

APPEAL NO. 002475

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 September 26, 2000. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury in the form of an occupational disease on _____; whether the claimant had disability as a result of his injury; and whether the respondent (carrier) was relieved of liability for the claimant's failure to give notice of his injury pursuant to Section 409.001.

The hearing officer held that the claimant had not proven that he sustained a repetitive trauma injury, that he did not have disability, and that he failed to give timely notice of the alleged injury to his employer and had no good cause for such failure.

The claimant has appealed, and argues that the hearing officer abused her discretion by believing the testimony of his supervisor over that of the claimant on the issue of notice to the employer. The claimant further argues that the decision runs counter to the great weight and preponderance of the medical evidence which establishes that a repetitive trauma injury related to the claimant's employment occurred. The carrier responds that the hearing officer's decision is supported by sufficient evidence and should not be set aside by the Appeals Panel.

DECISION

We affirm the hearing officer's decision.

The claimant was employed for years in the repair of automotive tires. He stated that the work involved being on his knees for great periods of time. In October 1999, he went to work for (employer). Asked to describe his job, the claimant said he traveled from customer location to customer location, checking back at the employer's headquarters in city 1, Texas, every day. Asked how much of his day was spent working on tires, the claimant said that it varied. He indicated that repairing a tire could take 30 minutes per tire. While the claimant asserted at one point that he repaired tires for seven hours out of an eight-hour day, he then agreed that an average of half his day was spent in traveling from site to site.

The claimant said he began to have knee problems on _____, and was taken to the emergency room by his wife. He then said that problems began again in _____, and he reported his injury to his supervisors on _____. Asked what he told his supervisors (including Mr. O, who testified at the CCH), he said that he reported knee pain but did not assert the cause. In fact, the claimant agreed that he had never told his supervisors that he had a work-related knee injury arising from his employment with the employer.

The claimant denied recollection of telling the adjuster in a recorded statement that he had no knee pain prior to _____. In this same statement, taken March 14, 2000, the claimant asserted that he hurt his knee on _____ when he fell on it while changing a large tire. He said that he did not assert that his injury was work-related (or not work-related) on an application for short-term disability because he did not understand the question. He said that the word "unknown" in this part of the application (asking the cause of the injury) was not filled in by him.

Mr. O testified that when he began working for the employer as a supervisor, he noticed the claimant visibly limping around and inquired as to the reason. He said that the claimant told him he had been injured working for his previous employer. Mr. O said that the claimant never reported a work-related injury to him in January 2000, and went on to deny that he had known before the date of the CCH that the claimant was asserting a work-related injury, because the claimant had never directly told him that he was. Mr. O asserted that this was why the employer had not filed an Employer's First Report of Injury or Illness (TWCC-1) as of the date of the CCH. Mr. O said that the claimant told him that his doctor advised him that he had arthritis.

The claimant said he had not worked since January 2000, when he was taken off work by his doctor. He was subsequently diagnosed through MRI with a torn meniscus in the left knee. He had arthroscopic surgery on this knee and the same had been recommended for his right knee. The claimant said he had been supported by his disability payments.

A medical report dated _____, recorded a history of three months of progressive left knee pain. A January 26, 2000, record recorded a seven-month pain history. The only medical opinion linking the claimant's knee condition to his work was written on August 24, 2000, by Dr. H, the claimant's orthopedic surgeon. This letter stated that getting up and down from his knees or out of a squatting position would definitely aggravate or worsen his condition. Dr. H stated that such activity "may have been the cause" of his problem as higher stress "could" cause meniscal tearing. He said that the claimant "did questionably relate" his symptoms to working at the shop. But this same letter stated that Dr. H could not be more specific as to when the problem started and what its cause was.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165. We review a hearing officer's fact determinations not according to a standard of abuse of discretion, but whether there is sufficient support in the record for the decision or whether the great weight and preponderance of the evidence is contrary to that decision. In reviewing the record, we cannot agree that the decision on any of the appealed issues lacks sufficient support in the record. A trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). There are conflicts in the record, but those were the responsibility of the hearing officer to judge, considering the demeanor of the witnesses

and the record as a whole. The facts set out in a medical record are not proof that a work-related injury in fact occurred. Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, 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.).

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." To recover for an occupational disease of this type, one must not only prove that repetitious, physically traumatic activities occurred on the job, but also must prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. Davis v. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). The hearing officer's conclusion that the claimant did not present evidence of the repetitiousness and trauma of his activities is not against the great weight and preponderance of the evidence.

Moreover, the claimant, on the matter of notice, admitted that he was not forthcoming with his supervisors in asserting that he was hurt on the job. This supports Mr. O's testimony that he was not informed of the work-relatedness of the claimant's knee condition on _____, which is an essential element of effective notice under Section 409.001. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980).

We consequently affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Kathleen C. Decker
Appeals Judge