APPEAL NO. 93791

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On August 4, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) did not develop carpal tunnel syndrome while working for her employer, did not have good cause for failure to notify her employer within 30 days, and did not have disability. Claimant, in effect, asserts that the hearing officer's recitation of the evidence does not reflect her understanding of it; her appeal will be taken as questioning the sufficiency of the evidence to support the decision. Carrier replies that the evidence is sufficient to support the decision.

DECISION

We affirm.

At the hearing, the parties agreed that the issues were whether claimant was injured in the course and scope of her employment, whether timely notice was given to the employer, and whether claimant has disability.

Section 410.204(a) of the 1989 Act states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

On appeal claimant states that the hearing officer took liberties with her words, that she completed 2,000 to 3,000 forms (not 500), that she did not know what she had was an injury for a long period, and that (Dr. B) said that her work probably caused her injury. She also says she still has pain in her thumb and wrist and did "not have fair representation by the Ombudsman".

Claimant had worked for (employer), or the same organization under another name, for several years. She had worked approximately two weeks for employer in 1991 - employer sent its employees to other businesses which needed temporary assistance. In 1992, employer sent claimant to a business called (borrower) where she worked from (month) 5, 1992, to August 28, 1992. Her work there involved making entries on service contracts, consisting of five copies, by hand, after checking information on the activity in the company computer. Entries on the contracts required a certain amount of pressure to assure legibility in the copies. Claimant testified that her hand was painful the first day she worked and certainly by the second day was noticeable to her. She told an employee of borrower of her pain and was provided with pens of different barrel size. (Claimant did not assert that she became a borrowed employee of borrower because of borrower's control of her work and did not claim against borrower's carrier.) Claimant did not work for employer at any other time in 1992 or 1993.

Claimant first called employer on (date), to inquire about her painful wrist. She testified that her hand was painful in (month) and August, but she did not think it was serious.

She was pregnant (delivery was in February, 1993) and saw (Dr. Bo) for prenatal care. She stated that she may have talked to Dr. Bo in September or November, 1992, about her hand; she was not sure. She related that Dr. Bo said she should call employer about the hand. Dr. Bo's records do not contain an entry indicating discussion of her hand problem until he states, "referred to (Dr. B), neurologist for ? carpal tunnel (date of injury)" in a short entry in doctor's progress notes dated 12/22/92. His file also contains a copy of a hand written letter on 12/22/92 indicating referral of claimant stating, "since (month) she has noted pain in her (right) thumb & thenar surface after a period of writing through her work."

Dr. B in a letter dated March 30, 1993, stated that claimant's problem was consistent with carpal tunnel syndrome. He adds that her work in (month) "may well have been the cause" of it, pointing out that no other cause was found.

In her appeal claimant states that she did not know she had an occupational disease. (NA), owner of the employer's local franchise, testified that when claimant called in (month year), reporting her pain, she asked her why she had delayed in letting employer know. According to NA, claimant replied that she got progressively worse. NA did not relate that claimant said she just learned of the connection of her pain to the job through her doctor; claimant did not testify that she told NA she had just learned of the occupational aspect from her doctor when she reported her pain in December.

Claimant criticizes the hearing officer's recitation of the facts and his discussion of the facts of the case. The hearing officer does not erroneously characterize the facts as reported in the record; the 1989 Act does not require that the hearing officer recite or discuss the facts; it only requires that findings of fact, conclusions of law, whether benefits are due, and an award of such benefits are to be part of the decision. *See* Section 410.168 of the 1989 Act. As long as the recitation of evidence, if made, reasonably reflects the record, the Appeals Panel will not consider questions on appeal that seek to question why part of the evidence was included and part was omitted. Obviously, either party may comment on the evidence of record, but the hearing officer is the sole judge of the weight and credibility to attach to all evidence. *See* Section 410.165 of the 1989 Act.

Claimant stresses that the number of documents she worked with in the approximately seven weeks of work in question numbered 2,000 to 3,000. One of the claimant's own exhibits, a statement by (PAPL), refers to claimant's task as filling in "more than 500 5-part contracts". The hearing officer did not make a finding of fact as to either amount and referred to both amounts as being in evidence in the statement of evidence.

Claimant's reference to the trivial nature of the injury is a matter for the hearing officer to weigh. He could give significant weight to claimant's testimony concerning the amount of pain she endured during the time of her work and in the three months after she completed her work prior to notifying the employer. Her testimony indicates that while she may not

have known the specific provisions of the 1989 Act, she knew that the effort at work was causing her pain; she referred to the attempt to find a better pen for holding, indicating an association of that task with the pain. Her doctor notes that she stated she had pain in her hand since (month) which was associated with her work. Compare these facts to those in Texas Workers' Compensation Commission Appeal No. 91097, decided January 16, 1992, in which a worker thought her back problems were gynecologic in nature until her doctor diagnosed the problem as stemming from the use of her leg to operate a sewing machine at work; the hearing officer's finding that the sewing machine operator gave notice within 30 days of learning that the injury may be related to the employment was upheld on appeal. In this case on appeal the hearing officer's finding that claimant knew or should have known by August that she had an occupational disease (the 1989 Act at Section 409.001 in referring to "occupational disease" states that the 30 day notice period runs from the date the employee knew or should have known that the injury may be related to the employment) is supported by sufficient evidence of record. The same evidence provides a basis for the hearing officer's finding that claimant did not have good cause for her delay, after August, of more than 30 days in reporting the injury; the hearing officer did not act arbitrarily in determining that good cause was not shown.

Claimant refers to Dr. B as stating that the cause of her problem was the workplace, but his letter only says that it "may well have been the cause". A medical opinion may be weighed in the context of other evidence, including that of the claimant, to determine if causation is probable, not just possible. *See* Insurance Company of North America v. Kneten, 440 S.W.2d 52 (Tex. 1969). While such a medical opinion may be found to be an integral part of a probable cause determination, the hearing officer is not bound to conclude that probable cause was shown; rather the hearing officer weighs all the evidence, including the type of work and its duration, in deciding an issue of repetitious physical trauma and may even choose not to follow an opinion expressed by an expert. *See* Gregory v TEIA, 530 S.W.2d 105 (Tex. 1975). The evidence was sufficient to support the finding of fact that claimant did not develop carpal tunnel syndrome from the work she did for employer.

Any question of disability first considers whether a compensable injury is present (*see* Section 401.011 (16) of the 1989 Act). Therefore the findings that claimant did not show her employment caused a carpal tunnel injury and that she did not have good cause for delay in reporting make the issue of disability moot. In addition, while pain may be a factor in determining disability, claimant testified that she did not work in 1993 not only because her hand hurt but also because of her new baby.

The assertion that claimant did not have fair representation by the ombudsman assumes a responsibility that is not the ombudsman's; the ombudsman only assists and does not represent a claimant. *See* Section 409.041(b) of the 1989 Act, which says that an ombudsman shall "assist unrepresented claimants, employers, and other parties . . . ." Specifically, claimant states that "telephone calls were not returned" but does not say how

that impacted the outcome of her hearing; she adds that she had to "prompt" the ombudsman about "pertinent" matters, but does not say what those matters were, or why they were pertinent. She also points out that she did not want to claim disability "to the extent that I could not work. I simply wanted some compensation for my pain and injury . . . ." Section 408.101 of the 1989 Act ties temporary income benefits to disability. As stated, disability is defined in Section 401.011 of the 1989 Act as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." (emphasis added). The 1989 Act has no provision for "some compensation for my pain and injury" without a showing that employment could not be obtained or retained. The assistance provided by the ombudsman does not provide a basis for reversal of this decision.

The decision and order of the hearing officer are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge