

APPEAL NO. 950261

On January 13, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The appellant (carrier) disagrees with the hearing officer's decision that the respondent (claimant) sustained an injury to his left elbow within the course and scope of his employment on (date of injury); that he had good cause for failing to timely notify his employer of his injury; and that he had disability from October 17, 1994, until January 4, 1995. No response was received from the claimant.

DECISION

Affirmed.

The employer makes blocks out of cement and other materials. The claimant said he started working for the employer in July 1993 operating a front-end loader to move bad blocks and had to use the levers on the loader all day long. He said that he constantly had to break up blocks using an eight-pound sledgehammer, pick up the blocks, and throw the blocks into a hopper. He said he did this for four or five months. About (date of injury), the claimant used a small jackhammer at work to break up material on the kiln floor. He said that he started work as a cuber in late December 1993; however, his supervisor, (TJ), said claimant started that work in March 1994. A cuber turns blocks on the conveyor belt and culls out bad blocks. In a transcribed recorded statement put into evidence by the carrier, the claimant stated that he began to have a "burning twinge" in his left elbow in November or December 1993, and that it was not until the latter part of January 1994 that his left elbow "really started bothering me bad, real bad." At the hearing the claimant testified that he did not have left elbow pain until the latter part of January 1994. He went to (Dr. B) on February 17, 1994, and was diagnosed as having tendinitis. Dr. B wrote that the claimant stated that "this started when he was working with a jackhammer," and that it had been hurting since that time. Dr. B gave the claimant an injection in his left elbow. Dr. B also stated that the claimant told him that he had an injection three years ago, but later amended his statement to state that the claimant stated that he did not have an injection three years ago. The claimant testified that he had told Dr. B about carpal tunnel surgery he had had in 1983 on his right arm. In November 1994 Dr. B reported that he doesn't think that the claimant's tendinitis is hereditary and that he doesn't think that the tendinitis was caused by using the jackhammer.

TJ, the claimant's supervisor, testified that the first week of February 1994 the claimant told him that he thought he had hurt his left elbow using the jackhammer in (month year). TJ said the jackhammer weighed about 35 pounds. (KL), the employer's general manager, testified that on February 17, 1994, the day Dr. B diagnosed the claimant as having tendinitis, the claimant told him that he thought he hurt his elbow using the jackhammer in (month year) and that the claimant said he did not want to file a workers'

compensation claim. KL said the claimant was terminated for tardiness on October 17, 1994.

The claimant testified that he felt some pain in his left elbow the weekend after Dr. B gave him an injection on February 17, 1994, but that he then did not have pain for several months and was able to work. He said that in June or July 1994 his left elbow began to bother him again and that in August 1994 he began to have pain in his right elbow. He said he jammed his finger at work on September 22, 1994, and went to (Dr. D). On September 26, 1994, Dr. D noted that the claimant's left elbow tenderness, which he diagnosed as "bursitis radiohumeral," was "not industrially related." On October 3, 1994, Dr. D gave the claimant injections in both elbows, and on October 14th Dr. D noted marked swelling in the left elbow and injected that elbow again. The claimant returned to Dr. D on October 17th complaining of continued elbow pain and on that day Dr. D issued a statement that the claimant was not able to return to work.

Dr. D referred the claimant to (Dr. F) who saw the claimant on October 20, 1994, and diagnosed "bilateral tennis elbow." He placed the claimant's left arm in a splint and fitted him with a sling. He stated that "[i]f the patient were employed he would not be able to work at this point in time," and that "[i]t is my feeling, that given his history, that these are definitely work related problems." On November 10, 1994, Dr. F wrote that the claimant may need surgery on his elbows. On December 6, 1994, Dr. F reported that, if the claimant were currently employed, he would still be on a "complete work release." He also reported that the claimant had tendinitis, and not bursitis, and that it was his feeling that the cause of this was the claimant's work-related activities. He noted that the claimant had told him about picking up heavy blocks and throwing them and about shifting levers. Dr. F stated "it is reasonable in my estimation to believe that it is directly work-related." The claimant testified that he has not worked since he was terminated from employment with the employer and that Dr. F released him to return to work without restrictions on January 9, 1995. He said he feels like he can go back to work.

The issues at the hearing were whether the claimant sustained a compensable repetitive trauma injury, the date of injury, whether the claimant timely reported his injury to his employer, or had good cause for failing to do so, and whether the claimant sustained disability. The hearing officer found that the claimant sustained a compensable injury to his left elbow, but not to his right elbow; that the date of injury was (date of injury) (this is the date of injury asserted by the carrier at the hearing); that the claimant failed to timely report his injury to his employer; that good cause existed for the claimant's failure to timely report the injury; and that the claimant had disability from October 17, 1994, until January 4, 1995. The carrier contends that the hearing officer erred in determining that the claimant sustained a compensable left elbow injury, that the claimant had good cause for failing to timely notify his employer of his injury, and that the claimant had disability. The carrier asserts that the claimant was not credible and that the evidence does not support the hearing officer's determinations on injury, good cause, and disability.

The evidence is conflicting on the appealed determinations. However, the claimant's testimony and Dr. F's opinion support the finding of a compensable left elbow injury, and the off work reports provided by Drs. D and F support the disability determination. In regard to good cause for failing to timely notify the employer of the injury, in her discussion of the evidence the hearing officer noted that her good cause determination was based on the claimant's failure to appreciate the seriousness of the injury, which has been held to constitute good cause for failing to give timely notice. See Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.); Texas Casualty Insurance Company v. Crawford, 340 S.W.2d 110 (Tex. Civ. App.-Amarillo 1960, no writ). While the claimant gave contradictory evidence, his statements in the transcribed recorded statement put into evidence by the carrier indicate that he did not have any serious problem with his left elbow until the latter part of January 1994, and TJ testified that the claimant notified him of the left elbow injury shortly thereafter during the first week of February 1994.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). The hearing officer can believe all, part, or none of the testimony of any witness, and resolves conflicts in the evidence, including the medical evidence, and determines what facts have been established. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084, *supra*. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084, *supra*. We conclude that the hearing officer's decision is supported by sufficient evidence and is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge