APPEAL NO. 950202

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On December 9, 1994, after one continuance, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues were whether appellant (claimant), who is the claimant herein, sustained a compensable injury on (date of injury); whether he sustained injury to his right arm, shoulder, and neck, in addition to his left wrist; whether he gave timely notice within thirty days after the date of injury to his employer in accordance with Section 409.001 of the 1989 Act (and, if not, whether he had good cause); whether he had, as a result of such injury, the inability to obtain and retain employment equivalent to his pre-injury wage (disability); and the amount of his average weekly wage (AWW).

The hearing officer determined that claimant had not proven that he sustained a compensable injury, that he did not give timely notice to a person in a supervisory or management position for the employer, that none of the exceptions to timely notice applied, and that claimant did not have disability. Claimant's AWW was set at $449.59.

The claimant appeals, arguing that he was injured, that the condition was first thought to be bursitis but later proved to be carpal tunnel syndrome (CTS), and that he notified his employer within 30 days after the date he realized the condition was linked to his employment. He argues his CTS developed because of repetitive motion at work, according to his doctor. The respondent, carrier herein, responds by pointing out the evidence in support of the hearing officer's decision.

DECISION

We affirm the hearing officer that claimant failed to prove that he sustained a compensable injury. We reverse her determination that claimant did not give timely notice to his employer of injury, and render a decision that timely notice of the alleged injury was given.

Claimant's theory of recovery in this case was not made exactly clear, and we will briefly describe what we believe to be a summary of pertinent evidence on the occurrence of an injury, whether the theory is specific incident or repetitive motion. Claimant worked for (employer) where he had done preventive maintenance work on trucks for several years. He stated that on (date of injury), after he had replaced a clutch in a truck, he experienced sharp pain in his shoulder for which he went to the emergency room. Claimant was asked, during cross-examination, whether he was alleging that he had a specific injury on that date that caused his injury, and responded: "No . . . I don't know how it happened. It just happened."

Claimant indicated that he had not told his doctor, (Dr. B), that his injury happened while he was raking and shoveling. However, he was asked about records from Dr. B

which recited such a history of raking and shoveling all day, and soreness afterwards, on April 9th. Claimant confirmed that he would have been home this day and not at work.

Claimant agreed he had been treated on October 1993 by Dr. B for shoulder pain as well. He stated that it was not known then what might have caused such pain. Dr. B's working diagnosis, indicated in his records then, was chronic right subacriminal bursitis, mild. Dr. B's records, as well as hospital emergency room records from that time, indicate that claimant was tested and examined to pursue the source of shoulder pains. Dr. B's record indicate that in October 1993 such pain was of "unknown etiology." Medical insurance claims were filed on claimant's regular health insurance for the October 1993 treatment, and those forms stated that the condition was not related to claimant's employment.

The record is confusing as to when and what claimant reported to his employer about the injury. He stated that he informed (Mr. E), his supervisor, about his shoulder pain on (date of injury). He also testified that he informed his employer after he realized he had a work-related CTS, which appeared to be April 25th at the earliest, although claimant stated at first he could not recall when he first had such knowledge. Then, he indicated that such knowledge came after EMG testing performed by a neurologist to whom he was referred, (Dr. G), sometime in July 1994. Claimant testified that Dr. B has told him CTS could result from overuse of his arms and hands, and he stated that during the work day he used his hands a lot. However, the extent or frequency of any repetitive motions was not developed in the evidence. Claimant had not worked since (date of injury). Claimant had, at the time of the hearing, had surgery on one wrist. He indicated that Dr. B was no longer his treating doctor.

Although a note on July 6, 1994, by Dr. B stated that claimant's left CTS was work related due to repetitive motion, claimant's medical evidence generally does not opine about the cause of his conditions. There was no testimony from anyone on behalf of the employer regarding notice.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). 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 Co., 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 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.). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses

or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

We cannot find error in the hearing officer's determination that claimant failed to meet his burden of proof in this case. At a minimum, a claim of injury by repetitive motion should be supported by evidence of the extent and nature of work performed, and some description of what "repetitive" traumas occur in that work that affect the worker in ways not common to the general population. *See* Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992. The fact that claimant has an undoubted medical condition does not, in and of itself, mean that it resulted from work, as opposed to an ordinary disease of life.

We do agree that there was error in her findings relating to timely notice. The issue relating to timely notice is tied to the hearing officer's determination that the date of injury for purposes of a repetitive trauma injury was the date that claimant first knew he had an injury that might be work related, as defined in Section 408.007. We note, first of all, that the hearing officer has determined that "October 1993" is the "date" that claimant knew or should have known that he had an occupational disease. An entire month is not a date within the meaning of Section 408.007 or the related notice provisions. We have repeatedly stated that it is essential for a hearing officer to find a date, most especially when timely notice was in issue. Texas Workers' Compensation Commission Appeal No. 941374, decided November 23, 1994.

Second, we would note that no issue was formulated as to the date of the injury. The claim was made that the first date claimant knew or should have known he had an occupational disease was (date of injury), the date upon which stipulations for coverage and venue were made. Although the carrier noted in passing in final argument that there were "indications" that claimant might have known as far back as October 1993 that he was injured, the essence of carrier's argument was that claimant failed to prove that he gave timely notice. As noted in Texas Workers' Compensation Commission Appeal No. 941505, decided December 22, 1994, the date an injured employee knows, or should have known, that he had an occupational disease does not in all cases equate to the date of the first symptom. The medical evidence indicated that even the doctor in October 1993 did not "know" the cause of claimant's injury or its work relatedness. Claimant's testimony was that he did not realize his condition could be work related until sometime in April, and regular health insurance claims were filed at that time. The hearing officer's determination that claimant's date of injury was sometime in October 1993 is against the great weight and preponderance of the evidence in this case, and we reverse that determination.

Because the hearing officer has found, as fact, that claimant gave notice of injury to his employer on (date of injury) (the date of injury), we must render a decision that timely notice of the alleged injury was given.

We affirm the hearing officer's decision that claimant did not prove a compensable injury occurred, and reverse the hearing officer's determination on notice and render a new decision, based upon her finding of fact, that timely notice was given of the contended (date of injury), injury. We affirm her order that benefits are not due.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge