APPEAL NO. 92072

On January 27, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding as the hearing officer. The hearing officer found that the respondent, claimant herein, sustained an injury to his left wrist on _____, arising out of and in the course and scope of his employment and that horseplay was not a producing cause of the injury. Based on his findings and conclusions, the hearing officer decided that claimant is entitled to workers' compensation benefits, as and when they accrue, under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Carrier, the workers' compensation insurance carrier for the employer, requests that we review Findings of Fact Nos. 3 and 4, and Conclusions of Law Nos. 4 and 5. Carrier asserts that the overwhelming weight and preponderance of the credible evidence indicate that claimant's injury was caused by horseplay, that there is no medical evidence causally linking claimant's injury to his work activities, that the medical records indicate that it is unlikely that claimant was injured by his employment, and that medical records indicate activities other than work activities were more likely the source of claimant's medical condition. Carrier requests that we set aside the hearing officer's decision and enter an order finding no compensable injury.

DECISION

Finding that there is sufficient evidence of probative value to support the hearing officer's decision, and that his decision is not against the great weight and preponderance of the evidence, we affirm his decision.

The parties stipulated that claimant was an employee of (employer) on _____, and that carrier was the employer's workers' compensation insurance carrier on that day.

According to claimant, he had been working for the employer for two and a half months to four months manually loading boxes weighing from 15 to 108 pounds into trucks. On _____, he testified he noticed pain in his left wrist when he was halfway through loading 60 pound boxes into a truck. He said he told a coworker who was helping to load the truck to slow down because of the pain in his wrist. Ten days later he said he reported his injury to his supervisor who made an appointment for him with Dr. FN, the "company doctor." Claimant said Dr. FN gave him light duty work for three or four weeks. About two months after seeing Dr. FN, claimant saw Dr. C who, he said, took him completely off work because of his wrist injury a few days after an EMG showed he had "carpal tunnel" and that there was "damage." He said Dr. C told him not to lift anything at all using his left hand. Claimant said he had no time for "horsing around" on the job, denied injuring his hand karate chopping boards at work, and denied engaging in that type of activity in the past. Claimant said he is right-handed. Claimant acknowledged that his left wrist felt a little weak every time he finished loading boxes, but that the pain always went away prior to the incident on _____. He also testified that he had had discomfort or pain three or four days prior to that day. Claimant also acknowledged that about a month after this claim for a work-related wrist injury, he claimed a work-related back injury.

DC testified for carrier. He said he worked with claimant and saw claimant on two or three occasions at work chopping boards with karate chops using his left hand. He said the boards, which were two inches wide, one inch thick, and four feet long, were placed across two trash barrels and that he saw the boards break when claimant hit them with his left hand. He also said that no one else at work engaged in this activity and that it was not part of claimant's job duties. He further testified that claimant told him he liked martial arts and karate. This witness did not give the dates on which he witnessed the karate chopping incidents, nor did he state whether or not claimant displayed any sign of physical injury to his left hand or wrist or whether he complained of pain in his left hand or wrist when the karate chopping incidents occurred.

Claimant introduced into evidence a medical report (TWCC-64) dated October 17, 1991, from Dr. FN, and an "Authorization to be Released From Work or School" dated November 14, 1991, signed by Dr. C. Dr. FN's report gave a date of injury of _____, and reflected that claimant visited him on September 12, 1991, and was diagnosed as having "Tendonitis-Wrist."

In his work release authorization, Dr. C stated that claimant was under his medical care from "10-14-91 to present;" that claimant "may not return to work/school until unknown;" and that claimant's illness or injury was "tendonitis hand and wrist."

Carrier introduced into evidence a subsequent medical report from Dr. FN dated December 10, 1991. This report noted that on his initial visit to Dr. FN, claimant told the doctor that on _____, while loading boxes on a dock he lifted a box and felt pain in his left wrist and that the pain continued with any use of his left wrist. Dr. FN stated that after initial evaluation he felt that claimant had a "flexor tendonitis" of the wrist. Dr. FN told claimant to use a wrist brace and gave him anti-inflammatory medication. On a subsequent visit, an x-ray was taken which the doctor described as normal. After several visits, Dr. FN reported that he referred claimant to Dr. H "as the diagnosis did not fit the course of the particular injury." Dr. FN concluded his report by stating "However, the course of this particular problem was inconsistent with the mechanism of injury that [claimant] states occurred. Many other types of injuries that [claimant] may have sustained in his personal activities could account for this particular medical problem."

The hearing officer took official notice of the "Disputed Issue" form prepared by the benefit review officer on December 17, 1991. The benefit review officer noted claimant's position as "Claimant developed carpal tunnel syndrome (left) as a result of lifting boxes in the loading of trucks." The carrier's position was noted as "Claimant injured his hand by frequently placing spacer boards (approximately ¼ - ½ inch thick) between two trash cans and then karate chopping the boards with his bare hand." In closing argument at the contested case hearing, the claimant argued that the diagnosed condition of tendonitis, given by two doctors, was consistent with claimant's testimony that he engaged in activity which was repetitious in nature. The employer's representative, Mr. FR (who had not been sworn as a witness), gave a statement to the effect that Dr. FN had told him the type of injury

sustained by claimant could have occurred from claimant breaking wood with his hand, and that the employer had tried to help claimant by letting him work on limited duty, that he refused limited duty, and that he then claimed another injury.

The contested findings and conclusions are as follows:

FINDINGS OF FACT

3.On _____, the date on which claimant claimed to have been injured, claimant sustained an injury to his left wrist loading boxes for the employer.

4.The injury sustained by claimant was not the result of claimant using his left hand to break boards with a karate chop.

CONCLUSIONS OF LAW

4.Claimant did not sustain an injury for which horseplay was a producing cause of the injury.

5.Claimant sustained an injury to his left wrist on _____, arising out of and in the course and scope of employment.

Under the 1989 Act, a "compensable injury" is defined as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). An "injury" is defined as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm" and includes occupational diseases. Article 8308-1.03(27). A repetitive trauma injury is an occupational disease and is defined 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." Article 8308-1.03(39). An insurance carrier is not liable for compensation if the employee's horseplay was a producing cause of the injury. Article 8308-3.02(3).

The hearing officer is the trier of fact at a contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to given to the evidence. Article 8308-6.34(e) and (g). When presented with conflicting testimony, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. R.J. McGalliard v. Kulman, 722 S.W.2d 694, 697 (Tex. 1987). The trier of fact is not bound to accept the claimant's testimony at face value. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). Nevertheless, the trier of fact has a right to believe a claimant's testimony, and believing it, has a right to find that the claimant suffered an injury in the course and scope of employment. Highlands Insurance Company v. Baugh, 605 S.W.2d 314, 316 (Tex. Civ. App.-Eastland 1980, no writ). The trier of fact also judges the weight to be given expert medical testimony, and resolves conflicts and

inconsistencies in the testimony of expert medical witnesses. Texas Employers' Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist] 1984, no writ); Atkinson v. United States Fidelity Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.).

In this case, there was a sharp conflict in the evidence on whether claimant engaged in horseplay at work. The hearing officer chose to believe claimant's testimony over the opinion of Dr. FN and the testimony of claimant's coworker on the issue of whether claimant's work activities or horseplay was a producing cause of his injury. As the judge of the weight and credibility of the evidence, the hearing officer was entitled to believe claimant's testimony over that of claimant's coworker. Article 8308-6.34(e). As the trier of fact, the hearing officer could also assign the weight to be given to the medical reports that were in evidence, and find in claimant's favor despite the contrary opinion of Dr. FN. As the court stated in Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 494-495 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.):

> "In workmen's compensation cases the issue of injury and disability may be established by testimony of the claimant alone, even though such lay testimony is contradicted by the unanimous opinion of medical experts." (Citations omitted).

> An exception to these well settled general rules is that, when a subject is one of such scientific or technical nature that the jury or court cannot properly be assumed to have, or to be able to form, opinions of their own based upon the evidence as a whole and aided by their own experience and knowledge of the subject of inquiry, only the testimony of experts skilled in that subject has any probative value." (Citations omitted.)

Under the facts presented in this case, we do not believe that the hearing officer was bound by the opinion of Dr. FN, and that he could find from the evidence that claimant's injury to his left wrist was sustained as a result of loading boxes in the course and scope of his employment. We find that there is sufficient evidence of probative value to support the hearing officer's Findings Nos. 3 and 4, Conclusions Nos. 4 and 5, and decision. We also find that the findings, conclusions, and decision are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. We affirm the hearing officer's decision. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Although not necessary to our decision, we note that at the hearing the parties discussed the benefit review officer's recommendation that carrier had waived its right to contest compensability due to its failure to timely controvert claimant's claim under Article 8308-5.21(a), and that they also discussed entering into a stipulation on that matter and keeping the record open for carrier to obtain evidence on that matter. The hearing officer concluded at the hearing and in his decision that the issue of whether carrier properly contested compensability was moot. Carrier, of course, did not contest that conclusion in its request for review, nor did claimant file a request for review of that conclusion.

Therefore, we do not address the matter of whether or not the hearing officer was correct in concluding that the issue of timely controversion was moot. *See* Article 8308-6.42(c).

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____

Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge