APPEAL NO. 950274

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 27, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. With respect to the issues before her, the hearing officer determined that appellant (claimant) did not sustain an injury in the course and scope of his employment on (date of injury), that claimant did not report that he was suffering from a work-related condition on (date of injury), and did not have good cause for his failure to report the (month year) injury until (month year); that claimant's average weekly wage is $451.69; and that claimant did not timely file a claim for compensation and did not have good cause for his failure to do so. Claimant's appeal argues that the hearing officer's determination of no injury, no timely notice and no timely claim are against the great weight and preponderance of the evidence. Respondent's (carrier) response urges affirmance. Neither party appealed the average weekly wage determination; thus, it has become final pursuant to Section 410.169.

DECISION

We affirm.

Claimant testified that he had worked for (employer) and its predecessor company for 17 years as a materials handler. In that position, claimant testified that he drove a forklift some six hours a day, five days a week, which required him to engage in repetitious hand and wrist movements. Claimant stated that in early 1991 he started experiencing tingling and numbness in his hands. He further testified that on (date of injury), he told his supervisor, (Mr. A), that he was experiencing tightness in his chest and numbness and tingling in his hands. Claimant said he told Mr. A at the time that he thought the problems he was having with numbness and tingling were related to his operation of the forklift. Mr. A sent claimant to the company nurse, who advised him that he should have a cardiology workup. Claimant went to (Dr. S) for a cardiology examination. That examination was negative, except for continued high blood pressure, which had predated the (month year) incident. In a report dated July 15, 1991, Dr. S lists claimant's symptoms as "sharp chest pain with numbness in both hands for 6 months." Claimant testified that he did not miss any work while he had his cardiology examination and that he continued in the same position with the same duties. Nevertheless, he said that the problems in his hands persisted.

Claimant stated that in (month year), the numbness and tingling in his hands got much worse. At that point, his employer, which had dropped its workers' compensation coverage, sent him to the doctor. Claimant was diagnosed as having bilateral carpal tunnel syndrome (CTS). On (date), claimant completed an incident report listing a date of incident of (month year). He described the incident in that report as "felt numbness in both hands, stiff neck and soreness in left shoulder while operating a forklift." Claimant testified that although he put (month year) as the date of the incident, he believed, and had told his employer, that he had previously reported the numbness and tingling in his arms in (month year). He insisted that (month year) was the date that the problems in his hands recurred

but the problems related back to the incident of (date of injury), when he first told the employer of the numbness and tingling in his hands and the chest tightness. Nevertheless, the medical records related to claimant's CTS likewise refer to (month year) as the date of injury and do not mention the numbness and tingling he experienced in his hands in (month year). Claimant had two carpal tunnel release surgeries on his left wrist and one on his right wrist. Claimant testified that he did not go to the doctor after his cardiology workup in August 1991 until (month year) and that he first missed work because of the tingling and numbness in his hands following his first surgery in (month year).

Claimant stated that he looked through his employment file in (month year) but could not find a copy of the (date of injury) incident report therein. Claimant submitted the May 9, 1993, statement of Mr. A, the supervisor to whom he reported in (month year) which provides in relevant part:

> During my service at [employer] [claimant] came to me complaining of pain, numbness, and tingling in his hands and up through the base of his neck. I sent him to [Ms. L], Company nurse at the time, so that she may examine him. . . . I was also instructed, by [Ms. L], to fill out an accident report which I did and turned it in to [Ms. L] the following day. I do not have the exact dates that all of this transpired, but I believe the time period to be the end of June to early part of (month year).

It is well-settled that the claimant has the burden of proving that he sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. A claimant's testimony is that of an interested party and only raises an issue of fact to be resolved by the hearing officer. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). Under the 1989 Act, 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 thereto. Section 410.165(a). When presented with conflicting testimony and evidence, the hearing officer may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). As the fact finder, the hearing officer must resolve conflicts and inconsistencies in the evidence, weigh the credibility of the witnesses, and make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993. An appellate body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Where sufficient evidence supports the findings and they are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The 1989 Act provides that the date of injury for an occupational disease such as carpal tunnel syndrome is the date on which the employee knew or should have known that

the disease may be related to the employment. Section 408.007. Likewise, an employee must notify his employer of an injury not later than the 30th day after he knew or should have known that the injury may be related to the employment. Section 409.001(a)(2).

In this case the evidence supports a determination that the claimant did not know or have any reason to know in (month) of (year) that the symptoms from which he suffered could be related to a work-related injury. Although the claimant testified that he told the employer that he believed his symptoms were caused by his employment, the evidence shows that the incident was treated as a possible heart attack and there is no evidence either in the employer's records, the statement of Mr. A, or the medical evidence to indicate otherwise. That being the case, the hearing officer did not err in failing to determine claimant's injury occurred on (date of injury), nor that he timely notified his employer of an injury.

We further find that the evidence supports the hearing officer's holding that claimant's ultimately diagnosed condition of CTS did not arise in (month) of (year), but rather that it occurred in approximately October or (month) of (year). Following a complete cardiology examination in August 1991, claimant returned to work driving the forklift and neither missed work nor sought medical treatment for numbness and tingling in his hands until (month year), 18 months later. Given the 18-month delay between the (month year) incident and the time that claimant obtained medical treatment and began missing work, we believe that the hearing officer was acting within her province as the fact finder in determining that claimant had not sufficiently proven a causal connection between the original symptoms and his diagnosis of CTS in (month year). Our review of the record indicates that there is sufficient evidence to support the determination that claimant did not sustain a work-related injury in (month year) and nothing indicates that that determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, there is no basis for disturbing that determination on appeal. Cain, *supra*.

Finally, we briefly address claimant's argument that his claim for compensation, which was filed in January 1994, was timely, because his filing period had been tolled under Section 409.008 by the employer's failure to file its first report of injury after he reported an injury in (month year). The success of this argument is dependent upon the success of claimant's argument that his conversation with Mr. A on (date of injury), was sufficient to constitute notice of a work-related injury. However, the hearing officer found, and we affirmed the determination, that the (month year) conversation did not constitute such notice, because it did not adequately apprise the employer that claimant was asserting that he had a work-related injury. Since the employer was not sufficiently notified of an alleged injury, no corresponding obligation was triggered that it file a first report of injury and claimant's reliance on Section 409.008 is misplaced. The "failure" of the employer to file the report does not operate to excuse claimant's late filing of the claim because the employer was under no obligation to file the report in (month year).

Based upon the evidence, we find that the hearing officer's determination was not so against the great weight of the evidence as to be manifestly unjust. Cain, *supra*.

The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge