder or right upper extremity on _____, and that he did not have disability. The claimant appeals a number of the hearing officer's findings of fact, conclusions of law, and the Statement of Evidence urging that the evidence established that he sustained a new repetitive trauma injury on _____. He also complains that an exhibit was not timely exchanged and should not have been admitted. The respondent (carrier) responds that the decision of the hearing officer was not against the great weight and preponderance of the evidence and should be affirmed.

DECISION

Affirmed.

The Decision and Order of the hearing officer sets forth the evidence considered in the case and it will only be briefly outlined here. The claimant, a 17-year employee, sustained two compensable injuries, one to his shoulder and the other to his back, in 1997 and was still obtaining chiropractic treatment from Dr. J in July 1999. However, according to the claimant, the symptoms he was being treated for were nothing compared to what he experienced after _____. Because of the movement of some plant operations, the claimant, who was a "set-up" man, was placed in other positions operating machines involving electrical wires and parts. He indicated that sometime in July 1999 he was put on an AMP machine and that he subsequently started feeling pain in his right shoulder and arm and then on _____, he operated a tapper machine for about 35 minutes and quit because he was in pain. Videotapes of the machines were admitted and generally show their operation and the limited movement required. He states he reported his injury when he was called into the employer's office on August 10, 1999, and was told his production was not satisfactory. He stated his shoulder and arm hurt and he thought it was understood he was reporting a new injury. When his supervisor indicated he was not under any restrictions, the claimant indicated he could get a note from his doctor, which he subsequently did. He denied that he felt the job he had been given to perform was "dirty" or that it was below him.

Claimant went to see Dr. J and the medical report of that visit indicates claimant has been under her care for the 1997 injuries and that "due to an exacerbation of pain to his shoulder" she recommended some restrictions on repetitive activity. Claimant stated that the employer indicated they did not have a position to accommodate the restrictions. The claimant subsequently saw Dr. A, who had an MRI performed on the elbow and shoulder

and, in comparing this MRI with one from 1998, wrote "based on the MRI results evaluation it is a new injury." Dr. A also stated, "At this time, I feel he is suffering from recurrent episodes of lateral epicondylitis and a rotator cuff tear." He does not indicate a relationship of an injury to any incident or to repetitive activity. The earlier MRI included an impression of "findings indicative of partial tear and/or tendinosis and impingement."

The claimant states he called the adjuster in late August to inquire about checks and was told no income benefits were due from the 1997 injury and that he then told the adjuster he had injured his shoulder and elbow. He says the adjuster told him that if there was a new injury he needed to report it to the employer as they did not have anything about another injury. The adjuster testified and stated that the claimant had two claims from1997; that when she advised him that lost wages would only apply if it was a new injury, he paused and then stated he had a new injury; that she told him to report it to the employer; and that he did not describe the nature of the asserted new injury and stated he would have to get back with her. According to statements from supervisors, the claimant did not indicate he had any new injury when he talked to them on August 10, 1999, and that he referred to the 1997 injury. They also indicated that the claimant was disgruntled about the movement of some operations and that he was not in his original position. In a statement by the claimant on August 25, 1999, he indicated he injured his right shoulder and arm above the elbow.

The hearing officer made a number of findings based on the evidence before him and determined that the claimant did not sustain a repetitive trauma injury to his right shoulder or right upper extremity on _____, while operating the AMP machine or performing any other work activities for the employer on that day. The claimant's disagreement with the underlying findings of fact generally go to the weight and credibility of the evidence as determined by the hearing officer. In this regard, it is apparent that the hearing officer did not give face value to the testimony of the claimant regarding his version of the events and the sustaining of a repetitive trauma injury on _____. The hearing officer is the sole judge of the relevance and materiality of the evidence and the weight and credibility to be given the evidence, including the testimony of the claimant. Section 410.165(a). Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ); Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer had before him testimony and video evidence of the general operation and activity level involving the machinery in question and was not convinced that the claimant established that he sustained a repetitive trauma injury on _____, from the activity. In this regard, the claimant was still receiving treatment for the 1997 injury and the evidence suggested that the parties, at least initially, related the complaints to ongoing symptoms from 1997. The evidence also suggested that the claimant was disgruntled with his new duties and that it was after he was questioned about his productivity that he mentioned he had pain or an injury. While different inferences from those found by the hearing officer may be possible from the evidence, this is not a sound basis to disturb his factual findings and decision based thereon. Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No.

94466, decided May 25, 1994. We have reviewed the evidence of record and cannot conclude that the findings and conclusions of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

Reading the exhibit admitted over objection (a prehearing statement from a supervisor) and which the claimant asserts error on appeal for timely exchange and inaccuracy, the hearing officer heard the explanations proffered, the positions advanced by the parties, and their arguments, and determined that the document should be admitted. We have reviewed the records and do not find prejudicial error in the admission of the statement. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Dorian E. Ramirez
Appeals Judge