

## APPEAL NO. 002583

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 October 16, 2000. The issues at the CCH were whether the appellant (claimant) had sustained a compensable injury in the form of an occupational disease and whether the respondent (carrier) was relieved of liability because of the claimant's alleged failure to report the injury to his employer in a timely manner. The hearing officer found that the claimant did not sustain a repetitive trauma injury in the course and scope of his employment and that the claimant had not reported the injury to his employer within 30 days from the date of the alleged injury. The claimant appealed, citing evidence which he asserts shows that the hearing officer's decision on both issues was against the great weight of the evidence. The carrier responds, asserting that the hearing officer's decision is correct and should be affirmed and also asserting that the claimant's appeal contains evidence which was not brought out at the hearing and which should not be considered for the first time on appeal.

### DECISION

Affirmed.

We note that the claimant has made certain statements in his appeal that are not specifically contained in the record. We do not normally consider new evidence for the first time on appeal. We may, in very limited circumstances, remand a case when new evidence is presented if that evidence came to the party's knowledge after the CCH, is not cumulative of the evidence presented, was not through lack of diligence that the evidence was not presented at the CCH for the hearing officer to consider, and if the evidence is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. In this case, there is no indication that the statements in the claimant's brief are any more than argument regarding facts which are contained in the record.

The claimant testified that he has worked on an assembly line for (employer) for a number of years. On \_\_\_\_\_, he began noticing a popping and pain in his shoulder. The claimant's job involves attaching compressors to air-conditioning units and then moving the units down the line. The claimant testified that on \_\_\_\_\_, he told his supervisor that he believed that he might have tendinitis. The claimant said that his supervisor replied, "Yeah, you probably do" and contacted the staff physical therapist for the claimant, as requested. The claimant testified that the physical therapist worked with him for approximately a month, attempting to structure the claimant's job to alleviate the shoulder pain, then scheduled an appointment for the claimant with the company's doctor. On May 17, 2000, the claimant advised the medical department that he believed that his problems were work-related and filled out an Employee Statement of Occupational Injury/Illness.

The claimant has received medical treatment through the company doctor and has undergone diagnostic testing including a cervical MRI and x-rays of his shoulder. Other than degenerative changes in the cervical spine, no abnormalities have been revealed and no specific causation for the claimant's problems has been determined. The claimant testified at the hearing that he believes that his employment is the cause of the shoulder problems (the cervical problems are not at issue since they may be the result of an earlier work-related injury).

The claimant had the burden to prove that he sustained the claimed injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. The Appeals Panel has stated that in workers' compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the 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)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). The hearing officer found that the claimant had failed to prove that his alleged shoulder injury was sustained as a result of the activity involved in his employment. As an appellate-reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The hearing officer determined that the claimant did not report that he had sustained a work-related injury until May 17, 2000, more than 30 days after the date of injury alleged by the claimant. It is noted that the \_\_\_\_\_, date of injury is fully supported by the evidence at the hearing. The hearing officer's determination that the claimant did not report the injury within 30 days is supported by the evidence; but the hearing officer failed to make a finding on whether the claimant had good cause for his failure to report the injury until May 17, 2000. However, since we affirm the dispositive finding that the claimant did not sustain an injury in the course and scope of his employment, we see no reason to remand the case to the hearing officer for additional findings on whether good cause existed for the failure to report the injury within 30 days.

The decision and order of the hearing officer are affirmed.

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Kenneth A. Huchton  
Appeals Judge

CONCUR:

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Kathleen C. Decker  
Appeals Judge

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Robert W. Potts  
Appeals Judge