APPEAL NO. 93731

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Begun on July 26, 1993, and closed on July 30, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the respondent (claimant) sustained a compensable injury but did not timely report her injury to her employer. However, the hearing officer determined that the claimant did establish good cause for her failure to do so. The hearing officer also determined that the claimant suffered disability from February 12 through February 17, 1993, and after May 5, 1993. The carrier, in its request for appeal, asserts that the claimant did not establish good cause for her failure to give notice of her injury to her employer in a timely manner. The carrier also argues that sufficient evidence does not support the hearing officer's conclusion that the claimant suffered a repetitive trauma injury in the course and scope of her employment. The carrier further argues that the finding of disability and the right to temporary income benefits is not supported by sufficient evidence. The claimant, in response, urges that the decision of the hearing officer is supported by sufficient evidence, and that she, the claimant, did have good cause for failure to file a timely notice of her injury.

DECISION

We determine that sufficient evidence exists in the record to support the hearing officer's decision on the finding that the claimant suffered a repetitive trauma injury and that claimant had good cause for her failure to timely notify the employer of her injury. However, there was sufficient evidence of disability only between February 12, 1993, through February 17, 1993, and not after May 5, 1993. Accordingly we affirm in part, and reverse and render on the issue of disability to find that there is insufficient evidence to support a finding that the claimant suffered disability after May 5, 1993.

The claimant worked as a part-time copy editor for the (employer). She was also a student working on her master's degree. Her job duties involved proofreading copy, correcting copy, and writing headlines and captions. Before the newspaper deadline of 10:30 p.m., her work was 100% typing on a keyboard. The claimant would work 17 to 18 hours a week over three different shifts. In late November of 1992, the claimant testified that she experienced a "cool breeze sensation" in both her hands and in both her wrists while typing for her employer. On December 1, 1992, the claimant saw (Dr. B), a general practitioner. In his notes of December 1, 1992, Dr. B noted that the claimant had experienced two weeks of "wrist discomfort and paresthesias," and Dr. B made the initial diagnosis of mild dysthymia and repetitive stress syndrome. Dr. B prescribed frequent work breaks and advised the claimant to return if the problems persist. She testified that she did not think her hand and wrist problem was serious. She believed her wrist and hand problems would gradually get better. The claimant testified that she continued her regular work after seeing Dr. B in December of 1992. She also stated that she was under stress from a sleeping disorder. She continued to believe the wrist injury would get better on its own when she was able to slow down at work.

On (date of injury), the condition of the claimant's wrist became suddenly worse. She testified that she injured herself on (date of injury), while typing on the keyboard. The claimant testified that she experienced "excruciating" pain and cramping in both her hands and her wrists. She returned to Dr. B on February 10, 1993, at which time Dr. B noted that the claimant continued to have wrist and arm pain, which seemed to be related to typing. Dr. B referred the claimant to an orthopedist. The record reveals that the claimant saw an orthopedist, (Dr. C), for her hand and wrist pains on February 12, 1993. In her notes of that day, Dr. C wrote that the claimant says that "she works on a computer a lot at the newspaper & has significant pain in both her hands & wrists when she does her computer work." The doctor's February 12, 1993, notes explained that the claimant's wrist and hand injury was related to "probable" tendinitis in both wrists secondary to repetitive computer work. Dr. C fitted the claimant with bilateral wrist splints. On February 17, 1993, Dr. C wrote a note which stated that the claimant "[m]ay return to work typing wearing the wrist braces." The claimant started work again on Saturday, February 20, 1993. She worked at first doing filing to stay off the keyboard, and she worked extra hours to make up for lost pay between February 12th through February 17th.

On March 3, 1993, the claimant resumed her work as a copy editor, but she only worked two shifts instead of her prior three. The claimant testified that "at the end of March, I dropped a shift." The claimant stated she discussed with her supervisor coming back on the keyboard slowly as Dr. C had instructed her. The claimant testified that she and her supervisor agreed that "slowly would mean dropping a shift." On March 3, 1993, (Dr. P), an orthopedist, examined the claimant, and recorded in his March 3, 1993, notes that the claimant's work required a lot of typing. Dr. P noted that the claimant "will be dropping one of her shifts, as she increases her typing for her master's" thesis. Dr. P diagnosed the claimant's problems to be "overuse" tendinitis in both hands and wrists. Dr. P instructed the claimant to return to full duty work on an "as-tolerated basis." The claimant stated that she had just started on her thesis at the end of January. The claimant stated that she had to spend time working on her thesis and that eight different people helped her with the typing. She turned her thesis in on May 5, 1993, though most of the work was done on May 3, 1993.

On May 3rd, the claimant picked up another shift for a co-worker. On that same night, the claimant discussed her desire to resume a third shift in a couple of weeks with her supervisor, but the claimant stated that her employer refused to let her resume three shifts. The claimant testified that the employer's refusal was because claimant might injure herself again and because the employer did not want the claimant filing another worker's compensation claim. The June 3, 1993, medical notes of Dr. P indicated that the bilateral upper extremity tendinitis has been tolerated by the claimant fairly well, but that she still experiences occasional discomfort in the hands, elbows, and shoulders. Because of financial difficulties, the claimant testified that she had not been able to seek medical attention as frequent as she would prefer.

The carrier presented no witnesses or medical evidence, nor was there any indication that the claimant had been examined by a carrier selected doctor. The claimant presented no medical evidence that showed a doctor instructed her to stay off work or to work reduced hours or shifts.

The medical evidence and the claimant's testimony support her claim that she suffered a compensable injury in the course and scope of her employment. An "injury" is defined as "damage or harm to the physical structure of the body" (Section 401.011(26)), and 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 subtitle." Section 401.011(10). The claimant testified that she suffered an injury to her hands and wrists on (date of injury), and that this injury had on that date suddenly worsened. She also testified that at the end of November of 1992, she felt a "cool breeze" sensation in her wrists, and that she went to Dr. B on December 1, 1992. The hearing officer found as fact that the date of December 1, 1992, was when the claimant knew or should have known of the relationship of her wrist problems to her work. The medical evidence presented supported the claimant's testimony that she did suffer a hand and wrist injury which worsened. The carrier raised the issue as to whether this injury occurred in the course and scope of employment. The claimant's testimony and the medical evidence reflect that the heavy amount of keyboard typing that the claimant did for her employer caused her wrist problems.

The claimant alleged that her injury is a repetitive trauma injury suffered in the course and scope of her employment. The definition of an "occupational disease" includes a repetitive trauma injury. Section 401.011(34). Section 401.011(36) defines "repetitive trauma injury" to mean "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." Tendinitis has been held to be a work-related injury. Texas Workers' Compensation Commission Appeal No. 93707, decided September 16, 1993; Texas Workers' Compensation Commission Appeal No. 93510, decided July 29, 1993. To recover for an occupational disease involving a repetitive trauma injury, the claimant must prove that the repetitive trauma activities occurred on the job and must prove the causal connection existed between these job activities and the claimant's incapacity. Davis v. Employers Insurance of Wausau, 694 S.W.2d 105, 107 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.). The causation should show that the disease is inherent in the claimant's particular type of employment as compared with employment generally. Id. In the present case, the claimant testified she was told that the "cool breeze" sensation in her wrists might be related to the keyboards at work. The medical notes by Dr. C and Dr. P also support the connection between her employment and her wrist problems. The hearing officer found that the claimant did suffer a repetitive trauma injury in the course and scope of her employment. There is sufficient evidence to support this finding.

Disability is defined in the 1989 Act under Section 401.011(16): "`Disability' means

the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The evidence from the claimant's own testimony shows that the injury did not prevent the claimant from working except for a short time in February of 1993. She testified that she had begun work on her thesis, and that she, upon agreement with her supervisor, reduced work from three shifts to two shifts. No evidence was presented showing that she was not allowed to work a third shift by her employer at this time or that the employer could not have placed her in a filing job shift for at least one shift. The hearing officer did not find disability from February 18, 1993, through May 5, 1993. The claimant testified that the employer prevented the claimant from working her usual three shifts after May 5, 1993, because the employer was afraid she would injure herself again and would file additional workers' compensation claims. Disability may be established by the testimony of the claimant. Texas Workers' Compensation Appeal No. 92147, decided May 29, 1992; *see*, generally, Reina v. General Accident Fire & Life Assurance Corporation, Ltd., 611 S.W.2d 415, 417 (Tex. 1981); *citing* Insurance Company of Texas v. Anderson, 272 S.W.2d 772 (Tex. Civ. App.--Waco 1954, writ ref'd n.r.e).

However, in the present case, the claimant testified that she "felt . . . ready to pick up [a third] shift . . . in a couple of weeks." The claimant did not attempt to start the third shift at the beginning of May, but her own testimony is that she testified that she hoped to pick up the third shift by the beginning of June. The issue of whether the claimant sustained a compensable injury which then caused her disability is a question for the fact finder. The hearing officer found that the claimant did suffer an injury in the course and scope of her employment. The hearing officer further found a disability from February 12 through February 17, 1993, and after May 5, 1993, resulting from the compensable injury. We have previously held that an injured person may go in and out of disability. Texas Workers' Compensation Commission Appeal No. 93707, decided September 16, 1993. A conditional release to work is evidence that the effects of an injury remain and disability continues. An unconditional release to work, however, does not, in and of itself, end disability. Texas Workers' Compensation Appeal No. 91045, decided November 21, 1991. The medical record shows Dr. C did not restrict the claimant's return to work but only required her to wear wrist splints for two weeks and then as needed for typing. Dr. P stated in his medical notes of March 3, 1993, that the claimant can return to full-duty on an as tolerated basis. The claimant offered no evidence that her injury prevented her from working a third shift or other positions after May 5, 1993. Indeed, it was the claimant who requested to increase her work to a third shift. The claimant only speculated that her injury might prevent her from working a third shift at a keyboard. In his June 3, 1993 examination of the claimant, Dr. P noted that the third shift "will work out fairly well once she's fit for it," after she has done some strengthening exercises. The claimant must show a causal connection between her diminished wages and the compensable injury. Texas Workers' Compensation Appeal No. 92078, decided April 2, 1992. The claimant has not met her burden of establishing disability after May 5, 1993, because the evidence in this case is so weak. *See* Texas Workers' Compensation Appeal No. 92158, decided June 5, 1992. Although there is sufficient evidence in the record to support the hearing officer's findings of

disability from February 12th through February 17th of 1993, there is insufficient evidence to support disability after May 5, 1993.

The speculative comments of the claimant, under the present facts, are no more than a scintilla of evidence with regard to disability after May 5, 1993. The claimant has not shown an inability to obtain or retain employment at her preinjury wages. Her employer's refusal in this case to allow the claimant to resume three shifts on the keyboard does not give rise to an inference that the claimant has suffered a disability as defined in the Act. The law does not permit the stacking of one assumption or inference upon another to arrive at an ultimate fact which would be too conjectural and too speculative to support a decision. Wells v. Texas Pacific Coal & Oil Co., 164 S.W.2d 660, 663 (Tex. Comm'n App. 1942, opinion adopted). The inference must be based upon more than surmise, speculation, conjecture, or mere possibility. Texas Workers' Compensation Commission Appeal No. 93447, decided July 19, 1993. While circumstantial evidence may be considered, there must be more than a scintilla of evidence. Litton Industrial Products, Inc. v. Gammage, 668 S.W.2d 319, 324 (Tex. 1984); Joske v. Irvine, 91 Tex. 574, 44 S.W. 1059 (1898). When circumstances present two conflicting facts and nothing shows that one is more probable than the other, then neither fact can be inferred. Id. For evidence to be legally insufficient to support a finding by the trier of fact, there must be no evidence of probative force to support the finding in question. Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965); Texas Workers' Compensation Commission Appeal No. 93415, decided July 5, 1993. The issue of the claimant suffering a disability after May 5, 1993, could only have been based on a mere possibility and speculation of her being unable to retain or obtain work at wages equivalent to her preinjury wage. The probative force of the claimant's testimony on her disability is so weak as to be against the great weight and preponderance of the evidence when compared with her own testimony that she does not have disability and when compared with the medical evidence which allowed her carefully to return to her regular work. Where the claimant's own testimony and the medical evidence show a portion of the hearing officer's decision to be clearly wrong and unjust, then we must reverse that portion. Texas Workers' Compensation Commission Appeal No. 93707, decided September 16, 1993. The claimant did not meet her burden of proving disability for the period after May 5, 1993.

Section 409.001 requires that the employee or a person acting on the employee's behalf must notify the employer not later than the 30th day after the date on which the injury occurs. Section 409.001(a)(2) requires that if the injury is an occupational disease, the employee must notify the employer not later than the 30th day after the date on which "the employee knew or should have known the injury may be related to the employment." "[T]he purpose of this statute is to give the insurer an opportunity immediately to investigate the facts surrounding an injury. . . . [T]his purpose can be fulfilled without the need of any particular form or manner of notice." DeAnda v. Home Insurance Company, 618 S.W.2d 529, 532 (Tex. 1980); *citing* Booth v. Texas Employers' Insurance Ass'n, 132 Tex. 237, 123 S.W.2d 322 (1938). The hearing officer found that claimant did not report the injury within

the statutorily required 30 days, but Section 409.002(2) expressly allows an exception for failure to give notice within the 30 days of the injury date when "the commission determines that good cause exists for failure to give notice in a timely manner. . . ." Good cause for delay is an issue relevant both to notice of injury and for delay in filing a claim for compensation. The Supreme Court of Texas has stated:

> The term good cause for not filing a claim for compensation is not defined in the statute, but it has been uniformly held by the courts of this state that the test for its existence is that of ordinary prudence, that is, whether the claimant prosecuted his claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Consequently, whether he has used the degree of diligence required is ordinarily a question of fact to be determined by the jury or the trier of facts. It may be determined against the claimant as a matter of law only when the evidence, construed most favorably for the claimant, admits no other reasonable conclusion.

Hawkins v. Safety Casualty Company, 146 Tex. 381, 207 S.W.2d 370 at 372 (1948). The burden of proof rests with the claimant to establish good cause. Lee v. Houston Fire & Casualty Insurance Company, 530 S.W.2d 294 at 296 (Tex. 1975).

Good cause for failure to timely report an injury within 30 days can be based upon the injured worker's not believing the injury is serious and his initial assessment of the injury as being "trivial," but this belief must be based upon a reasonably prudent person standard. Texas Workers' Compensation Appeal No. 91030, decided October 30, 1991; Texas Workers' Compensation Appeal No. 93184, decided April 29, 1993; Baker v. Westchester Fire Insurance Company, 385 S.W.2d 447 at 449 (Tex. Civ. App.-Houston 1964, writ ref'd n.r.e). Good cause exists for not giving notice until the injured worker realizes the seriousness of his injury. Baker, 385 S.W.2d at 449. In Appeal No. 91030, *supra*, the Appeals Panel affirmed a finding of a "good cause" excuse for the injured employee, who continued working until she began her new job. At the new job the injured employee found that her injury was disabling and prevented her from doing her new job, and she notified her former employer within a few days. Her injury occurred on (date), but she believed her injury was trivial until a few days before she called her former employer's manager on May 29, 1991.

In the present case, the claimant testified that she continued working and the "cool breeze" sensation temporarily subsided in December of 1992. During the claimant's December 1st visit, Dr. B noted only "wrist discomfort and paresthesias," and Dr. B only prescribed more frequent work breaks and Advil. The claimant testified that she believed the problems with her hand and wrists would get better over time, but that the pain in fact became worse forcing her once again to see a doctor. The record indicated that, until early February of 1993, the claimant believed she had a "trivial" injury, not a "serious" injury. The

hearing officer found as fact that the claimant did believe that her hand and wrist problem was a minor injury which would probably resolve itself.

The findings of fact and the conclusions of law made by the hearing officer are supported by sufficient evidence, except on the issue of disability after May 5, 1993. The hearing officer's decision finding disability after May 5, 1993, is against the great weight and the preponderance of the evidence. Pool v. Ford Motor Company, 715 S.W.2d 629, 634 (Tex. 1986). Accordingly, we affirm in part, and we reverse and render in part. We reverse and render only to hold that no disability was established by the claimant after May 5, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge