APPEAL NO. 950250

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held in (city), Texas, on February 1, 1995, (hearing officer) presiding as hearing officer. He determined that appellant (carrier) did not adequately state the defense regarding the reporting of the injury on the Notice of Refused or Disputed Claim (TWCC-21), that respondent (claimant) sustained a compensable injury on (date of injury), that the claimant timely reported his injury, and that the claimant sustained disability beginning on October 18, 1994. The carrier appeals on the single issue of whether the claimant sustained a compensable injury. The remaining issues at the contested case hearing, not being appealed, have become final. Claimant urges that there is sufficient evidence to sustain the hearing officer's decision.

DECISION

Affirmed.

The only issue on the appeal is whether the claimant sustained a compensable injury. Although the restatement of the issue in the carrier's appeal asserts the hearing officer erred in holding that the claimant sustained compensable "back and left knee injuries," the text of the following paragraphs indicates that the carrier is appealing an injury to the elbow. The case was litigated concerning an elbow injury and there was no evidence or findings concerning the back or knee. We address the issue of whether the claimant proved a compensable elbow injury.

The claimant testified that he worked as a helper for a refuse collection company and that his duties involved picking up, sometimes heavy, trash cans and tossing the contents into a truck as it slowly moved down the street. He also testified that on (date of injury), while throwing or emptying a heavy can of trash, he felt a sharp pain in his arm. According to the claimant, the driver pulled up a little and asked what was wrong and that he told the driver he hurt his elbow but that he thought he could continue working. The claimant worked the next day and up to the 13th of October when, because of his arm hurting, he called his supervisor and then went to the doctor. He told the doctor he hurt his arm throwing trash and stated that he could not straighten his elbow. Medical records in evidence indicate that x-rays were taken that revealed some mild osteoarthritis and noted: "Overuse syndrome of the left elbow; Some arthritic changes noted; Patient is unable to fully extend it."

At another point in the medical record is a notation that the claimant is able to extend his arm fully. The claimant was taken off work by the doctor and later, on October 13th, he went to the employer with the work excuse and was terminated. There was evidence offered by the carrier that his termination was a result of previous absences or failure to follow correct procedure in reporting an abuse and not related to his injury. In any event, the claimant was out of work until he later obtained a lesser paying security officer job.

The hearing officer found that on (date of injury), while emptying a trash can as a part of his duties, the claimant sustained an injury to his left elbow. We have held that a claimant's testimony alone, if believed by the fact finder, can establish that an injury has occurred and disability has resulted. Texas Workers' Compensation Commission Appeal No. 941698, decided February 2, 1995; Texas Workers' Compensation Commission Appeal No. 94772, decided August 2, 1994. And, the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Section 410.165(a). Where there is inconsistency or conflict in the evidence, it is for the hearing officer to resolve. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). Even thought the evidence in a case may give rise to different inferences than those found most reasonable by the fact finder, this is not a sound basis for an appellate body to set aside a finding. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). And, we decline to do so here where we cannot conclude that the finding is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Concluding there is evidence sufficient to support the hearing officer, we affirm the decision and order.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge