APPEAL NO. 93797

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. Article 8308-1.01 *et seq*.). A contested case hearing was held on August 4, 1993, to decide the following disputed issues: whether the claimant was injured in the course and scope of employment for her employer; whether she timely reported the injury to her employer and, if not, whether she had good cause; and whether the claimant has had disability, as defined by the 1989 Act. Hearing officer (hearing officer) determined that the claimant developed bilateral carpal tunnel syndrome in the course and scope of her employment, but that she did not report her injury timely and did not have good cause for such failure to report. She also held that the claimant has not had disability. The claimant, who is the appellant in this action, seeks our review of the hearing officer's findings and conclusions on timely notice, including the sub-issue of good cause, and on disability. No response was filed to the claimant's appeal.

DECISION

We affirm the decision and order of the hearing officer.

The claimant testified that she had been employed by the (city) Independent School District (because the employer is apparently a self-insured governmental entity it will hereinafter be referred to as "carrier") for approximately two years, first as a secretary and later as a clerk. Both jobs required writing by hand and typing on an electric typewriter. Claimant said that in January or February of 1992 she first noticed pain and tingling in her hands, but that she did not consult a doctor because she believed her hands were just sore from the work she did. In April of 1992 she had a slip and fall accident in a store; a June 22, 1992, letter from (Dr. V) indicates claimant was treated for injuries which included low back pain and pain over the left knee and right ankle. In the course of her treatment for these injuries it was also determined that claimant was diabetic.

Claimant worked for carrier until the end of the school year, which was June 6, 1992. On August 11th she started another job as a special education teacher's aide. On August 24th she reported numbness in her hands to Dr. V; claimant said she was not sure whether this was related to her diabetes, although Dr. V's notes of that date state her impression as carpal tunnel syndrome. On September 2nd the claimant was forced to go to an emergency room because of shooting pain going up her arm. (A (date of injury), report from Baptist Memorial Hospital System's Emergency Department states claimant's complaints of ongoing numbness to her hands for two weeks.) On September 3rd, at the recommendation of the emergency room doctor, claimant went to see a hand specialist, Dr. (Dr. G) who stated his impression as carpal tunnel syndrome and who ordered nerve conduction velocity studies. The report of those studies, dated September 11th, confirmed Dr. G's initial impression. The claimant said Dr. G asked her what type of work she did and explained that carpal tunnel syndrome was caused by repetitive motion. Pursuant to a June 11, 1993, benefit review conference agreement signed by both parties, claimant and carrier agreed that (date of injury), was the date the claimant knew her injury was job related.

The claimant said Dr. G discussed treatment alternatives with her, including surgery. She said that when she called his office to cancel a November 2, 1992, appointment because she could not afford it, she was told that her employer should pay for it and she should contact the Texas Workers' Compensation Commission (Commission). She said she talked to someone at the Commission and was told she needed to fill out "paperwork" (her claim) which, she said she was told, would be sent to carrier. The evidence shows that claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (Form TWCC-41) was dated December 22, 1992, and was date-stamped as received by the Commission on December 23rd. Carrier's attorney represented that carrier first became aware of the claim in December of 1992.

The claimant continued to work at her job as a teacher's aide until April 30, 1993, which was about a month before the school year ended. At that time, she said she had lost her ride to work and could not drive her own, stick-shift car, because of pain in her hands. In May she moved to , where she was living at the time of the hearing, to be with her mother. She testified that she has looked for a job but that she was not working at the time of the hearing.

In her appeal claimant challenges the hearing officer's determinations as to timely notice and good cause. The 1989 Act, Section 409.001(a), provides that an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the injury occurs or, if the injury is an occupational disease, the employee knew or should have known that the injury may be related to the employment. With regard to timely notice, claimant's own testimony and the benefit review conference agreement appear to have conceded that the operative date from which the 30 days began to run was (date of injury), and that the claimant did not attempt to give notice until November or December of 1992, clearly more than 30 days later. Thus the hearing officer's determination that no timely notice was given is supported by the evidence.

The 1989 Act further provides that failure to notify an employer as required by the statute relieves the employer and its insurance carrier of liability unless, among other things, the Commission determines that good cause exists for failure to provide notice in a timely manner. Section 409.002(2). In her appeal, the claimant appears to argue that good cause existed due to faulty information she received from the Commission in November 1992. She also notes that at that time she was still trying to get an exact diagnosis and prognosis on a disease she knew very little about. However, as mentioned above, the claimant conceded that on September 3rd she knew the nature of her disease and that it was job-related, and that she did not even talk to anyone at the Commission for another two months. To the extent that claimant argues that she did not give notice earlier due to ignorance of the statutory requirements, that has been held not to excuse such failure. Allstate Insurance Company v. King, 444 S.W.2d 602 (Tex. 1969).

Whether or not a claimant has good cause for failure to timely report an injury is a

question of fact for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 92081, decided April 14, 1992. The guiding test is whether the claimant prosecuted his or her claim with that degree of diligence which a person of ordinary prudence would have exercised under the same or similar circumstances. Bray v. Texas Employers Insurance Association, 483 S.W.2d 907 (Civ. App.-1972, writ ref'd n.r.e.). Our review of the record convinces us that there is sufficient evidence to support the hearing officer's determination that good cause did not exist under the circumstances of this case.

The claimant also challenges the hearing officer's determination that claimant's inability to earn wages from May 1, 1993, until the date of the hearing was not due to her bilateral carpal tunnel syndrome. Claimant states in her appeal that "there is a $2.61 [presumably per hour] difference in teachers assist [sic] wages and Administration I." However, this monetary difference was not in evidence at the hearing. Further, claimant testified that the pain and numbness in her hands which led her to seek medical attention arose after she had started work as a teacher's aide. Since quitting her job and moving to (city), she said she had gotten some job offers but had not been able to accept them due to the need to appear at hearings in this case; she also said she was only qualified to do secretarial work, but acknowledged that she also had experience as a teacher's aide, which did not require typing. Whether a claimant has disability--defined by the 1989 Act as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage," Section 401.011(16)--is a question of fact for the hearing officer to determine. Where, as here, there is evidence both in support of and contrary to claimant's claim of disability, the hearing officer is entitled give such evidence the appropriate weight. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied.) We will not overturn such determination where it is supported by the evidence and is not so against the great weight and preponderance of the evidence as to be unjust and unfair. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). In addition, the fact that claimant was held not to have timely notified her employer of her injury, nor to have good cause therefor, relieves the carrier of liability, including for temporary income benefits if disability were found to exist.

Finally, the claimant alleges that there are certain factual errors contained in the hearing officer's statement of the evidence. While in some cases this is true, principally with regard to several dates erroneously reflecting the wrong year, our review of the record as a whole does not indicate that these statements resulted in an erroneous decision.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge